IN THE SUPREME COURT OF FLORIDA

DAVID BALDWIN WEBSTER,

Petitioner, CASE NO. 79,979

v.

THE FLORIDA BAR,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT iii

SUMMARY OF ARGUMENT 1

ARGUMENTS:

I. RESPONDENT'S ASSERTION THAT PETITIONER'S SUSPENSION DID NOT EXPIRE ON JUNE 17, 1990 IS CONTRARY TO THE CLEAR LANGUAGE OF RULE 3-5.1 AND THEREFORE RESPONDENT'S RELIANCE ON PETITIONER'S APPLICATION TO MICRONESIA AND AFFIDAVIT TO PALAU IN DENYING REINSTATEMENT IS MISPLACED 3

II. PETITIONER MET HIS BURDEN AND ESTABLISHED HIS FITNESS TO BE REINSTATED TO PRACTICE LAW IN FLORIDA 6

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF CITATIONS

RULES REGULATING THE FLORIDA BAR	PAGE
Rule 3-5.1(e)	4, 7
Rule 3-7.6(k)	6
Rule 3-7.10(l)	1

PRELIMINARY STATEMENT

The following abbreviations are used in the brief:

Pet. Ex.	=	Petitioner's Exhibit
R.R.	=	Referee Report

SUMMARY OF ARGUMENT

One year and a half after Petitioner filed his reinstatement petition the Referee below recommended against Petitioner based upon Petitioner's conduct in failing to disclose his Florida disciplinary proceedings to Micronesia and Palau and further, Petitioner's failure to comply with the conditions of his previous suspension order.

While the Referee clearly does not make such a finding, Respondent insists the Micronesia and Palau documents are "improper and deceitful". Even cursory review of the applicable rules reveals Respondent's position in this regard is without foundation.

With respect to the conditions of the consent judgment and subsequent court order it is clear that Petitioner has completely satisfied all requirements to which he agreed including F.L.A., Inc. participation as evidenced by Petitioner's contract with that organization, entered into since the referee hearing. (See Motion to Supplement Record). Moreover, Petitioner is participating in F.L.A., Inc., despite the referee's finding that he "very likely does not have a present substance abuse problem". [R.R. at 13].

Two years have elapsed since Petitioner filed for reinstatement in June 1992. This delay was in large measure due to the Respondent's unpreparedness and due also to the eight months the Referee took to issue his report. Should this Court deny this petition for reinstatement, Petitioner would not be eligible to apply again for reinstatement for one year. (Rule 3-7.10(1)). Based upon that prohibition and the time required to once again go

through the reinstatement process, i.e. appointment of referee, investigation, discovery, hearings, etc., it is incomprehensible that Petitioner will be readmitted prior to 1996. Given Petitioner's suspension of eighteen months in December 1988, and given Petitioner's present complete compliance with the prior disciplinary order as well as the other substantial evidence of rehabilitation, such a result is punitive and unsupported by the record below.

Based upon the delay by Respondent and the Referee below and, more importantly, based upon the overwhelming record of rehabilitation, Petitioner should be reinstated to the practice of law immediately.

RESPONDENT'S ASSERTION THAT PETITIONER'S SUSPENSION DID NOT EXPIRE ON JUNE 17, 1990 IS CONTRARY TO THE CLEAR LANGUAGE OF RULE 3-5.1 AND THEREFORE RESPONDENT'S RELIANCE ON PETITIONER'S APPLICATION TO MICRONESIA AND AFFIDAVIT TO PALAU IN DENYING REINSTATEMENT IS MISPLACED.

Respondent repeatedly contends that Petitioner's motion for admission to practice in Micronesia and affidavit to Palau were "misleading, deceitful and improper". (Answer Brief at 5, 6, 9, 10, 19, 20, 26). Notably, Respondent takes this position despite the fact that the Referee made no such finding in his thirteen page report. More incredible, is Respondent's analysis of the expiration of Petitioner's suspension period.

Respondent actually argues that "[t]he expiration of the suspension period is not the equivalent of the expiration of the suspension". [Answer Brief at 2]. Respondent claims that the suspension never expired, otherwise Petitioner would have been automatically authorized to practice in Florida after June 17, 1990. [Answer Brief at 2]. Respondent further contends that the suspension period expires, but not the suspension order. [Answer Brief at 20]. Based upon this "reasoning", Respondent concludes that "[p]etitioner's suspension never expired" and therefore "his execution of the Motion for Admission to Micronesia was not executed four days after the expiration of the suspension" as Petitioner contends. [Answer Brief at 2].

To properly expose Respondent's position, it is necessary to review the undisputed facts. First, by order dated May 24, 1990, it is clear Petitioner was suspended for an eighteen month period nunc pro tunc December 18, 1988. [Pet. Ex. 8]. It is equally

clear that Rule 3-5.1(e), Rules of Discipline controls when Petitioner's suspension would lapse or expire. Rule 3-5.1(e) reads in pertinent part that:

> . . . During such suspension the respondent shall continue to be a member of The Florida Bar but without the privilege of practicing, and 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 clear meaning of the language of Rule 3-5.1(e) contemplates two phases to any suspension. Phase one is during the suspension period which includes membership in the Bar without the privilege of practicing. Phase two is after the suspension has expired, but prior to satisfaction of all conditions of the suspension, i.e., successful completion of the reinstatement process. Obviously, in the second phase after the suspension period has expired, an attorney is no longer under suspension, but cannot practice until he satisfies all conditions of the suspension order as required by Rule 3-5.1(e). This second phase is precisely Petitioner's status after June 17, 1990.

