IN THE SUPREME COURT OF FLORIDA

IN RE:
THE FLORIDA BAR,

Supreme Court No. 84,609

REINSTATEMENT APPLICATION

of

HARRY WINDERMAN

Petitioner.

_____/

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

The Petitioner adopts the Statement of the Case and Facts sets forth in the Bar's Brief except as follows:

A. Petitioner called Rabbi Michael Gold, the rabbi at the synagogue at which the Petitioner is and has been a member for at least the five years that the rabbi has served that synagogue. The rabbi testified that Mr. Winderman had been a member of the Board of Directors and frequently attended services, that Mr. Winderman was a person of high moral character and a very loving parent. Rabbi Gold testified that he had observed that Mr. Winderman was currently more "gentler" than when he first met him. Rabbi Gold testified that Mr. Winderman possessed all of the traits that make up good moral character (tr. 7). By implication and otherwise, therefore, Rabbi Gold indicated that Mr. Winderman had a good reputation in the community.

B. Petitioner presented Gary Barber, Esq., a partner with the Ft. Lauderdale firm of Fleming, O'Bryan & Fleming and a practicing attorney for 28 years. Mr. Barber testified that that Mr. Winderman was knowledgeable of the law, had stayed current and had high moral character in that he performed all of his assigned duties with enthusiasm, that Mr. Winderman immediately informed Mr. Barber's associate who first contacted Mr. Winderman, that Mr. Winderman was suspended from the practice of law . Importantly, Mr. Barber like all of the Petitioner's witnesses, testified that the Petitioner was very careful in the manner he identified himself on the telephone, that the Petitioner never identified himself as an attorney and instead identified himself as a paralegal. It appears to be a fair implication that had Mr. Winderman had a immoral reputation in the community, a firm such as Fleming, O'Bryan and Fleming would not have taken the risk of engaging such a person and then entrusting him with the matters assigned to the Petitioner. Mr. Barber also testified that they had discussed the reasons for Mr.

Winderman's suspension and that Mr. Winderman demonstrated remorse. (tr. 16). Finally, Mr. Barber testified that he was extremely pleased with Mr. Winderman.

C. The Petitioner called Richard Glick, Esq., another member of the Florida Bar. Mr. Glick testified that he had known Mr. Winderman for three years, had represented Rabbi Gold in contract negotiations during the time that Mr. Winderman represented the synagogue in those negotiations. Mr. Glick testified that Mr. Winderman was always honest in his dealings, fully represented his client, was reliable and "He didn't play any games" (tr. 20). Mr. Glick further testified that he was aware that Mr. Winderman had stayed current on the law by reading "the Florida Law Journal Weekly" on a regular basis and by performing legal research for Mr. Glick. Mr. Glick testified that he worked in the same office as the Petitioner, had heard him announce who he was on many telephone conversations and that each time the Petitioner identified himself as a secretary or paralegal and never as an attorney and that the Petitioner was very careful in not giving any impression that he was an attorney. Mr. Glick testified that the Petitioner was remorseful and that the Petitioner had discussed details of the underlying disciplinary case with him (tr. 24).

D. Petitioner called Amy Hyman, Esq., another member of the Florida Bar. Ms. Hyman testified that Mr. Winderman was currently in her employ as a legal secretary and had performed those duties for one year. Ms. Hyman reiterated Mr. Glick's first hand of Mr. Winderman reading the Florida Law Weekly, performing legal research for her and others, and identifying himself on the telephone as a paralegal or secretary. Ms Hyman testified that she knew Mr. Winderman was suspended during the time he worked for her. Ms. Hyman testified that Mr. Winderman is a person of high moral character (tr. 34). By clear implication, Ms. Hyman would not have continued to engage Mr. Winderman had he disclosed any poor moral character. Instead, Ms. Hyman testified that Mr. Winderman, an attorney of over 17 years performed all of the tasks of a secretary and that he was helpful and courteous during said employment. Ms. Hyman also testified that Mr. Winderman bore no malice or ill will to the Florida Bar and particularly to Mr. Barnovitz. (tr.33).

