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IN THE SUPREME COURT OF FLORIDA

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By _____
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THE FLORIDA BAR,)
)
 Complainant-Appellant,)
)
 v.)
)
 MILTON E. GRUSMARK,)
)
 Respondent-Appellee.)
 _____)

Supreme Court Case
No. 83,700

The Florida Bar File
No. 95-50,836 (17F) (FRE)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the bar" or "The Florida Bar". Milton Grusmark, Appellee, will be referred to as "petitioner". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

STATEMENT OF CASE AND FACTS

This is a reinstatement case. Milton Grusmark, petitioner, served a petition for reinstatement and his application for reinstatement was heard before the Honorable Maynard Gross, referee on March 10, 1995. The referee, after hearing testimony from two character witnesses and petitioner, as well as having reviewed Grusmark's petition for reinstatement and the pleadings related thereto, entered an order recommending that petitioner be reinstated to the practice of law, notwithstanding the bar's objections thereto. As a condition precedent to reinstatement the referee recommended that (1) petitioner satisfy all outstanding bar dues and (2) petitioner satisfy any outstanding CLER requirements.¹ While the referee recommended reinstatement, he did place two conditions on same. They are: (1) petitioner was directed to file personal bankruptcy within 15 days of the final order in this case and (2) he was further directed to make \$200.00 monthly payments to reconstitute the Client Security Fund. RR5.

As in any reinstatement case, a petitioner has the burden to prove that he is entitled to resume the privilege to practice law. The suspended lawyer does this by establishing the criteria set

¹ Petitioner has accomplished both of these goals. See the post trial stipulation at paragraphs 3 and 4.

forth in the Petition of Wolf, 257 So. 2d 547, 549 (Fla. 1972) and its progeny.² The referee found that petitioner met the criteria for reinstatement. The bar takes issue with two of the Wolf criteria only and will therefore only discuss the facts of those two issues.

Firstly, petitioner has failed to make full restitution to the Client Security Fund. In reference to this issue the report of referee, at page 4, reads as follows:

7. The Client Security Fund has paid two claims on behalf of petitioner. They are:

<u>Name</u>	<u>Date</u>	<u>Amount</u>
Anne Casoli	November 13, 1992	\$3,500.00
Allan Kozich	February 25, 1994	<u>400.00</u>
TOTAL		\$3,900.00

8. Petitioner has yet to make restitution to the Client Security Fund. However, petitioner has expressed his intention to make full restitution to the Client Security Fund.

² The Wolf criteria includes (a) strict compliance with the specific conditions of the prior disciplinary order; (b) evidence of unimpeachable character and moral standing; (c) clear evidence of a good reputation for professional ability; (d) evidence of a lack of malice and ill feeling towards the individuals prosecuting the prior disciplinary proceeding; (e) personal assurances revealing a sense of repentance and a desire to be an exemplary lawyer; and (f) restitution. Id. at 549.

The referee has recommended that petitioner be allowed to retribute the Client Security Fund at \$200.00 a month until he has fully satisfied this claim.³

The second area of concern is petitioner's "enormous debt". RR5. At the time of trial, petitioner's financial obligations were immense. The report of referee goes in to some detail and lists 44 different creditors (some of them judgement holders). RR2-3. At the time of trial petitioner owed \$268,621.81 to his creditors. RR3. The report of referee notes that ". . . petitioner's financial condition is a morass. This was a problem before he was suspended and has not improved since his suspension." RR2. After the trial was held, petitioner filed a petition for personal bankruptcy.⁴ This bankruptcy should result in the discharge of all of his debts, except part of his obligation to the Internal Revenue Service.⁵ The remaining portion of the IRS obligation is approximately \$28,000.00,⁶ which sum represents past

³ Post trial, petitioner has paid \$400.00 towards the Client Security Fund obligation, but a balance of \$3,500.00 still remains. See the post trial stipulation at paragraph 6.

⁴ See the joint post trial stipulation at paragraph 5.

⁵ See the joint post trial stipulation at paragraph 5.

⁶ Prior to trial, petitioner owed \$175,000.00 to the IRS.

due assessments for trust fund payroll taxes and the civil theft assessment for unpaid trust fund taxes pursuant to Title 26 U.S.C. Section 6672.⁷ Post trial, petitioner was able to enter into a payment plan with the IRS, wherein he is required to pay the IRS \$50.00 on a monthly basis to satisfy his past due taxes.⁸

The referee found that there appeared to be a direct correlation between petitioner's poor financial condition and his extensive disciplinary record with the bar. This correlation is predicated upon the fact that by 1990 (the year he was suspended) petitioner already had over twenty judgements recorded against him.⁹ The report of referee, at page 6, lists petitioner's disciplinary record as follows:

1. 1975 private reprimand;
2. 1978 public reprimand;
3. 1978 ten day suspension;
4. 1989 private reprimand;
5. 1990 five month suspension;
6. 1994 three year suspension.¹⁰

In the 1994 suspension case this correlation is clearly established. In that case, petitioner was disciplined, among other

⁷ See the joint post trial stipulation at paragraph 5.

