IN THE SUPREME COURT OF FLORIDA

IN RE:
THE FLORIDA BAR,

Supreme Court No.: 84,609

REINSTATEMENT APPLICATION

The Florida Bar File No.:
95-50,583 (15D)

OF

HARRY WINDERMAN,
Petitioner.
_____/

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The undersigned was appointed as referee to preside in this proceeding by order of the Chief Judge, Fifteenth Judicial Circuit Court of Florida dated January 9, 1995. The petition for reinstatement, transcript of final hearing, exhibits and all other papers filed with the undersigned, which are forwarded to the Court with this report, constitute the entire record in this case.

Respondent appeared in person and by Raymond W. Russell, his attorney. The bar was represented by David M. Barnovitz, bar counsel.

II. FINDINGS OF FACT:

A. 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 this 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 objectives 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).

B. Petitioner sought reinstatement in The Florida Bar Re: Harry Winderman, No. 82,700 (Fla. May 5, 1994). Petitioner withdrew his application and was ordered suspended for an additional period of one (1) year.

C. 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. I am using the modern broad evidence code definition of "reputation of a person's character among his associates or in the community." Fla. Stat. 90.803 (21)(1994). See Erhardt, Florida Evidence, Sec. 405.1 (1995 Ed.).

D. Petitioner presented one Gary Barber, a 28 year member of The Florid Bar practicing with the firm of Fleming, O'Bryan and Fleming (tr. 9). He originally encountered petitioner about five (5) years ago in connection with a commercial litigation in which petitioner and Mr. Barber represented different defendants (tr. 10). The case had been dormant but was revived in 1994. (tr. 11). Mr. Barber had one of his associates contact petitioner and petitioner immediately informed Barber's associate of his suspended status with the Florida Bar (tr. 12). Mr. Barber hired petitioner to work on the case as a paralegal (tr. 13). He worked with Mr. Barber from July or August, 1994, to February, 1995, when Barber

was able to settle the case. He never identified himself as an attorney during this period, and when he attended depositions with Mr. Barber, the petitioner identified himself as a paralegal working for Barber. He testified that he was pleased with petitioner's work, that it was very professional. He stated that petitioner is an honest person and that he trusted the petitioner (tr. 14, 15). He had discussed Harry's problems with The Florida Bar and that Harry demonstrated remorse, that he himself was at fault for not handling the (underlying) matters better (tr. 15, 16).

E. The Petitioner called Richard Glick, Esq., another member of The Florida Bar. Mr. Glick testified that he had known Mr, Winderman for three years, and had represented Rabbi Gold in contract negotiations during the time that Mr. Winderman represented the synagogue in these negotiations. He stated that Mr. Winderman was always honest in his dealings, fully represented his client, was reliable and "didn't play any games" (tr. 18 - 20). Mr. Glick further testified that he was aware that Mr. Winderman had stayed current on the law by reading "The Florida Law 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. (tr. 22, 23). He testified that petitioner is a "trustworthy forthright individual, knowledgeable of the law" (tr. 23). Mr. Glick was aware of the petitioner's suspension (tr 20, 23) and stated that petitioner is remorseful of his conduct and has not accused the Bar of having wronged him. (tr. 23, 24).

F. Petitioner called Amy Hyman, Esq., another member of the Florida Bar. Ms. Hyman testified that Mr Winderman was currently in her employment as a legal secretary and had performed those duties for one year (tr.28, 29). She echoed Mr. Glick's testimony of Mr. Winderman reading "The Florida Law Weekly" to maintain current proficiency in the law, in performing legal research for her and other attorneys, and by identifying himself on the telephone as a paralegal or secretary (tr. 31, 32). She stated she knew of petitioner's suspension during the period he worked for her (tr. 30). She testified that Mr.. Winderman is a person of high moral character (tr. 34). She testified that Petitioner performed all of the tasks of a secretary and that he was helpful and courteous during his employment. Mrs. Hyman also testified that petitioner bore no malice or ill will towards The Florida Bar and particularly towards Mr. Barnovitz. (tr. 30-33).