E. Petitioner called Kenneth R. Segal, Esq., another member of the Florida Bar. Mr. Segal testified that he knew Mr. Winderman for three or four years, that they had been members of the same synagogue and had served together on that synagogue's Board of Directors. Mr. Segal reiterated the testimony of Mr. Glick and Ms. Hyman as to Mr. Winderman's knowledge of the law, that he had kept current therewith, that he possessed high moral character and had performed all of his assigned duties in a professional and competent manner. He also testified that he had observed the Petitioner on many occasions identify himself as a paralegal or secretary and never as an attorney. Mr. Segal testified that Mr. Winderman's moral standing in the community was high. (tr.40) that Mr. Winderman was remorseful and had demonstrated no malice or ill-will toward the Florida Bar. (tr. 41). Mr. Segal related several details of his discussion with Mr. Winderman regarding the underlying facts of the prior disciplinary proceeding (tr. 41).

E. Petitioner testified that he was thoroughly remorseful and that he recognized that he was wrong in his prior actions and that he bore no ill will or malice toward those who were duty bound to pursue him.

F. Most, if not all of the witnesses presented by the Petitioner, as well as the Petitioner testified that he had kept current with the law, had maintained all of the skills requisite to return to the practice of law, had high moral standing, and bore no ill will or malice toward the Florida Bar, Judge Collins Mr. Barnovitz or any of the witnesses who testified against him. Since Rabbi Gold, Mr. Barber, Mr. Glick, Ms. Hyman and Mr. Segal are all members of the community and the Florida Bar presented no witnesses on the specific issue of community reputation I conclude that the testimony and all clear inferences therefrom indicate that Mr. Winderman has a good reputation in the community. In addition, since Mr. Barber, Mr. Glick, Ms. Hyman, Mr. Segal and even the Petitioner (although not currently in good standing) are all members of the Florida Bar and under particular obligation to be truthful under

oath I conclude that their testimony is credible and have established all of the criteria for reinstatement of the Petitioner.

G. The Florida Bar presented no witnesses as to the nature or manner of the Petitioner's debts and it indicated that its own internal investigation had disclosed no facts upon which to oppose Mr. Winderman's reinstatement, but that witnesses had come forward in response to the Florida Bar's publication.

SUMMARY OF THE ARGUMENT

The Referee's determination of the facts, including the Petitioner's unrebutted evidence of good moral character, is well supported by the record and is presumed correct and will be adopted by the Court.

The Bar requested and the Referee adopted the criteria and guidance set forth in Petition of Wolf, 257 So. 2d 547 (Fla., 1972). It is impermissible for a party to raise issues at the appellate level for the first time.

The Florida Bar and the Court by the entry of the Consent Order adopting the Conditional Plea set forth therein and in the prior disciplinary proceedings were not sufficient to prevent reinstatement or amount to grounds for disbarrment. The adoption of the Bar's position would be tantamount to disbarrment.

The existence of debt, even by a previously suspended attorney is not evidence of "fiscal irresponsibility" and poses no threat to the public. Further, the Bar presented no facts as to the manner of occurrence of such debts or their nature.

ARGUMENT

POINT I - QUESTIONS NOT TIMELY RAISED AND RULED UPON IN THE TRIAL COURT WILL NOT BE CONSIDERED ON APPEAL.

The Bar contends that substantial debt, no matter the nature thereof or the manner in which it was incurred, without any further proof, constitutes a new prong in the criteria adopted by this Court in Petition of Wolf, supra. The Bar asks this Court to reverse its long held position set forth in In re Whitlock, 511 So. 2d 524 (Fla. 1987). However, the Bar did not raise this issue at the hearing. Instead, the Bar acknowledged and adopted the standards of Petition of Wolf, supra.