⁸ See the joint post trial stipulation at paragraph 5.

⁹ See the petition for reinstatement.

¹⁰ This order was effective, nunc pro tunc, August 30, 1990.

things, for collecting clearly excessive fees and more importantly for engaging in dishonest and deceptive practices to avoid the post judgement collection efforts of two creditors.¹¹

It is the correlation between petitioner's disciplinary record and his omnipresent burdensome financial condition, as well as his failure to make restitution prior to the final hearing (and prior to his reinstatement) that cause the bar to seek a review of the referee's recommendation that respondent be reinstated.

¹¹ See the amended report of referee attached to the petition for reinstatement.

SUMMARY OF ARGUMENT

The ability to practice law in the state of Florida is a privilege and not a right. A suspended lawyer, who seeks to be reinstated as a member of the bar, bears the heavy burden of proving, to this court's satisfaction, that he should once again be allowed this privilege.

In this appeal, the court is faced with deciding whether a suspended lawyer, who has failed to make full restitution, who has an extensive disciplinary history which can be linked to his abysmal finances, who currently owes the Internal Revenue Service approximately \$28,000.00 and who, until after the trial of this matter, had such a bleak financial picture that the referee referred to that individual's finances as a "morass", should be reinstated. The bar strongly urges this court not to reinstate such an individual.

Standing alone, the failure to make restitution should be sufficient grounds to deny reinstatement. However, when one considers the link between this suspended lawyer's disciplinary record and his irresponsible way of handling his personal finances, as well as the fact that this suspended lawyer still owes substantial sums to the IRS, one can clearly see the danger in allowing such an individual to return to the practice of law. Thus

the bar respectfully requests this court to protect the public by denying reinstatement.

ARGUMENT

I. A SUSPENDED LAWYER, WHO HAS FAILED TO MAKE FULL RESTITUTION AND HAS A DEMONSTRATED HISTORY OF FINANCIAL IRRESPONSIBILITY SHOULD BE DENIED REINSTATEMENT.

Reinstatement to the practice of law is ". . . more a matter of grace than a right and is dependent upon (the petitioner's) rehabilitation and whether or not the disciplinary sanctions have been adequate." In re Stoller, 36 So. 2d 443, 444 (Fla. 1948). Thus, the heavy burden of proving entitlement to resume the privilege of practicing law has been placed upon the suspended lawyer who seeks reinstatement. In re Timson, 301 So. 2d 448, 451 (Fla. 1974). This court has noted that it is their responsibility, through the reinstatement process, "to safeguard the right of the public to secure adequate representation by attorneys and to maintain the image and integrity of The Florida Bar as a whole." Id. at 451. In the bar's view, this petitioner presents a danger to the public and he should therefore be denied reinstatement.

In testing whether a suspended lawyer should be reinstated a referee and this court must "consider all aspects of the applicant's present fitness to resume the practice of law." In re

Inglis, 471 So. 2d 38, 39 (Fla. 1985). When one considers "all aspects" of this petitioner's application for reinstatement, the inescapable conclusion is that this petitioner should be denied reinstatement.

A. Failure to make restitution.

One of the many criteria for reinstatement is that the suspended lawyer must have made restitution prior to reinstatement. Wolf at 549. In fact, this court has used the failure to make restitution one of the reasons to deny reinstatement. In In re Brush, 358 So. 2d 1355 (Fla. 1978) the court denied reinstatement to a lawyer who failed to call any supporting witnesses attesting to his character and fitness and further failed to provide proof that he had restituted the victims of his misappropriation.

In the case at bar, petitioner has failed to make restitution to the Client Security Fund (CSF) which has paid out \$3,900.00 in claims filed by his former clients. RR4. The referee, in his report, makes note of this failure to make restitution but is recommending that petitioner be allowed to make \$200.00 a month payments until the CSF claim is fully satisfied. No comment is

made by the referee about restituting any former client for excessive fees collected.¹²

The referee committed error when he recommended that petitioner should be reinstated and then allowed to retribute the CSF on a payment plan. This court has specifically disagreed with this type of arrangement. In re Hessler, 493 So. 2d 1029 (Fla. 1986). In Hessler, the court found that:

A repayment schedule as proposed by Hessler and the referee would in effect allow Hessler to borrow money from the wronged party to enable him to once again become a lawyer. Funds for readmission should come from another source.

