IN THE SUPREME COURT OF FLORIDA

DAVID BALDWIN WEBSTER,

Petitioner, CASE NO. 79,979

v.

THE FLORIDA BAR,

Respondent.

PETITIONER'S AMENDED INITIAL BRIEF

SCOTT K. TOZIAN, ESQUIRE
SMITH AND TOZIAN, P.A.
109 North Brush Street
Suite 150
Tampa, Florida 33602
(813)273-0063
Fla. Bar No. 253510

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PRELIMINARY STATEMENT

The following abbreviations are used in the brief:

R.	=	Transcript of final hearing conducted April 29 and 30, 1993.
Pet. Ex.	=	Petitioner's Exhibit
Resp. Ex.	=	Respondent's Exhibit
Referee Report	=	Referee Report

STATEMENT OF THE FACTS AND CASE

On November 18, 1988, petitioner was temporarily suspended from the practice of law in this state by order of this Court in case number 73,302. This order resulted from respondent's petition seeking temporary suspension alleging a variety of trust accounting violations.

Thereafter, respondent filed a complaint in case number 74,503 before this Court against petitioner alleging the same trust violations which had caused petitioner's temporary suspension. An amended complaint was subsequently filed on August 14, 1989. Thereafter, an accord was reached between petitioner and respondent which resulted in the filing of a Consent Judgment dated February 14, 1990, which was filed before the presiding referee.

On February 21, 1990, the Report of Referee was issued adopting and incorporating the Consent Judgment referenced above. The Report of Referee provided, inter alia, that:

> The 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). Further Respondent shall be placed on probation for a period of two (2) years from the date of the Report of Referee. Said probation shall consist of semi-annual audit examinations by The Florida Bar. Further, the probation period shall include an evaluation by Florida Lawyers Assistance, Inc., (F.L.A.) and any treatment or aftercare recommended by F.L.A. Respondent also agrees to pay the reasonable costs of these disciplinary proceedings, as set forth in the Report of Referee. Further, during the term of probation, respondent shall complete six (6) hours of CLER credit from The Florida Bar in Ethics and Trust Accounting. [Pet. Ex. 7].

The Report of Referee was subsequently approved by this Court by order dated May 24, 1990, suspending Petitioner effective nunc

pro tunc December 18, 1988. [Pet. Ex. 8]. Accordingly, Petitioner's suspension expired on June 17, 1990.

On June 21, 1990, four days after the expiration of his suspension, petitioner executed a Motion for Admission to the Federated States of the Micronesia Bar. In that motion, petitioner indicated that he was "not under an order of suspension or disbarment" [Pet. Ex. 10]. Petitioner specifically waited until the end of his suspension to execute this Motion for Admission so that his suspension in Florida had terminated or expired. [R. 340, 341].

Petitioner was admitted to practice in Micronesia and thereafter worked under the attorney general of Micronesia beginning in June 1990. [R. 341, 365, 370].

One year later, petitioner applied and was accepted for a prosecutional position on the island of Palau. [R. 368, 370]. Respondent completed an affidavit relating to his admission to practice before the courts of the Republic of Palau dated May 30, 1991, reflecting that he was a member in good standing of the District of Columbia Bar. [Pet. Ex. 13]. At that time, petitioner had not received notice from the District of Columbia Bar that he, in fact, was not in good standing. [R. 379]. However, petitioner did advise the Law Enforcement Coordinator of Palau of his earlier drug problem which led to Florida Bar problems, prior to being hired for the Palau position. [R. 279, 366, 394, 395].

During the time petitioner was in Micronesia, he received this Court's order of suspension dated May 24, 1990, imposing the

probationary conditions as set forth in the referee report referenced above. [R. 336]. Notwithstanding the language of the Consent Judgment and Referee Report, petitioner believed that the probationary period would begin when he returned to the practice of law in Florida. [R. 441]. As such, petitioner failed to complete the CLER hours or pay the disciplinary costs mandated by this Court's order until shortly prior to his reinstatement hearing. Moreover, while petitioner received treatment for the earlier drug problem from Dr. Farzanegan, and two other evaluations by a psychologist and psychiatrist, he failed to comply with the recommendations of F.L.A., Inc.