It is well settled that a party cannot assert a defense or point of law for the first time at the appellate level. This rule is founded on consideration of practical necessity and fairness to the trial court and the opposite party. (See Fla. Jur. 2d, Appellate Review, Section 92, page 130 and the myriad of cases cited therein). This rule applies to questions as to the proper law to be applied. (See Fla. Jur. 2d, Appellate Review, Section 92, page 133 and 134 and the myriad of cases cited therein).

POINT II - THE BAR IS PRECLUDED FROM RAISING ITS STATED GROUNDS FOR DENIAL OF REINSTATEMENT BASED ON THIS COURT'S ORDER ACCEPTING THE CONDITIONAL PLEA.

In the Bar's Statement of the Case and Facts it states that "it would not raise in opposition to such future application, any matters referenced in the conditional plea." The Conditional Plea clearly includes Petitioner's prior petition which sets forth almost the identical list of creditors as cited by the Referee. In addition, the Wisconsin Judgment which is raised by the Bar in a manner which makes it appear that such judgment was not disclosed by Petitioner, was included in the Petitioner's first petition and specifically mentioned in the Conditional Plea. This Court indicated in Whitlock, supra, that imposing the standard requested by the Bar would amount to disbarment. Paragraph 8 of the Conditional Plea states that the Bar knew of no grounds for further disciplinary proceedings. Consequently, the application of the Bar's standard to the Petitioner would result in at least a defacto suspension of another year since Petitioner would have to pay off all of his debts and reapply of reinstatement.

In addition to the clear language of the Conditional Plea, there is a clear inference which arises therefrom. It is clear that if the Bar or this Court believed that Petitioner's debts constituted grounds for denial of his reinstatement, then such Conditional Plea would not have been accepted.

It is also clear that the Bar, by not raising this issue until this stage of the proceedings agreed with the assumption that the Conditional Plea applied to Petitioner's debts.

Based on the clear language of the Conditional Plea and the inferences which must be drawn from the action of the Bar and this Court's acceptance of the Conditional Plea, that the Bar is precluded from raising the Petitioner's debts as a bar to reinstatement.

POINT III - THE REFEREE'S FINDINGS OF FACT ARE PRESUMED CORRECT AND RECORD EVIDENCE SUPPORTS HIS FINDINGS.

It is also well settled law that the Referee's findings of fact are presumed correct and are upheld so long as competent evidence exists in the record to support his conclusions. The Referee cites the debts and concludes that based on the facts in the record Petitioner still demonstrated "good moral character". It is the clear inference of the Bar's brief that except for the debts, the Petitioner has clearly demonstrated "good moral character". It is also certain that the Referee in considering the totality of the evidence determined that there was no greater likelihood that Petitioner would act in a dishonest manner or that the Petitioner "presents a threat to the public because of his financial difficulties".

An attorney applying for reinstatement is not granted that privilege unless this Court determines that he or she has been rehabilitated. Rehabilitation must mean to this Court that the applicant is as fully trustworthy and honest as any first time applicant to the Bar or any practicing attorney. It was the finding of the Referee that the Petitioner is rehabilitated, that he is as trustworthy and honest now as any first time applicant to the Bar or practicing attorney. Since the Referee's findings of fact are supported by competent testimony and evidence in the record this Court should accept them.

POINT IV - THE EXISTENCE OF DEBT ALONE IS NOT EVIDENCE OF FINANCIAL IRRESPONSIBILITY.

It is clear from the Bar's brief that the Bar is petitioning this Court to overrule In re Whitlock, supra. The Petitioner urges this Court to restate its support therefor based on the fairness of the principles set forth therein.

The Bar states in its brief :

"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." At page 4,5.

First, this Court has not taken a "different approach" with new bar applicants. The Bar cites three cases and this Court's recent response to a proposed extension of the Rules of Practice to financial irresponsibility.