We have not made it a practice to permit restitution on an instalment plan and see no reason to commence that practice here. If a suspended lawyer wants to enjoy the privilege of practicing after having been convicted of thievery, he should settle the debt created by his dishonest acts in full before readmission.

Hessler at 1030. In this case the respondent should be required to settle the debt (full restitution) caused by his unethical acts prior to being reinstated.

¹² See for example The Florida Bar v. Grusmark, 637 So. 2d 237 (Fla. 1994) and in particular the amended report of referee attached to the petition for reinstatement, wherein it is revealed that petitioner collected a \$9,000.00 excessive fee from Alexander Santucci and a \$400.00 excessive fee from Allan Kozich, trustee.

The denial of reinstatement due to a failure to make restitution is not restricted to theft cases. For example, a lawyer has been denied reinstatement for, among other things, failing to meet child support obligations which had been outstanding for several years. In re Janssen, 643 So. 2d 1065, 1066 (Fla. 1994).

In Janssen, the lawyer also failed to disclose this failure to meet his child support obligation in his petition for reinstatement. Id. at 1066. In case at bar, petitioner also failed to disclose the need to make restitution to the CSF.¹³ In fact, his petition, at paragraph nine (9), boldly states that "(t)he question of restitution is inapplicable." Obviously, petitioner chose to ignore the funds paid out on his behalf by the CSF, as well as the clients (and prior complainants to the bar) he had previously been convicted of collecting an excessive legal fee from.¹⁴

¹³ See the petition for reinstatement at page nine (9).

¹⁴ The petitioner, under cross examination, does reveal that he is making \$1,000.00 a month payments to Santucci, a former complainant. RR29. However, this appears to be compelled restitution to avoid yet another judgement as the agreement to pay the restitution came after a lawsuit was initiated by Santucci. RR29; Also see the amended petition for reinstatement.

Petitioner's failure to make full restitution, prior to filing for reinstatement, is sufficient grounds to deny reinstatement. However, this is not the only reason the bar opposes this reinstatement.

B. Financial distress.

"The most glaring problem faced by petitioner is his finances." RR4. The report of referee clearly describes an individual struggling to keep his head above water. The report describes over \$268,000.00 in debts incurred by petitioner prior to his petitioning for reinstatement and the bulk of the debt is incurred prior to petitioner's suspension. RR3. Petitioner's biggest obligation was the \$175,000.00 owed to the Internal Revenue Service for back taxes and for unpaid employment trust fund taxes, inclusive of interest, penalties and the civil theft assessment. The good news for petitioner is that, post trial, he has finally sought bankruptcy protection from his creditors and will secure shelter from all but approximately \$28,000.00 of the unpaid IRS obligation for unpaid withholding taxes and the attendant penalties.¹⁵ It is anticipated that petitioner will argue that the suspension has wreaked havoc with his finances, that he now has his

¹⁵ See the post trial stipulation at paragraph 5.

financial house in order and that he ought to be allowed reinstatement at this time. The bar emphatically disagrees.

The referee noted that the petition for reinstatement revealed that "petitioner's financial condition is a morass" and that "(t)his was a problem before he was suspended and has not improved since the suspension." RR2. Perhaps, more telling was the petitioner's own testimony at trial that his financial woes started, not because he had an inability to make money, but because he purposefully ignored his money problems and "didn't try to get income." TT26. Instead, petitioner chose to live above his means¹⁶ by "traveling all over the country, staying at the best hotels, first class" everything and in the bar's view otherwise enjoying life rather than attending to his clients. TT27, 1.2-3. Perhaps, if he had been attending to his clients' cases petitioner's disciplinary record would not be extensive.

The referee, in his report at page 4, found that petitioner's:

. . . extreme financial difficulties appear to have a direct correlation to his difficulties with The Florida Bar. In fact some of the same people that sued petitioner for monies owed have also been complainants to the bar. Additionally, several of the grievances have resulted in findings of excessive legal fees.

¹⁶ TT26, lines 9-17.

In addition to the foregoing, all one need do is look at petitioner's last disciplinary action and examine the fact that petitioner was disciplined, for among other things, engaging in dishonest and deceptive practices to avoid post judgement collection efforts of a former client and a former provider of services to petitioner's law firm.¹⁷

It is anticipated that petitioner will argue that the bar is being unreasonable in resisting reinstatement solely because of petitioner's finances and will point to the fact that, after the bankruptcy, his debt service will be minimal.¹⁸ However, in the bar's view, reinstatement for a lawyer, who has evidenced difficulties in keeping his financial house in order which financial failures have led to the imposition of discipline, would be inappropriate until that financial house is set in order and the lawyer has the ability to start with a clean slate.

