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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

CASE NO. 81,774

v.

TFB FILE NO. 93-11,493(6D)(HRE)

DENNIS MICHAEL JANSSEN,

Respondent. /

ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Respondent, Dennis Michael Janssen, will be referred to as the "Respondent". The Florida Bar will be referred to as "The Florida Bar", "The Bar" or "Complainant". "TR" will refer to the transcript of the Final Hearing held on October 11, 1993. "A" will refer to the Appendix attached to this Brief.

RESTATEMENT OF THE CASE AND THE FACTS

Respondent accepts that portion of Complainant's Statement Of The Facts And Of The Case reciting the various Rules Regulating The Florida Bar to which the Respondent pled guilty, resulting in his suspension and in addition the statement on Page 2 reading:

"The above-referenced Rules were based upon trust accounting violations including trust account shortages. There was no evidence of any misappropriation by Petitioner. In addition, Petitioner was disciplined for improprieties relating to receiving loans from clients."

With these exceptions, Respondent will restate the Statement Of Facts And Of The Case.

The matter is before the Court on The Florida Bar's Petition For Review Of Referee's Report recommending that Respondent's Petition For Reinstatement be granted.

By Order dated April 2, 1992, the Supreme Court of Florida suspended Respondent from the practice of law for a period of one (1) year effective May 4, 1992, and his reinstatement was conditioned upon his passing the ethics portion of the Multi-State Bar Examination.

On or about May 17, 1993, Respondent filed his Petition For Reinstatement and the Honorable Claudia R. Isom was appointed as Referee. The matter came on to be heard before the Referee on October 11, 1993. At the very beginning of the hearing, the attorney for Respondent stated:

"MR. EARLE: Judge, I would like to make an opening statement, if I may. It is not going to be in the sense of a normal opening statement. It is an explanation of how I plan to proceed, if Your Honor will allow me.

I think it is necessary to explain to you why I am doing what I am going to do because this is an unusual proceeding.

Now, Judge, I say it is an unusual proceeding because it is here on a Petition for Reinstatement. The Petition for Reinstatement, I believe, sets out all the facts justifying the reinstatement. The problem with cases like this is that there is no answer filed by the Bar.

Normally you can look at a complaint and an answer and come to some conclusions as to what the issues are. You can look at this file till you get blue in the face and you will never know what the issues are. Unfortunately I occupy substantially the same position as the Court. I don't know what the issues are and I don't want to proceed forward representing the Petitioner and raise issues on behalf of the Bar. I want the Bar to raise their own issues.

So, what I propose I am going to do, I am going to try, if Your Honor will allow me, is I am going to call as my first witness Mr. Janssen. I am going to have him

testify with a broad brush about as broad as they make them and everything in that Petition of Reinstatement is true as of the date it was signed by him.

Then I am going to ask him the next question is it true as of today and let him make whatever corrections he wants. When he gets through saying everything is true, plus the corrections, Your Honor, I propose then to turn him over to the Bar for cross examination, believing that when they take him on cross examination they will raise the issues that they want to raise and we can then address them on rebuttal and I can take my shot at the issues. That is what I propose to do. I can't tell you what those issues are going to be until they raise them themselves."

THE COURT: "Okay. Thank you.

Do you wish to make an opening statement?"

MR. RISTOFF: "Judge, just briefly. May I be seated, Judge?"

THE COURT: "Yes."

MR. RISTOFF: "It is the responsibility of the Bar in these type of proceedings to conduct an investigation, to determine whether or not Mr. Janssen should be reinstated. In these type of proceedings, it is not the type of case where -- the normal type of case, many issues involving ethics, morality are also involved. There are specific things that the Bar will present to

the Court in opposition to his reinstatement.

Again, we don't know exactly how things will turn out as well. But just in terms of the Bar's position, we will present evidence in opposition to Mr. Janssen's reinstatement. And again, Mr. Janssen has the burden of proof in this case."

THE COURT: "Okay."

MR. EARLE: "Your Honor, I take it there is no objection to my -- on the part of the Bar to my proceeding as I outlined?"

MR. RISTOFF: "None."

THE COURT: "Okay."

It is not Complainant's position as stated in its Brief that any of the Referee's Findings of Fact in the Referee's Report are not supported by substantial competent evidence. Notwithstanding this, Complainant substitutes its own views of the effect of the evidence for the Findings of Fact as found by the Referee. The facts of this case consists of the Findings of Fact by the Referee and not Complainant's views thereof.

The Findings of Fact of the Referee are substantially different from the facts stated in Complainant's Brief. To avoid discussion as to the facts of this case, Respondent will merely copy the Findings of Fact in the Referee's Report. In most instances, the Referee's Report cites the pages of the transcript for the evidence supporting specific findings. Where the Referee did not so cite the transcript, Petitioner will do so and will

underscore the citations to indicate that it is not a part of the Referee's Report.