G. Kenneth R. Segal, a member of The Florida Bar since 1981, testified he met petitioner about three to four years ago in

connection with a litigation in which both were involved as attorneys (tr. 35 - 37). Both belonged to the same synagogue (tr.38). After his suspension the witness spoke to petitioner and petitioner worked as a paralegal and secretary from time to time for Mr. Segal on a nonexclusive basis. Petitioner kept himself current in the law, possesses high moral standing in the community, and is a trustworthy, honest, and reliable person (tr. 39,40).

Mr. Segal discussed petitioner's suspension with him and he has expressed remorse for his own conduct and has not expressed any anger or resentment towards the Bar. (tr. 40,41).

H. Petitioner testified that the events leading to his suspension was entirely his fault and that he was very remorseful about his actions (tr. 48, 49) and bears no ill will or malice towards those who conducted the bar proceedings, including Mr. Barnovitz, who represented the Bar (tr.47).

I. Petitioner's application for reinstatement lists indebtedness as follows:

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|---|---|
| Landlord | $ 38,000.00 |
| West Publishing | 12,00.00 |
| 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 |

Additionally, petitioner testified to the fact that there was a judgment entered against him in Wisconsin in the approximate sum of $1,000,000.00 which judgment was domesticated in Florida.

He explained that the domestication occurred over five (5) years ago and that as a result thereof collection on such judgment would be precluded by a five (5) year statute of limitations contained in F.S. 95.11(2). (tr. 51)

J. Much testimony was elected regarding a civil litigation entitled Sweet Licks, Inc. v. D'Lites Enterprises, Inc., which litigation is pending in the Seventeenth Circuit. The Bar introduced as its exhibit 8, a deposition taken by the bar in these reinstatement proceedings. One Edward Coryn testified that he was subpoenaed to testify as a witness in the D'Lites litigation. He explained that petitioner (while under suspension) had called him prior to the deposition and that petitioner had represented that he, petitioner, had a copy of a certain ice cream formula and that as a result of such possession by petitioner, it would be all right for Mr. Coryn to send to petitioner Mr. Coryn's copy of the formula. (Coryn Depo. p. 7) On cross Coryn stated that he thought D'Lites (represented by petitioner's employer, Atty Segal), had a right to the ingredient list (Depo. pp. 15,16). Although Coryn stated that the person from Segal's firm asked for the "formula" and thought he sent him the formula (Depo. p. 16) he later exhibited considerable confusion by asking petitioner's attorney what the difference was between the "ingredient" and the "formula" (depo. p. 17) and at the

conclusion of he deposition referred to the document as "***the formula slash ingredients, whatever you want to call it" (Depo p. 18).

Coryn explained that he relied upon petitioner's telephone representation and that he would not have parted with it without the representations that he already had it and was legally entitled to it (Depo. pp. 7,8). Much of this appears to be an afterthought and a conclusion arrived at after he talked to Attorney Weintraub. After concluding that he thought D'Lites had a legal right to it when he sent it but , in a later telephone conversation with Mr. Weintraub the latter appears to have told the witness that D'Lites did not have the right to it (Depo. p. 15).

On cross-exam, Mr,. Weintraub conceded that a subpoena duces tecum to Ed Coryn (Bar Exhibit #5) had been issued (tr. 144) and that the witness had filed a motion for a protective order (Bar Exhibit #6) and that an agreed order was entered (Bar Ex. #7)(tr. 145,146). The order appears to exclude from production at Coryn's deposition only the extent that any amount paid by any entity to the defendant for the mix will be redacted therefrom, and denying Sweet Licks Motion for Protective Order as to all other matters (Bar. Ex. #7).

Weintraub recognizes that the subpoena requests "Any and all correspondence, memoranda, or other documentation between the entities and Dairy Mix, Inc., from January 1993 to the present."

(tr. 150), but while it (Bar. Ex. #4), was a piece of correspondence within the time frame specified in the subpoena, Weintraub contends it was not between Sweet Licks and Dairy Mix, but from Argo Associates. But the addressee of Bar Exhibit 4 was Sherman who was one of the stockholders of Sweet Licks. He disagrees with counsel's characterization of Exhibit #4 as correspondence between him (i.e. Coryn) and the other entities. (tr. 150, 151).