It is also anticipated that petitioner will point to In re Whitlock, 511 So. 2d 524 (Fla. 1987), for the proposition that

¹⁷ See the amended report of referee attached to the petition for reinstatement at pages 2 through 5.

¹⁸ The expenses we know about include the \$50.00 monthly payment to the IRS, the referee's recommended \$200.00 a month of restitution to the CSF and the \$1,000.00 a month petitioner testified he will be giving Santucci as restitution/repayment of a judgement.

denying petitioner reinstatement because he is financially unsound "is basically denying him reinstatement forever." In Whitlock, the court allowed reinstatement notwithstanding the fact that the lawyer had a total indebtedness exceeding \$300,000.00 due primarily because of what the referee found to be financial irresponsibility. Id. at 525. Whitlock was allowed to be reinstated because of several unspecified mitigating factors, but was placed on probation until he could make good on a payment plan for several obligations, such as court ordered child support. Id.

The bar is not trying to deny petitioner "reinstatement forever" because of his financial irresponsibility. Rather, the bar is requesting this court to deny reinstatement so a suspended lawyer, whose prior disciplinary actions were rooted in his inability to handle his finances, not be unleashed on the public once again. Especially, when that same lawyer is already behind the financial eight ball. The more reasoned approach to resolving reinstatement for lawyers who are in financial crisis can be found in Board of Bar Examiner's cases.¹⁹

¹⁹ This court has viewed the character components of a reinstatement action as being analogous to the demonstration of good moral character required of an applicant during initial admission to The Florida Bar. In re Jahn, 559 So. 2d 1089, 1090 (Fla. 1990).

This court has commented on the legitimacy of the Board's inquiry into an applicant's finances and noted that:

The Board is rightly concerned over the morality of a person who continues to incur large debts with little or no prospect of repayment. Further, it cannot be doubted that a lawyer who is constantly in debt is more likely to succumb to temptations to the detriment of his or her clients or the public.

Florida Board of Bar Examiners re S.M.D., 609 So. 2d 1309, 1311 (Fla. 1992). This fear of unleashing a financially unstable applicant on the public has resulted in an applicant being denied admission and more particularly has been one of the grounds to deny admission. Florida Board of Bar Examiners re J.A.F., 587 So. 2d 1309 (Fla. 1991) [Applicant denied admission for financial irresponsibility and lack of candor.]; Florida Board of Bar Examiners re G.W.L., 364 So. 2d 454 (Fla. 1978) [Financial irresponsibility and bad faith bankruptcy to defeat legitimate debt led to denial of admission]. Recently, this court has addressed the admission of applicants to the bar who have financial difficulties when the Board had requested a rule change to include applicants with financial problems into the conditional admittee program. Florida Board of Bar Examiners re Amendment of Rules of Admission, 645 So. 2d 972 (Fla. 1994). The court in denying the requested rule change stated that: "(t)o expand the 'credit string'

and grant conditional admission to applicants with serious financial problems creates the risk of giving creditors leverage over a bar applicant for an indefinite length of time." Id. at 974. The court further noted that: "(i)f an applicant presents a threat to the public because of financial difficulties, he or she, should not be admitted to the bar." Id.

This petitioner, by virtue of the nexus between his disciplinary record and his awful financial history, is such a danger and ought to be denied reinstatement.


CONCLUSION

The referee in his report discussed that petitioner was an affable man and that in his prime he was a skilled lawyer. RR4. However, the referee also correctly found that "(m)oney is at the root of petitioner's difficulties". RR5. The prime purpose of lawyer regulation is to protect the public. The Florida Bar v. Dancu, 490 So. 2d 40 (Fla. 1986). In the bar's view, this petitioner is a danger to the public. Since his admission he has been disciplined six times and narrowly escaped disbarment in his last trial. This petitioner has failed to make restitution and has evidenced a lack of financial responsibility that has led to his being disciplined by the bar. Because of these two later facts,

petitioner is unable to meet his heavy burden in establishing that he should once again be given the privilege to practice law.

WHEREFORE, The Florida Bar respectfully request this court to reject the referee's recommendation that the petitioner be reinstated and enter an order denying petitioner's reinstatement to the practice of law.

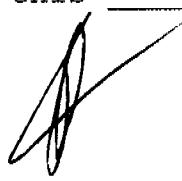
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing initial brief of The Florida Bar has been furnished via regular U.S. to C. Everett Boyd, Jr., attorney for petitioner, at P.O. Drawer 1170, Tallahassee, FL 32302-1170; and to John A. Boggs, Director of Lawyer Regulation, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 9th day of May, 1995.



KEVIN P. TYNAN