The Bar adduced evidence to impeach only one of the allegations in the Petition For Reinstatement. It was required that Respondent list all of his indebtedness. He was in arrears in his court awarded child support and failed to list said arrearage in his Petition. As to this the Referee found:

"The Petition For Reinstatement, Paragraph 8, avers that all financial obligations of Petitioner are shown on Exhibit 2, which is a financial statement attached to the Petition. On cross-examination, the Petitioner admitted that he was indebted to his ex-wife in a substantial amount for unpaid child support, which was not shown on Exhibit 2. He explained that he thought it referred to commercial obligations only and he did not believe that this type of financial obligation had to be reflected in the Petition For Reinstatement (TR 14). The Referee finds that the Petitioner did not intend to mislead The Florida Bar by omitting this indebtedness. It was at all times evident to the Petitioner that the Bar would interview his ex-wife relative to his reinstatement and would undoubtedly learn about the delinquent child support payments."

The Bar did not directly question any of the other allegations in the Petition For Reinstatement but instead attempted to demonstrate that the Petitioner was lacking the character and

fitness to warrant his reinstatement by offering evidence relative to various events and the Court made the following Findings of Fact relative thereto:

"1. Shortly after midnight on May 27, 1993, Petitioner was arrested by Officer Vaughan of the St. Petersburg Beach Police Department, and after investigation, was charged with driving under the influence of alcohol. This case had not been tried. During the course of the police investigation, Petitioner told Officer Vaughan and Officer Bellin that he had had knee and ankle surgery and had hurt his back while running and these injuries were the result of football at Florida State University (TR 10, 13). Petitioner was, prior to his suspension, associated in the practice of law with Larry Beltz, in St. Petersburg. On one occasion, Petitioner and Beltz were discussing the injuries to Petitioner's ankles and Petitioner told Beltz that he had injured them playing basketball for Florida State University (TR 98). Petitioner offered certain medical reports in evidence reflecting that he had had problems with his knees and ankle (TR 48-49) and had told some of the doctors that they were the result of his playing basketball at FSU as well as in high school. The Court finds that Petitioner suffered from knee, ankle and back problems but they were in no way connected with his playing basketball or football on the varsity teams of

FSU because he did not play on said varsity teams (TR 31). The Court further finds that the Petitioner attempted to mislead the police officers, Larry Beltz and the various doctors into believing that he played on the FSU varsity basketball and/or football teams, but that these efforts were solely for his self-aggrandizement and were not for the purpose of financial gain or the perpetration of any fraud. Further, the statements made to Larry Beltz and the doctors were made prior to Petitioner's suspension and had no materiality on the Hearing for Reinstatement."

"2. After the arrest of the Petitioner by Officer Vaughan, he was taken to the St. Petersburg Beach Police Station where he was confined. During the course of the investigation and his confinement, Petitioner made Officer Vaughan aware of the fact that he was a lawyer. During the course of his confinement at the St. Petersburg Police Department, he inquired as to when he would be released. Officer Vaughan testified that Petitioner told him, "I have a meeting in the morning with a woman victim of a domestic violence thing...I have to be with her in court tomorrow morning...Petitioner said that he had to be released and had this meeting, you know, the following morning." (TR 136, 137). Officer King testified that Petitioner told him that, 'He needed to be in court in the morning to represent a woman...I

have got to be in court in the morning, I really have to be there.'" (TR 147, 148).

"...he needed to be released. He said something to the effect of court in the morning and he didn't elaborate on that." (TR 151). Officer Bellin testified that he wasn't sure whether Petitioner said he had to be at a "hearing" or if it was "court". (TR 153). The Court finds as a fact that he did tell Officers Vaughan, King and Bellin that he had to be somewhere in the morning but does not find that he said he had to be in Court; it could have been a "hearing" or a "meeting". In that connection, the Court finds that the Petitioner did have an appointment that morning at 10:00 a.m. with his attorney, Richard T. Earle, Jr. and Martin Egan, the investigator for The Florida Bar, for the purpose of discussing the Petition For Reinstatement (TR 52, 56). The Referee can well understand the reluctance of Petitioner to discuss the true nature of the hearing or meeting with the police officers and finds that whatever Petitioner told them was not told for the purpose of misleading them or defrauding them in any way but was told for the purpose of avoiding unnecessary embarrassment to the Petitioner."

"3. In January, 1992, Petitioner was obligated by Court Order to pay his ex-wife, Gail Stauffer \$300.00 every two weeks for the maintenance and support of their

minor daughter. At said time, Petitioner was in arrears \$1,000.00 in said support payments. He told his ex-wife that he was about to be suspended for one year from The Florida Bar and that after his reinstatement, 'His income would be low when he got started back.' In response, his ex-wife told him that she 'would work through this time knowing it would be a difficult time.' (TR 94). The child support was payable \$300.00 twice a month, on the 1st and 15th day of each month. (TR 85, 86). Petitioner made no child support payments from January, 1992 to the date of the hearing, and as of the payment due on October 1, 1993, Petitioner was in arrears in the amount of \$14,200.00. Although occasionally Mrs. Stauffer requested that Petitioner make some payments on said support, said requests were ignored, but she took no legal action to collect them, believing that he was earning a minimal salary. (TR 88). This belief was not based upon any misrepresentations by the Petitioner but was a mere surmise on her part. (TR 89). The Referee finds that although Petitioner's ex-wife agreed to work with him and took no legal action to enforce the provisions of the Court Order, under the circumstances of Petitioner's income flow, his failure to meet his child support obligations was not reasonable."