In June 1992, petitioner filed his Petition for Reinstatement to The Florida Bar which is the subject matter of the instant case. Final hearing on the petition was conducted April 29 and 30, 1993. At the final hearing, thirteen (13) witnesses testified concerning petitioner's rehabilitation including five (5) attorneys, three (3) doctors, and a circuit court judge. Additionally, eight (8) letters of recommendation, seven of which were from attorneys, were received in evidence. Petitioner's witnesses and letters of recommendation unanimously concluded that petitioner was possessed of the necessary moral character and professional reputation to warrant his reinstatement to the practice of law. Moreover, none of the witnesses offered any evidence of a drug or alcohol problem in petitioner.

Nearly eight (8) months later, the Referee issued his report recommending the petition be denied without prejudice. [Ref. Rep. at 13]. The Referee stated that petitioner's failure to abide by the Consent Judgment and his failure to disclose the Florida Bar

disciplinary proceedings in his applications for admission to Micronesia and Palau, and his failure to advise the District of Columbia Bar of those same proceedings, "cast doubts on his claim of rehabilitation". [Ref. Rep. at 13]. However, the Referee also noted that petitioner "may not have made an actual misrepresentation on those applications", and that "very likely petitioner does not have a present substance abuse problem". [Ref. Rep. at 13].

The Referee also opined that "Petitioner was a fine trial lawyer and has the ability to continue being a fine trial lawyer", and "I do not believe he would be a danger to the public if he was allowed to practice law in this state". [Ref. Rep. at 11, 13].

On March 7, 1994, petitioner filed his Petition for Review seeking review of the referee's findings of fact and recommendation.

SUMMARY OF ARGUMENT

The petitioner presented testimony from thirteen (13) witnesses attesting to his moral character, professional reputation, and other necessary elements of his rehabilitation. The referee recommended that the petition be denied based upon his finding that petitioner had not complied with the conditions of his probation and upon his finding that petitioner's applications for admission to two foreign bar associations did not reveal his Florida suspension.

However, the referee failed to recognize the ambiguity surrounding the commencement of his probationary period. The referee further failed to recognize that under the Rules Regulating The Florida Bar that petitioner's suspension had expired prior to petitioner seeking admission to the referenced bar associations.

Accordingly, the evidence below does not support the referee's findings and as such does not negate the overwhelming evidence of rehabilitation presented by petitioner which mandates his reinstatement.

PETITIONER ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE HIS FITNESS TO RESUME THE PRACTICE OF LAW.

Rule 3-7.10(g) of the Rules of Discipline establishes that in reinstatement proceedings "the matter to decide shall be the fitness of the petitioner to resume the practice of law". Moreover, this Court has previously announced that the petitioner must prove his rehabilitation according to the criteria set forth in In Re Dawson, 131 So.2d 472 (Fla. 1961), and Petition of Wolf, 257 So.2d 547 (Fla. 1972). Those criteria include: (1) evidence of unimpeachable character and moral standing in the community; (2) clear evidence of a good reputation for professional ability; (3) evidence of lack of malice and ill feeling toward those who by duty were compelled to bring about the disciplinary proceedings; (4) personal assurances, supported by corroborating evidence revealing a sense of repentance as well as a desire and intention of the petitioner to conduct himself in an exemplary fashion in the future; (5) strict compliance with the specific conditions of the disciplinary order such as payment of costs; and (6) in cases involving misappropriation, restitution is important. Petition of Wolf, 257 So.2d 547, 549 (Fla. 1972).

However, "this list is not all-inclusive; 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 Florida Bar In Re Inglis, 471 So.2d 38, 39 (Fla. 1985).

A review of the record below clearly establishes petitioner's rehabilitation under the Wolf criteria.

First, petitioner's character and moral standing in the community were well documented by the witnesses below. Petitioner was variously described by witnesses as "more responsible"; [R. 49], "a compassionate person"; [R. 51], "a good father"; [R. 25], having "a tremendous sense of responsibility towards those children"; [R. 112], "so honorable and so ethical"; [R. 124], as straight an arrow as you are ever going to see"; [R. 132], "changed a lot"; [R. 222], and "straight forward". [R. 356].

Furthermore, none of the respondent's witnesses testified negatively about petitioner's moral character. Accordingly, petitioner well established his character and moral standing before the referee.