But I must disagree with Mr. Weintraub's contention that Exhibit #4 is not "correspondence between him (Coryn) and the other entities". Relevance on discovery is a considerably broader concept than the evidentiary objection on the grounds of relevance at trial. Without narrowing the scope of the subpoena by making a motion to that end and obtaining a ruling by a Broward County Circuit Judge, I think there is a reasonably credible argument that Dairy Mix, Inc. (Ed Coryn) is one of the "other entities" specified in the subpoena (Bar. Ex. #5). I refer to Petitioner's Exhibit for ID only which was identified as a demonstrative guide for the referee to show the relationships between Sweet Licks. (represented by Mr. Weintraub) and D'Lites Enterprises, represented by petitioner's employer, Mr. Segal). D'Lites had licensed Sweet Licks to sell a proprietary diet ice cream (tr. 56, 57). On the Exhibit for ID appears the various entities and their principals who have been involved as parties or as witnesses in a highly contested suit in the Broward County

Circuit Court. Sweet Licks (one of whose principals is the witness Lance Sherman), wrote D'Lites in 1993 terminating their licensing agreement. Sweet Lick's principals, Sherman and Frank Barbarino, thereafter bring in a couple of other people and form an entity called Great Taste of Ice Cream. Then Great Taste of Ice Cream hires Edward Coryn's company, Dairy Mix, Inc. to produce the ice cream that will be sold in their stores. (tr. 57).

This explanation of the interlocking nature of the relationships between Sweet Licks, Great Taste of Ice Cream and Dairy Mix, Inc. does two things: First, it supports petitioner's view of the scope of the subpoena served on Ed Coryn, and, secondly, it demonstrates that none of the three individuals who voluntarily appeared and testified against petitioner are quite as disinterested and free from bias as suggested by bar counsel.

Petitioner's testimony that the "ingredient list" was already in their files was corroborated by Kenneth Segal who produced it (Bar Ex. #9) and identified it as having been given to him by Mr. Corsover, his client (tr. 175, 176).

I fail to find any misrepresentation of fact or law in Petitioner's telephone conversation with Coryn just prior to the latter's deposition on Nov. 11, 1994. There has been no showing by The Florida Bar that what Weintraub and Coryn term a "misrepresentation" gained the petitioner, his employer, Segal, or the client, anything of value or any advantage in the litigation or

in the commercial world. There has been no legal challenge to the subpoena requiring production of the document.

K. Lance Sherman, Bar witness, testified that he had a telephone conference with petitioner, on or about April 15, 1993 (the suspension of petitioner took effect March 11, 1993) in which petitioner identified himself as an attorney representing D'Lites (tr. 69).

In April, 1993, while Sweet Licks was still operating under D'Lites licensing agreement, Sweet Licks was sued by some third party, whose attorney directed a discovery subpoena to Sweet Licks, demanding documents, licensing agreement, etc., between Sweet Licks and D'Lites Franchise Systems, Inc. (tr. 65). Sweet Licks had no attorney on retainer so Sherman called Gerald Corsover, the owner of D'Lites, for informational help in responding to the subpoena (tr. 66). The witness telephoned Corsover a second time and Corsover told Sherman that he, Corsover, would have his attorney get in touch with Mr. Sherman and assist him by providing the information (tr.68) While Corsover did not mention petitioner by name, the witness assumed it would be Winderman (tr. 68). Sherman had heard of Winderman's name because it was at the end of the licensing agreement Sweet Licks had with D'Lites. His name was listed as the attorney to contact for D'Lites if there were any problems or notifications to send regarding the agreement (tr. 64).

Sherman relates that the phone call occurred about April 15, 1993, and other than taking down the information which he was requesting from D'Lites, as dictated by phone by the petitioner, Sherman did not take any notes or memoranda of the conversation, so I am inferring that he is testifying entirely by memory. No suggestion is made that the information given by Petitioner was inaccurate or misleading.

Mr. Sherman's testimony is in conflict with that of the petitioner, who denies that he ever held himself out to anyone as an attorney (tr. 179, 180) and the only memorandum he has retained concerning the conversation indicates that the only information discussed was the fact that "D'Lites Emporium Products Franchise Systems, Inc.", was no longer in business (tr. 180).