"4. On May 27th, shortly before 10:00 a.m., Martin Egan, The Florida Bar investigator, met with Mr. Earle,

Petitioner's attorney, for a conference with the Petitioner. The Petitioner was late for said meeting, having been detained in jail and did not appear until approximately 10:10 a.m.. This was an informal meeting, the purpose of which was to assist The Florida Bar in investigating the allegations in the Petition For Reinstatement. It was on an informal conversational basis in which the Petitioner, his attorney and Mr. Egan participated. Mr. Egan explained to the Petitioner that what he was looking for was sources of information and when he got the sources, he would check the information. After explaining to Petitioner that he would check all information given to him relative to judgments against, the lawsuits pending for and against, and arrests of the Petitioner, he would check the same out. (TR 54,55) (TR 131). Mr. Egan asked a question, 'Are there any judgments or arrests or cases pending where you are the Plaintiff or Defendant?' (TR 131). Mr. Earle stated, 'There are no judgments and no arrests...Mr. Janssen is clean.' (TR 131). At the time Mr. Earle made the above statement to Mr. Egan, he did not know of the arrest of the Petitioner that morning because Petitioner had had no opportunity to discuss it with him. The Referee recognizes that the Petitioner, being well aware of his arrest, could have promptly corrected Mr. Earle's statement but he did not do so because he wanted to

confer with his attorney before discussing this with the investigator (TR 55,56), which the Referee finds to be understandable."

"5. The Referee further finds that except as specifically set out above, the Petitioner proved the allegations in the Petition For Reinstatement. None of the conduct specifically set out above was in the course of the practice of law and none of it was for the purpose of financial gain to Petitioner or to defraud anyone."

"6. As a result of the Petitioner's arrest for driving under the influence of alcohol, The Florida Bar requested that he voluntarily consult with Florida Lawyers Assistance, Inc., to determine whether or not he was suffering from alcoholic dependency. Petitioner was examined by Dr. Myers, who evaluated his condition, and reported his findings to the Bar and to Florida Lawyers Assistance, Inc."

"7. Dr. Myers' opinion was that Petitioner was not suffering from an alcoholic dependency problem but that he could use outpatient education regarding alcoholism and its effects, as well as involvement in Florida Lawyers Assistance program. Florida Lawyers Assistance, Inc. concurred in this view. Referee finds as facts the views of Dr. Myers and Florida Lawyers Assistance, Inc., as reflected in the letter of Florida Lawyers Assistance, Inc., dated October 18, 1993."

"8. Subsequent to the hearing before me, the Petitioner has filed an Affidavit, signed by his ex-wife, Gail Stauffer, reflecting that Petitioner has paid to her the sum of FOURTEEN THOUSAND FOUR HUNDRED (\$14,400.00) DOLLARS, being the child support money that was in default as of October 1, 1993, in the amount of FOURTEEN THOUSAND TWO HUNDRED (\$14,200.00) plus TWO HUNDRED (\$200.00) DOLLARS more."

The Referee concluded that:

"The conduct of the petitioner as found by the Referee in Paragraphs 1, 2, 3 and 4, were not within the context of the practice of law and were not for the purpose of financial gain or to defraud anyone. This conduct was somewhat less than sterling but it does not demonstrate such a lack of character or fitness as to preclude him from reinstatement. The petitioner has demonstrated that he is entitled to be reinstated subject, however, to several conditions."

Having made said Findings of Fact and Conclusions of Law, the Referee recommended that Petitioner be reinstated as a member of The Florida Bar subject, however, to being on probation for a period of one and one-half (1 1/2) years, which probation should be conditioned as follows:

1. If Petitioner is found guilty of the presently existing charge of DUI and is placed on probation, he shall completely fulfill all of the probationary conditions of said

sentence.

2. He shall comply with all of the conditions and recommendations of Florida Lawyers Assistance, Inc. relative to education regarding alcohol and its effects.

3. He keep current the child support payments as provided by Court Order.

4. Petitioner's reinstatement should also be conditioned upon the payment of all costs in this proceeding.

The Referee, on December 14, 1993, served the Report of Referee upon the Complainant and the Petitioner.

On November 22, 1993, the charge of DUI pending in the County Court of Pinellas County, Case Number 9320865 was amended to "Reckless Driving" (A1). On the same day the Court entered an Order of Direct Court Supervision Probation which reflects that the Respondent entered a plea of nolo contendere to the offense of reckless driving and an adjudication of guilt was imposed (A2).

The Board of Governors of The Florida Bar, at its meeting held on February 24, 1994, voted to seek a review by this Court of the Report of Referee, and a Petition For Review Of Referee's Report was filed with the Supreme Court of Florida on March 1, 1994.

SUMMARY OF ARGUMENT

The Referee's Findings of Fact are presumed to be correct and will be upheld if supported by competent, substantial evidence. The Bar in its Brief does not contend or even suggest that the Referee's Findings of Fact are not so supported.

Therefore, the Referee's Findings of Fact are the facts in this case.