In In re S.M.D., 609 So. 2d 1309 (Fla 1993), this Court admitted the Applicant notwithstanding her debts. The Court stated:

"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. On the other hand, the costs of a legal education are high and the ability to maintain oneself while attending school at the same time is limited. We suspect that it is the rule rather than the exception for today's law school graduate to be in debt." (Emphasis added). At page 1311.

In In re J.A.F., 587 So. 2d 1309 (Fla. 1991), the Court set forth a number of factors that indicated financial irresponsibility, just not the existence of debt. The Court stated:

"(3) Since 1978, J.A.F. has conducted his financial affairs in an irresponsible manner, as evidenced by the following: his dealings with creditors which have resulted in the making of unsatisfactory payments and/or the incurring of delinquent accounts; his failure to maintain adequate records of his outstanding credit obligations; his attempt to compromise his unsatisfied judgment for the unpaid mortgage despite the absence of a reasonable basis for doing so; and his failure to enter into acceptable repayment agreements with his creditors. Despite these financial difficulties, he has expended funds for excessive or nonessential items such as a car phone and a beeper." (Emphasis added). At page 1310.

In In re G.W.L., 364 So. 2d 454 (Fla. 1978), this Court ruled that the filing of a voluntary petition in bankruptcy may be evidence of financial irresponsibility but that "At a future hearing, the petitioner may be able to present evidence of good moral character to offset the circumstances now in the record." At page 460.

Finally, in In re Amendment of Rules of the Supreme Court Relating to Admission to the Bar, 645 So. 2d 972 (Fla. 1994), this Court stated:

"We believe the Board's current practice is the best way to handle applicants with financial problems. Applicants who have fraudulently incurred or postponed the payment of debt typically are required to prove rehabilitation before they are admitted. But because some applicants legitimately incur debt to finance their legal education, we recognized that debt alone is not a bar to admission. See Florida Board of Bar Examiners re S.M.D., 609 So. 2d 1309 (Fla. 1992) (Emphasis Added). At page 974.

It would appear that all of the standards enunciated by this Court in the cases cited by the Bar are consistent with In re Whitlock, supra. In each case this Court

has made it clear that the existence of debt itself is not a bar to admission or reinstatement. The Bar is urging this Court to retreat not only from In re Whitlock, supra. but from all of the authorities the Bar cites as what it perceives as being a "different approach" for Bar applicants. To the contrary, the Bar is proposing a "different approach" with regard to the reinstatement process. It is the Bar that seeks to establish that the mere existence of debt equates to not only "financial irresponsibility" but is the sole and determining criteria for whether the Petitioner evidences "good moral character".

This Court has defined "good moral character" as requiring an inclusion of acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the law of the state and nation. See In re G.W.L., supra.

The Petitioner has been found by the Referee to exhibit all of the above characteristics and the Referee has concluded that all of the facts indicate that the Petitioner is rehabilitated. As set forth above, rehabilitation means that the Petitioner is to be treated as fully capable of exhibiting "honesty, fairness . . . " If the Bar was concerned about the Petitioner's honesty based solely on the debts listed in his first Petition, would it have entered into the Conditional Plea, would it not have presented evidence of financial irresponsibility at the hearing, would the Bar have waited to raise this issue only at the appellate level.

CONCLUSION

Reinstatement should be granted based on:

1. The Bar is precluded by its failure to raise the issue at the hearing;

2. The Bar and this Court are precluded from raising the issue of debts disclosed in Petitioner's first petition as a bar to reinstatement based on the Conditional Plea.

3. The factual determination of the Referee that the Petitioner has satisfied the element of "good moral character" notwithstanding the existence of debt.

4. The existence of debt is not a bar to reinstatement.

Respectfully submitted,

HARRY WINDERMAN

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to The Florida Bar by hand delivery to David M. Barnovitz, Esq., Branch Staff Counsel, 5900 N. Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309 and by U.S. Mail to John T. Berry, Esq. and John F. Harkness, Jr., Esq., 650 Apalachee Parkway, Tallahassee, Florida 32399 this July 27, 1995.

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