Second, petitioner's reputation for professional ability was well chronicled in the record below. The five attorneys and circuit judge who testified that they know petitioner and his professional reputation described his legal abilities as "smart"; [R. 358], "a trial lawyer's trial lawyer"; [R. 285], "an excellent attorney"; [R. 220], "a good lawyer"; [R. 51], "very organized, very competent in everything that he did"; [R. 122], "a very fine attorney"; [R. 137], and "as proficient as any attorney I've worked with . . .". [R. 140]. The referee below obviously was persuaded by the evidence of petitioner's professional reputation as he stated in his report that "petitioner was fine trial lawyer and has the ability to continue being a fine trial lawyer". [Ref. Rep. at 11].

Third, the evidence below indicated that petitioner had no

malice or ill feeling toward those compelled to bring the earlier disciplinary proceeding. In response to questions concerning petitioner having any hostility towards The Florida Bar, the witnesses indicated "not at all"; [R. 114], "absolutely nothing"; [R. 125], and "the Bar was absolutely 100 percent right with that . . .". [R. 142].

Fourth, the record below is replete with testimony concerning petitioner's repentant attitude and his desire and intention to conduct himself in an exemplary fashion in the future. On this subject, the character witnesses offered the following insights concerning petitioner's attitude; "he knew that he committed a wrongdoing; [R.56], that he had "really screwed up ... made some very bad decisions"; [R. 124], he "truly is sorry for what happened"; [R. 132], he "is very honest about that. He's honest and genuine in that he was, I think, genuinely embarrassed"; [R. 141], "he was very candid and blunt ... he wanted to start over again, he wanted another chance ...; [R. 223], "he feels horrible ... he's very remorseful ...; [R. 286], and "[h]e's determined to turn his life around"; [R. 360]. Moreover, petitioner's testimony confirmed his remorse and good intentions for the future. [R. 464].

Fifth, petitioner has complied with the disciplinary order in that he has paid the disciplinary costs and completed the required CLER hours mandated by the court order. [R. 435]. While petitioner has not complied with the recommendations of F.L.A., Inc., the counseling and evaluations he has received persuaded the

Referee below to note that he "very likely" has no present substance abuse problem.

Next, as this Court stated in Inglis, other factors should properly be considered to determine petitioner's fitness to practice law. In the instant case, petitioner's conduct in dealing with his prior drug problem should be considered relevant to his reinstatement. In this regard, the undisputed evidence below establishes petitioner sought the assistance of Dr. Fred Farzanegan, a clinical psychologist who specializes in substance abuse. [R. 166, 168]. Petitioner volunteered the information concerning the drug usage to Dr. Farzanegan and to the referee in the earlier disciplinary case. [R. 171, 322]. Between August 1986 and December 1988, petitioner counseled with Dr. Farzanegan. [R. 172]. Dr. Farzanegan testified that petitioner's acknowledgement of his problem indicated a better chance of recovery than if his treatment had been mandated. [R. 174]. Dr. Farzanegan indicated that given petitioner's lengthy recovery period that an AA or NA Step Program was not appropriate as, while it would not harm him, neither would it benefit him. [R. 177]. Dr. Farzanegan stated that since petitioner never had an alcohol dependency problem, he was not concerned that moderate use of alcohol would precipitate petitioner's future use of drugs. [R. 178].

Moreover, petitioner was evaluated by Dennis R. Brightwell, M.D., a psychiatrist. Dr. Brightwell testified that he had been involved in the care of over 1000 persons with alcoholism as well as treating persons for drug abuse. [R. 84, 85]. Dr. Brightwell

evaluated petitioner in 1993, at the request of Dr. Farzanegan. [R. 179]. Dr. Brightwell found petitioner to be straight forward about his previous problem and found that petitioner had no active disorder. [R. 94, 106]. Dr. Brightwell recommended that random drug screens of petitioner would be appropriate to protect the public, but did not feel total abstinence from alcohol was necessary. [R. 97, 98].

Finally, petitioner was also evaluated by Dr. Donald Delbeato, a clinical and forensic psychologist, with substantial experience with alcohol and other substance abuse. [R. 189, 191]. In addition to reviewing the reports of the other doctors, Dr. Delbeato performed various standardized psychological tests on petitioner in April 1993. [R. 192]. Dr. Delbeato found petitioner to be candid in his interview with a low vulnerability to future substance abuse. [R. 193, 194]. Moreover, Dr. Delbeato felt petitioner had a strong support system that enhanced his recovery, and recommended only that petitioner follow-up with Dr. Farzanegan as needed and attend some minimal support group sessions with NA in order to live responsibly and recover. [R. 195].