The Referee's Findings of Fact inescapably lead to the conclusions that:

1. Respondent does not lack the character and fitness required to engage in the practice of law.

2. Respondent has been rehabilitated.

3. Respondent was suspended primarily because of ignorance of or inattention to the Rules regulating trust accounts. While suspended he studied the Rules Regulating The Florida Bar, was "tutored" by an accountant relative to bookkeeping, and the Trust Account Rules. He took and passed the Ethics portion of the Multi-state Bar Examination with flying colors. He has demonstrated that he possesses the required legal ability to engage in the practice of law.

As a result of the foregoing, the Referee recommendation that the Respondent be reinstated is clearly not erroneous and should not be disturbed.

**WHETHER THE REFEREE'S RECOMMENDATION OF REINSTATEMENT IS
ERRONEOUS GIVEN THE ABSENCE OF CLEAR EVIDENCE SUPPORTING
PETITIONER'S FITNESS TO PRACTICE LAW.**

ARGUMENT

Respondent adopts the issue before the Court as stated in the Brief of Complainant. As presented by Complainant in its Brief, there are three different aspects of this issue. On Page 16 of Complainant's brief it is stated "Petitioner presented no witnesses to establish that he has a "good reputation for professional ability". As Petitioner failed to establish a "good reputation for professional ability" and failed to prove clear evidence of(sic) "unimpeachable character" his Petition for reinstatement should be denied". On Page 6 of its brief, Complainant states that Petitioner failed to meet his heavy burden by establishing by clear evidence an "unimpeachable character" and "good reputation for professional responsibility". Respondent will treat the issues of failure to present witnesses to establish that he had a good reputation for professional ability and an unimpeachable character, whether he established by clear evidence an unimpeachable character and whether he established by clear evidence that he had a good reputation for professional ability as sub-issues and treat each sub-issue separately.

FAILURE TO PRESENT WITNESSES TO ESTABLISH THAT RESPONDENT HAS A GOOD REPUTATION FOR PROFESSIONAL ABILITY AND UNIMPEACHABLE CHARACTER WARRANTS DENIAL OF REINSTATEMENT.

It is apparently the Bar's position that in order to carry the burden of establishing a good reputation for professional ability and an unimpeachable character, it was necessary for Respondent to call witnesses other than himself to testify relative to these matters. Admittedly a Petitioner for Reinstatement has the burden of proving that he does have an unimpeachable character and a good reputation for professional ability but nowhere in the Rules or in the case law relative thereto is there any requirement that good reputation for professional ability and unimpeachable character must be proved by testimony of witnesses other than the Petitioner.

Rule 3-7.10(n)(3) of the Rules of Discipline dictates the contents of a Petition for Reinstatement. An examination of the provisions of this rule reflect that a Petitioner for Reinstatement must, in his petition, reveal practically all aspects of his life from a period of time predating his suspension to the filing of the Petition for Reinstatement. The information required to be in the Petition for Reinstatement, if true would reveal practically all aspects of the Petitioner's conduct in any way related to character and fitness or at least leads to further investigation by the Bar.

Rule 3-7.10(n)(4) provides "Upon the appointment of a Referee and Bar counsel, copies of the Petition shall be furnished by the Executive Director to local Board members, local Grievance Committees, and to such other persons as are mentioned in this

rule. Persons will be asked to direct their comments to Bar counsel. The proceedings and findings of the Referee shall relate to those matters described in this rule and also to those matters tending to show the Petitioner's rehabilitation, present fitness to resume the practice of law and the effect of such proposed reinstatement upon the administration of justice and purity of the courts and competence of the people in the profession.

A persons "character" whether good or bad is determined not by his mere appearance but by a composite picture of practically all of his activities over a relatively long period of time. It is not unusual for scoundrels to appear to be paragons of virtue or, in the eyes of some, for paragons of virtue to appear to be scoundrels.

Respondent submits that the Petition for Reinstatement in the form dictated, the seeking of information by the Bar as required by Rule 3-7.10(n)(4), and the resulting investigation made by the Bar and cross-examination of the Petitioner at the Referee hearing are well calculated to furnish the Referee and the Court a complete picture of practically all aspects of the Petitioner's life which in any way relate to his character. This picture is more reliable than the testimony of individuals. The use of "character" witnesses is permissible in these proceedings but certainly not required.

As to a Petitioner's reputation for legal ability, the opinion testimony of members of the Bar and/or judges is of little value. Members of the Bar differ widely in their views as to the

reputation and legal ability of individual lawyers. Some lawyers revered by segments of the Bar as having great legal ability are despised by other members of the Bar as being without any legal ability, and are considered mere showmen. The ability of lawyers is better measured by the objective tests of Bar Examinations and if the lawyer can pass the Bar Examination it is assumed subject to being rehabilitated that he has the necessary ability to practice law.

