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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

IN RE:
THE FLORIDA BAR

REINSTATEMENT APPLICATION

of

HARRY WINDERMAN,

Petitioner.
______________________________/

Supreme Court No. 84,609
The Florida Bar File No.
95-50,583(15D)

THE FLORIDA BAR'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS

STATEMENT OF THE CASE AND FACTS

In The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993), petitioner was suspended from The Florida Bar for a period of one (1) year. In its order of suspension, the Court recited:

> The Florida Bar alleged and the referee found that Winderman violated Rules Regulating The Florida Bar 3-4.2 (violating the rules of professional conduct); 3-4.3 (committing any act that is unlawful or contrary to honesty and justice); 4-1.1 providing competent representation to a client); 4-1.2 (a) (abiding by a client's decisions concerning the objective of the representation); 4-1.3 (acting with reasonable diligence and promptness in representing a client); 4-1.4 (a) and (b) (keeping a client reasonably informed and explaining a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation); 4-3.3 (knowingly making false statements of material fact to a tribunal); and 4-8.4 (c) and (d) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and engaging in conduct prejudicial to the administration of justice).

Petitioner sought reinstatement in The Florida Bar Re: Harry Winderman, No. 82,700 (Fla. May 5, 1994). The bar opposed petitioner's reinstatement as a result of certain items appearing in petitioner's application and in the bar's investigative findings. The parties entered into a conditional plea to consent judgment which was approved by the designated board reviewer, the referee and the Court. As a result of such action, petitioner withdrew his application for reinstatement and was suspended for an additional period of one (1) year. The bar, for its part, agreed that upon a future application by petitioner for reinstatement, it would not raise in opposition to such future application, any matters referenced in the conditional plea.

This proceeding arises from petitioner's second application for reinstatement. In his application, petitioner listed indebtedness, as follows:

Landlord	$	38,000.00
West Publishing		12,000.00
James Tuthill, Esq.		7,000.00
IRS		75,000.00
CIS		1,500.00
Tokai, Inc.		11,000.00
Robert Spector, Esq.		3,000.00
	$	147,500.00

Additionally, petitioner testified that there was a judgment entered against him in Wisconsin in the approximate sum of $1,000,00 but that collection thereon was precluded by virtue of §95.11(2), Fla. Stat. (page 51).[1]

The referee, specifically noting petitioner's indebtedness (Report of Referee, page 6, item I.), as hereinabove listed, recommended that petitioner be reinstated.

[1] All page references herein are to transcript of final hearing unless otherwise specifically noted.

SUMMARY OF ARGUMENT

Petitioner was disciplined for violating a plethora of Rules of Professional Conduct including conduct that was unlawful or contrary to honesty and justice, numerous violations establishing fundamental breaches of the attorney-client relationship, knowingly making a false statement of material fact to a tribunal and engaging in conduct prejudicial to the administration of justice. In attempting to gain reinstatement upon his first application, issues were raised of such concern to the bar as enumerated in the conditional plea to consent judgment, that petitioner not only withdrew his application for reinstatement, but agreed to the imposition of an additional one (1) year suspension.

In the bar's view, an applicant seeking reinstatement after successive suspensions for egregious misconduct demonstrates a fatal flaw in character when revealing outstanding indebtedness in a substantial aggregate amount to numerous creditors. It is respectfully submitted that in addition to other criteria enunciated by the Court as guides to reinstatement, an applicant should demonstrate fiscal responsibility, a factor facially lacking in the case at bar.

ARGUMENT

I. REINSTATEMENT SHOULD BE DENIED TO AN APPLICANT WHOSE DEBT LOAD IS SUCH AS TO EVIDENCE FISCAL IRRESPONSIBILITY.

In advancing opposition to petitioner's reinstatement to the bar due to his heavy debt load, the bar is aware of In re Whitlock, 511 So. 2d 524 (Fla. 1987), where the Court ordered reinstatement notwithstanding the fact that the applicant in that case had outstanding indebtedness in excess of $300,000.00 due primarily to what the referee therein determined to be fiscal irresponsibility. 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.

Respectfully, the bar would urge that fiscal irresponsibility is simply inconsistent with the character expected of anyone seeking admittance to the bar. When coupled with an applicant who has demonstrated a propensity for ethical impropriety requiring the imposition of two (2) suspensions, it is difficult to comprehend how one who has succumbed to such fundamental breaches as has petitioner, can or should be restored to a position where a weakened financial plight may likely create temptations to the injury of the public. It is urged that the Court reconsider the Whitlock rationale in that it is difficult for the bar to measure it in light of what appears to be a different approach taken by the Court in its consideration of financial irresponsibility and the impact of such status upon new applicants to the bar.

This Court has commented on the legitimacy of the Board of Bar Examiners' 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.

If there is such concern at the admission of a new applicant due to the burden of financial duress, then, respectfully, the concern should be magnified a thousand times where one who has already established a disregard for his ethical responsibilities, seeks entry through the very door closed to those who have shown no such failing.

CONCLUSION

Reinstatement should be denied to petitioner. In the alternative, petitioner should be placed on a fixed period of probation with a requirement that he work out a reasonable payment schedule, assiduously adhere thereto and in the event of a breach, have his privilege revoked.

Respectfully submitted,

David M. Barnovitz

David M. Barnovitz #0335551

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to respondent by U.S. Mail addressed to him at 1000 West McNab Road, Suite 200, Pompano, Florida 33069 on this 25th day of July, 1995.

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