Therefore, under the criteria established in Dawson and Wolf, petitioner has provided clear and convincing evidence of rehabilitation.

THE REFEREE'S RECOMMENDATION THAT THE PETITION FOR REINSTATEMENT BE DENIED IS UNSUPPORTED BY THE EVIDENCE OR ALTERNATIVELY, THE EVIDENCE IN SUPPORT IS INSUFFICIENT TO DENY PETITIONER'S REINSTATEMENT.

The referee below found that petitioner "did not abide by the conditions of his probation". [Ref. Rep. at 12]. The referee also found that petitioner's "conduct regarding his application to . . . Micronesia and Palau and his failure to notify the Washington D.C. bar of his Florida Bar disciplinary proceeding "was troubling". [Ref. Rep. at 12, 13]. The referee further stated that "[t]hough 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". [Ref. Rep. at 13].

The referee concludes that "[p]etitioner's failure to disclose these things along with his failure to abide by the Consent Judgment cast doubts on his claim of rehabilitation". [Ref. Rep. at 13].

However, closer analysis of petitioner's conduct reveals that is not of a nature as to be disqualifying. With respect to petitioner's perceived failure to comply with the specific requirements of the Consent Judgment the following is clear. The Consent Judgment and ensuing order of this Court purported to require petitioner, <u>during his period of probation,</u> to: 1) submit to semi-annual audits by The Florida Bar, 2) be evaluated by F.L.A., Inc. and any treatment or after care recommended by F.L.A.,

Inc., 3) pay the reasonable costs of the disciplinary proceeding, 4) complete six (6) hours of CLER credit from The Florida Bar in Ethics and Trust Accounting. [Pet. Ex. 6]. (emphasis added).

However, while the Consent Judgment stated that the probation would be "for a period of two years from the date of the Report of Referee", such language is expressly contrary to the Rules Regulating The Florida Bar and one of the conditions of probation.

Rule 3-7.6(k)(1)(A) provides that a referee report shall include "recommendations as to the disciplinary measures to be applied". (emphasis added). By definition, the Referee's report can contain only a recommendation and can impose no obligation upon either petitioner or respondent until approved, rejected or modified by The Supreme Court of Florida pursuant to Rule 3-7.7(c)(6).

Accordingly, the period of probation could not lawfully commence until judgment of the Supreme Court of Florida was entered. However, in reviewing the conditions of probation, specifically the mandated audits, it is clear that the probation could not logically begin even upon entry of judgment of this Court.

In order for petitioner to submit to semi-annual audit examinations by The Florida Bar, as agreed to in the Consent Judgment and mandated by the court order, petitioner would have to be reinstated possessing office accounts, trust or otherwise, upon which The Florida Bar could conduct an audit. If the probation commenced upon the date of the Report of Referee, there would be no

accounts to audit since petitioner was under temporary suspension. Therefore, the condition of probation requiring semi-annual audits was an impossibility until reinstatement, since petitioner could not maintain office accounts during his suspension period.

Clearly, the Consent Judgment was a poorly drafted, ambiguous document which left substantial confusion as to when the probation period actually commenced. Legally, it could commence no earlier than the entry of this Court's order. Logically, it could begin only after petitioner's reinstatement when he would again possess trust and other office accounts upon which The Florida Bar could conduct its semi-annual audits.

Clearly, petitioner was the victim of this confusing, contradictory document. Petitioner testified that he believed that "[t]hen once I got in, I would be on probation and I would be -- have my accounts audited on a regular basis, I would be evaluated by F.L.A., Inc. [R. 326]. It is significant that this ambiguous document was prepared by assistant staff counsel of The Florida Bar. [R. 327].

Given the requirement of semi-annual audits, it would appear that the probationary period could only commence upon petitioner's reinstatement. If this interpretation is correct, petitioner promptly and properly paid his disciplinary costs and completed the required CLER hours. Moreover, the last condition of probation, F.L.A., Inc.'s evaluation and recommended treatment or after care can be a condition of petitioner's reinstatement along with the semi-annual audits as originally suggested by the audit

requirement, and as understood by petitioner. [R. 331].