FAILURE TO ESTABLISH GOOD REPUTATION FOR PROFESSIONAL ABILITY

In his opening statement, Counsel for Respondent stated that he would call Respondent as his first witness and he would testify that every allegation in his Petition For Reinstatement was true as of the date it was signed by him. He would then ask him if the allegations in the Complaint were true as of the date of the hearing, at which point the Respondent would correct the Petition by updating it. Counsel then stated that after Respondent updated the Petition For Reinstatement, he would turn Respondent over to the Bar for cross-examination. The Bar, by cross-examination could raise the issues that the Bar wanted to raise and counsel for the Respondent could readdress these issues on rebuttal. Bar counsel stated that The Bar had no objection to Respondent's counsel proceeding as stated by him.

Paragraph 14 of Respondent's Petition For Reinstatement alleges, among other things:

"14. The record relative to the suspension of
Petitioner reflects that through ignorance and

inattention he did not comply with the rules regulating trust accounts in keeping appropriate records relative thereto. No client or other person was injured as a result thereof and no client complained of Petitioner's conduct. One of the conditions of Petitioner's suspension was that he take and pass the Professional Responsibility Examination required for admission to The Bar. Petitioner spent a substantial portion of his time during his suspension preparing for and taking the Multi-state Professional Responsibility Examination and at the same time studying the rules regulating trust accounts and in conferences with his accountant acquainting himself with the basic principles of bookkeeping. Petitioner passed the Multi-state Professional Responsibility Examination with a scale score of 116 when a minimum passing scale of 70 was required.

Further, it was necessary for Petitioner to keep abreast of developments in the law during the period of suspension which he did best by working as a paralegal in a law firm rendering to the law firm services not constituting the practice of law, which was accomplished."

On direct examination, Respondent testified that every allegation in his Petition For Reinstatement was true as of the date the same was filed.

Bar Counsel, on cross-examination and direct examination of

witnesses called by it, did not adduce any testimony relative to any of the allegations in Paragraph 14 of the Petition For Reinstatement above quoted.

There is nothing in the record of the original proceeding leading to Respondent's suspension or in the record on his Petition For Reinstatement that in any way questions Respondent's professional ability other than his ignorance concerning or inattention to the Rules Regulating The Florida Bar as to Trust Accounting. The allegations in Paragraph 14 reflect that not only did Respondent carefully study said Rules and employed an accountant to teach him the rudiments of bookkeeping and trust accounting, but he passed the Multi-state Professional Responsibility Examination with a comparatively high score.

Respondent submits that passing that portion of the Bar Examination with a high score sheds more light on Respondent's professional abilities than the testimony of several witnesses and nothing in the record reflects adversely on Respondent's legal ability.

Based upon the allegations in the Petition, the direct examination of the Respondent and the lack of cross examination by the Bar, the Referee in her report found:

"The Referee further finds that except as specifically set out above, the Petitioner proved the allegations in the Petition For Reinstatement."

FAILURE TO ESTABLISH "UNIMPEACHABLE CHARACTER"

The third aspect of the issue on review as to whether

Respondent failed to meet his burden by establishing by clear evidence an "unimpeachable character" was raised by the Bar on cross-examination and direct examination of witnesses called by the Bar.

Respondent's suspension was based upon trust accounting violations, including trust account shortages. There was no evidence of any misappropriation by Respondent. In addition, Respondent was disciplined for improprieties related to receiving loans from clients (Complainant's Brief 2). There is nothing in the record of that proceeding which reflects adversely on Respondent's character.

If there is any evidence reflecting on Respondent's character, it must be in the record of this Reinstatement Proceeding. The Bar, on cross and direct examination, offered evidence relative to five different incidents to demonstrate that Respondent should not be reinstated because of character defects. These incidents are as follows:

On cross-examination of the Respondent, it appeared that he was indebted to his Wife in a substantial amount for unpaid child support, which indebtedness was not reflected in his Petition For Reinstatement. Respondent explained that he thought that the Petition For Reinstatement should only reflect commercial obligations and he did not believe that this type of financial obligation had to be reflected therein. The Referee found that the Respondent did not intend to mislead The Florida Bar by omitting this indebtedness. It was at all times evident to the Respondent

that the Bar would interview his ex-wife relative to his reinstatement and would undoubtedly learn about the delinquent child support payments.

The Bar called as a witness Respondent's ex-wife who had been employed at all material times in a relatively well paying position at St. Petersburg Junior College. She testified that Respondent was in arrears in his support payments due her for the support of the minor child of the parties. Said arrears were in the amount of \$14,200.00, which accrued between January 1992 and the date of the hearing. On January 2, 1992, Respondent told his ex-wife that he was about to be suspended for one year from The Florida Bar and that after his reinstatement, "His income would be low when he got started back." And his ex-wife told him that she, "Would work through this time knowing it would be a difficult time." (TR 94)

The Referee found that although occasionally Mrs. Stauffer requested that Respondent make some payments on said support, said requests were ignored, but she took no legal action to collect them, believing that he was earning a minimal salary. This belief was not based upon any misrepresentations by the Respondent but was a mere surmise on her part. The Referee found that although Respondent's ex-wife agreed to work with him and took no legal action to enforce the provisions of the Court Order, under the circumstances of Respondent's income flow his failure to meet his child support obligation was not reasonable.