Most respectfully, Respondent's illogical insistence that the "expiration of the suspension period is not the equivalent of the expiration of the suspension", [Answer Brief at 2], and its further contention that "the suspension period expires, but not the suspension order" is dizzying doublespeak and unsupported by the referenced rule or any prior decision of this honorable Court.

Accordingly, Respondent's mischaracterization of Petitioner's Motion for Admission to Micronesia and affidavit to Palau as improper, deceitful and misleading, based upon the expiration date

of Petitioner's suspension is without evidentiary support. As such Petitioner's conduct in submitting this application and affidavit should not adversely affect his petition for reinstatement.

PETITIONER MET HIS BURDEN AND ESTABLISHED HIS FITNESS TO BE REINSTATED TO PRACTICE LAW IN FLORIDA.

Respondent suggests that Petitioner failed to meet his burden in establishing his fitness for reinstatement based primarily upon two issues. The first issue, Petitioner's actions in seeking permission to practice law in Micronesia and Palau is misplaced as discussed above. The second issue, Petitioner's lack of compliance with the suspension order is insufficient to overcome the clear, uncontroverted, evidence of rehabilitation offered by Petitioner. This is especially true given the ambiguity of the consent judgment between Petitioner and Respondent and the confusing nature of the commencement date of the period of probation.

Respondent again fails to comprehend the clear language of the Rules of Discipline when insisting "there is nothing in the Rules Regulating The Florida Bar which would prohibit the period of probation imposed by the Referee". [Answer Brief at 15]. Rule 3-7.6(k) of the Rules of Discipline directs the referee to include in his report, "recommendations as to disciplinary measures to be applied". Obviously, the rule does not sanction or permit the referee to impose <u>any</u> disciplinary measure. Moreover, the Respondent's position that the Rules do not "prohibit" certain action by the Referee is unpersuasive. The Rules also do not prohibit the Referee from recommending the death penalty in bar proceedings, however, Petitioner hopes Respondent would not suggest such a recommendation proper in the absence of a specific prohibition.

Respondent further fails to cite a single case of this court wherein a period of probation was contemporaneous with a suspension as opposed to following a suspension. Additionally, Rule 3-5.1(e) also supports Petitioner's contention that probation be imposed subsequent to reinstatement in that it provides that a failure to comply with the conditions of probation can cause an attorney to be "suspended from the practice of law on petition by The Florida Bar . . .".

Respondent acknowledges the ambiguity of the consent judgment in its statement that "since no trust account audits could be conducted in the absence of a trust account, that condition would be rendered moot unless and until Petitioner was reinstated" . . . [Answer Brief at 17]. Given the purpose of trust audits, i.e. compliance with the rules and protection of the public, it would appear that Respondent would not intentionally allow the requirement of semi-annual audits to be eliminated based upon when Petitioner was reinstated relative to the probationary period. If Petitioner were to be reinstated today would Respondent concede no audits are necessary since the two year probationary period has, in Respondent's view, long since passed?

Finally, it is interesting that when Petitioner did not strictly comply with the confusing consent judgment, Respondent characterizes such conduct as "failure or refusal". [Answer Brief at 13]. However, when Respondent failed to conduct semi-annual audits during the probationary period as required, Respondent characterizes its own failure as "rendered moot". [Answer Brief at

17]. This transparent double standard should not be countenanced by this court.

With respect to the conditions of probation imposed upon Petitioner, irrespective of the commencement date, is it clear that Petitioner has now completely complied with all requirements in that he has (1) paid all disciplinary costs (2) completed the 6 hours of C.L.E.R. credit (3) been evaluated by and entered into a contract recommended by Florida Lawyers Assistance, Inc.

Moreover, Petitioner offered the testimony of thirteen (13) witnesses, including five (5) attorneys, three (3) doctors and a circuit court judge. Additionally, Petitioner introduced eight (8) affidavits, seven of which were from lawyers. All witnesses attested to Petitioner's good character, professional reputation and rehabilitation in general. There was no evidence of alcohol or drug problems in the recent past.

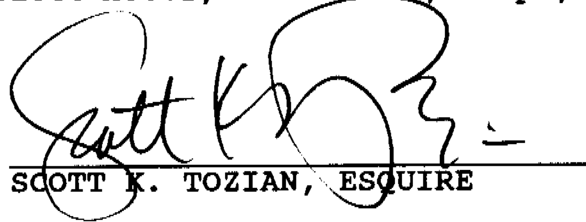
Given the unanimous opinion of rehabilitation expressed by the witnesses below, and given Petitioner's compliance with all requirements of the court's order of discipline, Petitioner clearly and convincingly established his fitness to be reinstated.

CONCLUSION

Petitioner has remained continuously suspended from the practice of law since December 1988, a period of some five and one half (5 1/2) years. At least eighteen (18) months of this time period resulted from, in large part, the delay caused by the Respondent and the Referee below. Should this court deny the petition, the original suspension of eighteen (18) months will result in Petitioner being unable to practice for seven to eight years, given the prohibitions on successive petitions. As Petitioner has now complied with all requirements of his suspension order and considering the substantial testimony of the many witnesses attesting to Petitioner's rehabilitation, Petitioner should be forthwith reinstated to the practice of law in Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 23 day of June, 1994, to: Joseph A. Corsmeier, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.



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