Assuming arguendo, that petitioner's probationary period began before the entry of this Court's order, or, alternatively, began upon entry of the order, petitioner has now substantially complied with the probationary conditions. First, the disciplinary costs have been paid. Second, petitioner, upon his return after two (2) years in the South Pacific, completed 55 hours of CLER credits including 6.5 hours involving ethics. [R. 435]. Third, although petitioner has not participated in the F.L.A., Inc., program after his evaluation by that organization, he has received substantial counseling from Dr. Farzanegan and evaluations from two additional doctors. None of these doctors believe petitioner has an existing problem. Accordingly, petitioner has taken substantial remedial steps in lieu of the F.L.A., Inc. program. As the referee noted it is very likely that petitioner does not have a present substance abuse problem. [Ref. Rep. at 13]. Moreover, both the F.L.A., Inc. evaluation and any aftercare and the semi-annual audits can properly be a condition of petitioner's reinstatement.

Accordingly, the Referee's finding that petitioner failed to abide by the conditions of his probation is either erroneous, given the confusing language of the Consent Judgment or petitioner's conduct relating to his probation is understandable and has been rectified by petitioner's recent compliance.

Petitioner's conduct relative to his application to Micronesia and affidavit to Palau, and his failure to advise the Washington D.C. Bar of his suspension is similarly harmless.

First, it is clear that petitioner truthfully indicated on his Micronesia application that he was not under a suspension order from any authority. Review of the applications, suspension order, and applicable rules confirms this assertion was palpably correct.

Petitioner's application for Temporary Admission to the Micronesian Bar was dated June 21, 1990. [Pet. Ex. 10]. It must be noted that petitioner's eighteen (18) month suspension order was effective nunc pro tunc December 18, 1988. Accordingly, petitioner's suspension was terminated on June 17, 1990, four days prior to his application to Micronesia. Reference to Rule 3-5 entitled Types of Discipline supports this position. More specifically, Rule 3-5.1(e) Suspension, refers to the "expiration" of the suspension period. Therefore, by rule, petitioner's eighteen (18) month suspension "expired" on June 17, 1990, and his subsequent statement to Micronesia that he was not under suspension was truthful and factually correct.

Moreover, petitioner's affidavit to Palau accurately reflected that he was a member in good standing of the Washington D.C. Bar.

The remaining problem perceived by the Referee as an impediment to petitioner's reinstatement is his failure to promptly notify the Washington, D.C. Bar of his Florida suspension. However, petitioner testified that he advised the Washington, D.C. Bar in October or November 1992, of The Florida Bar suspension. [R. 447]. Moreover, there was no testimony or evidence that petitioner's failure to more promptly notify the D.C. Bar was ill-motivated or intentional.

Therefore, the evidence in support of the referee's recommen-

dation is insufficient to negate the overwhelming evidence of rehabilitation.

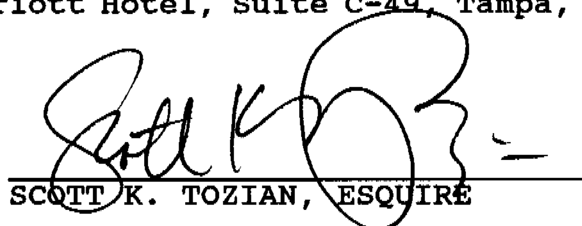
CONCLUSION

Petitioner was suspended from the practice of law nearly five and one-half years ago for trust account violations relating to negligence, not misappropriation. Since that time petitioner has engaged in a consistent pattern of conduct reflecting his rehabilitation. Petitioner's failure to strictly abide by the conditions of his probation was owing, in large part, to the ambiguity of the Consent Judgment between the parties. All conditions of probation excepting F.L.A., Inc. participation have now been met. However, petitioner has received three substance abuse evaluations and substantial counseling for his prior problems in lieu of F.L.A., Inc. participation. In recognition of petitioner's efforts to correct the substance abuse problem the referee found "[i]t is very likely petitioner does not have a present substance abuse problem and I do not believe he would be a danger to the public if he was allowed to practice in this state".

This Court should order petitioner's reinstatement as the evidence below clearly establishes petitioner's fitness to resume the practice of law.

C E R T I F I C A T E O F S E R V I C E

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 19 day of May, 1994, to: Joseph A. Corsmeier, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.



SCOTT K. TOZIAN, ESQUIRE