On May 27, 1993, Respondent was arrested by an officer of the St. Petersburg Beach Police Department and after investigation was

charged with, "Driving under the influence of alcohol." During the course of the police investigation, Respondent told the police officers that he had had knee and ankle surgery and had hurt his back while running and these injuries were the result of playing football at Florida State University.

Prior to his suspension, Respondent had been associated in the practice of law with Larry Beltz in St. Petersburg. On one occasion, Respondent and Beltz were discussing the injuries to Respondent's ankles and Petitioner told Beltz that he had injured them playing basketball for Florida State University. Respondent also had told some doctors who had attended him that the problems with his knees and ankles were the result of playing basketball at Florida State University. The Referee found that the Respondent had in fact suffered from knee, ankle and back problems but they were in no way connected with his playing football or basketball on the varsity teams of Florida State University, because he did not play on said varsity teams.

As to these incidents, the Referee found that the Respondent attempted to mislead the police officers, Larry Beltz and various doctors into believing that he played on FSU Varsity Basketball and/or Football teams, but that these efforts were solely for his self-aggrandizement and were not for the purpose of financial gain or the perpetration of any fraud. Further, the statements made to Larry Beltz and the doctors were made prior to Respondent's suspension and had no materiality on the hearing for reinstatement.

During the course of the investigation of the DUI charge by

the police officers, Respondent told some of them that he needed to be released from jail and that he had to be somewhere in the morning. The Referee found that Respondent told the police officers that the "somewhere he had to be" could have been a "hearing" or a "meeting", and that he did have an appointment at 10:00 in the morning with his lawyer and the investigator for The Florida Bar for the purpose of discussing the investigation of Respondent's Petition For Reinstatement.

Regarding this incident, the Referee found:

"The Court finds as a fact that he did tell Officers Vaughan, King and Bellin that he had to be somewhere in the morning but does not find that he said he had to be in Court; it could have been a 'hearing' or a 'meeting'. In that connection the Court finds that the Petitioner did have an appointment that morning at 10:00 a.m. with his attorney, Richard T. Earle, Jr., and Martin Egan, the investigator for The Florida Bar for the purpose of discussing the Petition For Reinstatement. The Referee can well understand the reluctance of Petitioner to discuss the true nature of the 'hearing' or 'meeting' with the police officers and finds that whatever Petitioner told them was not told for the purpose of misleading them or defrauding them in any way but was told for the purpose of avoiding unnecessary embarrassment to the Petitioner."

Respondent was released from jail in time to attend the

meeting with his lawyer and Mr. Egan, although he was late and did not have an opportunity to discuss his arrest with his lawyer prior to the meeting with Mr. Egan. As to this meeting, the Referee found, "This was an informal meeting, the purpose of which was to assist The Florida Bar in investigating the allegations in the Petition For Reinstatement. It was on an informal conversational basis in which the Petitioner, his attorney and Mr. Egan participated. Mr. Egan explained to the Respondent that what he was looking for was sources of information and when he got the sources, he would check the information. After explaining to Respondent that he would check all information given to him relative to judgments against, the lawsuits pending for and against, and arrests of the Respondent, he would check the same out. Mr. Egan asked a question, "Are there any judgments or arrests or cases pending against where you are the Petitioner or Defendant?" Mr. Earle stated, "There are no judgments and no arrests...Mr. Janssen is clean."

"At the time Mr. Earle made the above statement to Mr. Egan, he did not know of the arrest of the Respondent that morning because Respondent had had no opportunity to discuss it with him. The Referee recognizes that the Respondent, being well aware of his arrest, could have promptly corrected Mr. Earle's statement, but he did not do so because he wanted to confer with his attorney before discussing this with the investigator, which the Referee finds to be understandable." It is obvious from these Findings that Respondent's failure to correct Mr. Earle's statement was not

for the purpose of misleading the Bar.

The Referee summarized the effect of the evidence adduced by the Bar as follows:

"The conduct of the Petitioner as found by the Referee in Paragraphs 1, 2, 3 and 4, were not within the context of the practice of law and were not for the purpose of financial gain or to defraud anyone. This conduct was somewhat less than sterling but it does not demonstrate such a lack of character or fitness as to preclude him from reinstatement. The Petitioner has demonstrated that he is entitled to be reinstated subject, however, to several conditions."

The issue on this appeal can be reduced to a simple question. Do the facts as found by the Referee justify the Referee's Conclusion of Law that the "Respondent has demonstrated that he is entitled to be reinstated subject, however, to several conditions."

Complainant's counsel in the first paragraph of his Argument states, "A Referee's Findings of Fact and recommendations are presumed to be correct and should be upheld unless clearly erroneous AND without support in the record, The Florida Bar v. Vannier, 498 So2d 896, 898 (FLA. 1986)". The Court actually held that "a Referee's Findings of Fact and recommendations are presumed to be correct and should be upheld unless clearly erroneous OR lacking in evidentiary support." A better statement of the law is

found in The Florida Bar v. Jahn, 559 So2d 1089, 1090 (FLA 1990) wherein the Supreme Court stated "A Referee's Findings of Fact are presumed to be correct and will be upheld if supported by competent substantial evidence." Nowhere in the Bar's Brief does counsel contend or even suggest that the Referee's Findings of Fact are not supported by competent substantial evidence so that said Findings of Fact should be upheld.

In the second paragraph of Complainant's Argument, it stated that, "The Referee's recommendation that Petitioner should be reinstated in the instant case is clearly erroneous and contrary to the Case Law." To support this statement Bar Counsel cites several cases.

The Bar cited In re Timson, 301 So2d 448 (FLA. 1974) in support of the proposition that it was incumbent upon Respondent to present witnesses other than Respondent to establish that Respondent had a "good reputation for professional ability" and "evidence of unimpeachable character". Timson, supra. was before the Court on a Petition For Reinstatement after permanent disbarment. The proceedings were conducted pursuant to the Rules existing prior to December 1, 1972, at which date the Rules were changed so that a disbarred attorney had to be admitted to The Florida Bar in compliance with the Rules Governing Admissions thereto. In this case there was no issue as to Mr. Timson's good moral character and highly ethical conduct. He was disbarred because of his lack of professional attention and diligence, his failure to maintain and run a law office in an acceptable manner,

his lack of legal ability and good judgment. In recommending that the Petition For Reinstatement be denied, the Referee stated,

"Mr. Timson had the burden of establishing that he had rehabilitated himself, since December 1971, so as to make it appropriate to permit him to practice law again. It is the conclusion of the undersigned that the Petitioner failed to establish in a convincing manner that this rehabilitation has taken place, or that it is complete, for the following reasons:

"2. The complete rehabilitation process for Mr. Timson should include reeducation process, legal studies and additional training of some kind. This has not been undertaken. Without this aspect of his rehabilitation, it would be a mistake to readmit Mr. Timson to practice, in view of his low professional reputation for ability and knowledge among the judiciary and general members of the Bar. An alternative would be for Mr. Timson to submit himself to a Florida Bar examination." "5. Mr. Timson's general professional reputation for legal ability with the Bench and the Bar was not clearly shown to be good. In fact, it was shown to be 'poor', 'bad', 'below average', and 'not good', in this proceeding, witnesses in the best position to know about such matters - five present and former Circuit Judges and five lawyers active in the local Bar Association." (Emphasis supplied)

The Supreme Court accepted the recommendation of the Referee and denied the Petition For Reinstatement.

In some respects, Timson, supra. is similar to the instant case and dissimilar in other respects. Respondent was suspended because of his ignorance or inattention to the Trust Accounting Rules. Unlike Timson, Respondent studied the Rules Regulating The Florida Bar and took the Ethics portion of the Bar exam and passed the same with a relatively high grade. He also sought the help of an accountant who taught him the general principals of trust accounting and bookkeeping. In this regard he had rehabilitated himself while Timson had not.

The Bar in its Brief cited The Florida Bar v. Shores, 587 So2d 1313 (FLA. 1991) as authority for denying Respondent's reinstatement because he failed to pay child support. In this case, Shores was suspended for failure to comply with the Courts prior opinion as well as his Consent Judgment which required him, among other things, to refrain from the use of alcohol and to comply with the contract entered into between himself and FLA, Inc. More than one year after his suspension, Shores filed a Notice of Appearance in the County Court requesting continuance of a civil matter involving Petitioner's brother without advising the judge of Shores' suspension. The Internal Revenue Service filed a \$44,000.00 claim against Petitioner which was still outstanding. The Internal Revenue Service had an additional claim against Shores for the sum of approximately \$78,000.00, which remained outstanding. The Petitioner had not filed an income tax return

with the IRS since 1982 except that Petitioner filed an extension to file a 1989 return with the IRS after filing his Petition For Reinstatement. The Petitioner failed to advise the University of South Florida in his graduate school application that he was suspended from the practice of law and merely stated that he was admitted to practice in the Courts of Florida and the Federal Courts. Further, Shores was delinquent in back child support payments to his dependent child, although the former spouse had not initiated any legal proceeding to enforce the same. The Referee recommended that the Petition for Reinstatement be denied without prejudice and that if Shores resolved his Internal Revenue Service obligations, his petition should be reconsidered when permitted by the Rules Regulating The Florida Bar, thus indicating the importance which the Referee attributed to the failure to pay child support. Further in the instant case, Respondent and his ex-wife had agreed to a moratorium of the child support. (Emphasis supplied)

The Bar cited The Florida Bar v Jahn, 559 So2d 1089 (Fla. 1990) for the proposition that Respondent's reinstatement should be denied because of the misstatements made to the police officers relative to the source of the injuries to Respondent's knees and ankles. Jahn was suspended from The Florida Bar because he was convicted of two felonies, possession of cocaine and delivery of cocaine to a minor. Jahn petitioned for reinstatement. At the hearing before the Referee Jahn testified that several prospective employers refused to consider him further when he disclosed his

felony convictions. He then purposely altered his resume to conceal his convictions, imprisonment, and suspension in applying for a position as trust officer with NCNB and intentionally failed to disclose his past history in numerous interviews with NCNB personnel. NCNB hired Jahn but, after receiving an anonymous tip about his criminal activity, fired him immediately. Jahn admitted that his primary motive for lying to NCNB was to secure a better paying job in Miami so that he could leave Orlando. He also stated that he intended to make full disclosure to NCNB eventually. The Referee found that Jahn had established rehabilitation and recommended reinstatement. In reversing the Referee, the Supreme Court pointed out that "Jahn's lying, primarily for personal pecuniary gain, cast 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 the time." There is no similarity between the conduct of Jahn and the conduct of the Respondent herein. Respondent was stopped by police officers in St. Petersburg Beach who, believing that Respondent was driving under the influence of alcohol attempted to give him a sobriety test, which tested his coordination in many ways. Respondent told the police officers that he had suffered injuries to his knees and ankles and that it would be difficult for him to submit to a sobriety test. He also told them that he received these injuries playing varsity sports at Florida State University. The Referee found that Petitioner did suffer from knee, ankle and a back problem, but that the statement relative to the cause of these

problems -- playing varsity sports at Florida State University was not true. Thus part of the statement was true and part of the statement was false. The Referee found that the false portions of the statement were made solely for Respondent's self aggrandizement and were not for the purpose of financial gain or for the purpose of any fraud. The ruling in Jahn, supra, was based upon Jahn's false statements being made for the purpose of personal pecuniary gain. Thus, Jahn, supra, is not applicable in the instant case.

The Bar cites The Florida Bar v Rubin, 323 So2d 257, 258 (FLA 1975) as requiring the denial of Respondent's reinstatement because of Respondent's failure to reflect, as a debt in his Petition for Reinstatement, the delinquent child support money owing his ex-wife. As to this, the Referee found that in failing to reflect said delinquent support money that the Respondent did not intend to mislead The Florida Bar and that it was at all times evident to the Respondent that the Bar would not interview his ex-wife relative to his reinstatement and would undoubtedly learn about the delinquent child support payments.

In Rubin, supra, Rubin was suspended for six months and applied for reinstatement. At the hearing before the Referee, the Bar introduced evidence of Petitioner's prior disciplinary proceedings, evidence of unsatisfied liens and judgments (at least one of which Petitioner did not report in his required financial statement), and evidence of prior judicial directives seeking to require Petitioner's compliance with court orders (including jail time served for civil contempt). The Referee recommended denial

of the Petition for Reinstatement which was affirmed by the Court.

The conduct of Respondent in inadvertently, with no intent to mislead The Florida Bar, failing to show in his Reinstatement Petition the back support money as an indebtedness is a far cry from the conduct of Rubin. Respondent's conduct in this regard does not in any way reflect upon his character or honesty.

Rubin, however, sets out principals which are common to and expressed in practically all of the cases cited. In order to be reinstated the burden is on the Petitioner to offer evidence reflecting rehabilitation. Thus, in Rubin, the Court stated "An attorney once removed or suspended must demonstrate rehabilitation and the burden of doing so requires more than recitation and contrition. Unsatisfied judgments, and a failure to acknowledge judgment liens in a personal financial statement filed for the purpose of demonstrating reinstatement are antithetical to an affirmative showing of rehabilitation. They do not demonstrate that a lawyer suspended for "violation of his oath as an attorney has progressed in his understanding of professional responsibility to the point that he may now be reposed with the public trust." Rehabilitation has been the key in all reinstatement from suspension proceedings.

Rubin, supra, however, stands for something else. At the Referee's level, the Bar introduced evidence of Petitioner's prior disciplinary proceedings. Petitioner contended before the Supreme Court that evidence of prior disciplinary action should not be considered in a reinstatement proceeding because it should have

been considered (whether it was or not), and would have been a factor in the disciplinary proceedings which generated this suspension. We disagree. It was proper for the Referee to accept evidence of prior disciplinary proceedings, among other things, for the purpose of comparing prior and current conduct and the Referee's report in this case indicates that evidence of prior misconduct was considered for that express purpose.

It would seem therefore that in order to determine whether a petitioner for reinstatement is rehabilitated, it is necessary to consider the nature of the prior disciplinary conduct. This is particularly applicable in the instant case where there is no evidence in the prior proceeding or in this reinstatement proceeding that Respondent's good character or his ability to practice law has been questioned in any way. He was suspended because of his ignorance or inattention to the rules regulating The Florida Bar relative to trust funds without any suggestion that Respondent had misappropriated any funds or that any client had been in any way injured or damaged by his conduct. During the course of his suspension he studied for, took and passed with a high grade the bar examination relative to ethics and he sought guidance and advice from his accountant relative to bookkeeping and trust accounting.

Respondent submits that the evidence in this case supports the Findings of Fact of the Referee and the findings of the Referee require the recommendation that Respondent be reinstated.

CONCLUSION

Respondent submits that based upon the Referee's Findings of Fact, which are not disputed by the Bar, the Respondent has demonstrated that he is rehabilitated, he does not lack the character and fitness required to engage in the practice of law, and he does not lack the legal ability to do so. As a result, the Referee's recommendation that he be reinstated should not be disturbed but should be affirmed by this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished by U. S. Mail to David R. Ristoff, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607 and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 20 day of April, 1994.



Richard T. Earle, Jr.

A P P E N D I X

APPENDIX

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