I find that Mr. Sherman's testimony is in conflict with that of various other witnesses, Attorneys Gary Barber (tr. 14), Richard Glick (tr. 22), Amy Hyman (tr. 30), Ken Segal (tr. 43), and even Peter Weintraub (tr. 114) who all state, in effect, that petitioner, during the period of suspension, never identified himself as an attorney in conversation with, or overheard by these witnesses.

I find that Mr. Sherman's accusation falls short of proving that Harry Winderman, on or about April 15, 1993, held himself out as an attorney at law, even if the standard of proof were the lesser standard of the greater weight of the evidence. Sherman made no notes of the conversation; since he is in sales, he probably has had

more phone conversations in the past two years than I've had in the past ten years. We must also remember, not only his bias as an adverse litigant, but that he expected to talk to Harry Winderman, the lawyer, because Winderman's name was on the licensing agreement his company (Sweet Licks) had with D'Lites.

## III. RECOMMENDATIONS AS TO WHETHER OR NOT PETITIONER SHOULD BE REINSTATED:

In my deliberations, I have relied upon the criteria and guidance set forth in Petition of Wolf, 257 So. 2d 547 (Fla. 1971). As in Wolf, the first aspect that I considered is the nature of petitioner's offenses which resulted in the disciplinary action. The offenses were of a most serious nature involving, among other things, dishonesty, fraud, deceit, misrepresentation, knowingly making false statements of material fact to a tribunal and conduct prejudicial to the administration of justice. I have also considered that not only did petitioner fail at his first attempt at reinstatement, but was suspended for an additional year. Further, I note that the initial proceeding against him was his first bar complaint and that by the entry of the consent order The Florida Bar acknowledges that, the matters set forth therein were not sufficient to prevent reinstatement or to constitute grounds for disbarment.

The second factor in Wolf is evidence of unimpeachable character and moral standing in the community. Among his professional colleagues who constitute a work-a-day community and the members of his synagogue, who constitute a modern-day substitute for the former small-town "community" which was both residential and work oriented in character, the proof of high character and moral standing is clear, full and satisfactory.

The third element in Wolf, clear evidence of a good reputation for professional ability, is amply supported by attorneys Gary Barber and Ken Segal, both of whom testified that they hired petitioner as a paralegal to assist them in handling complex civil litigation issue. Barber's case involved a defense against two engineering testing companies for alleged professional malpractice with regard to analysis of soils on a development site (tr. 10). Segal's case is a suit by one corporation against another corporation for breach of a commercial licensing agreement whereby the licensee was to sell a proprietary diet ice cream (tr. 56). Mr. Segal had earlier encountered petitioner in certain litigation brought by HRS against a client of petitioner's in which Mr. Segal came into the suit representing the insurance carrier providing coverage to Mr. Winderman's client (tr. 36).

Mr. Winderman's excellent reputation as a professional was corroborated by Attorneys Richard Glick and Amy Hyman. Mr. Glick represented Rabbi Gold in the latter's negotiations with the

synagogue to discuss terms of future employment and finalize those terms and petitioner, represented the synagogue's board of directors. Mr. Glick's description of his work was "very professional" (tr. 19). Mrs. Hyman's description of petitioner's work as a paralegal for her during the time of his suspension was that "they were performed in an excellent manner" (tr.32).

The fourth factor in Wolf is lack of malice and ill feeling by the petitioner toward those who by duty were compelled to bring about the disciplinary proceeding resulting in his suspension. There is no question but that petitioner demonstrated by convincing evidence that he harbors no malice or ill will towards his accuser, The Florida Bar, and bar counsel, Mr. Barnovitz.

The last element in Wolf requires personal assurances from the petitioner revealing a sense of repentance, as well as a desire and intention of the petitioner to conduct himself in an exemplary manner in the future. Wolf, 257 So. 2d at p. 549. Mr. Winderman's testimony amply supports this element (tr. 48 - 49). His intention to return to the practice as an honorable, knowledgeable, practitioner, scrupulous in his actions is corroborated by Richard Glick, Esq. (tr. 23 - 24). That petitioner is a responsible and reliable person upon whose word one can rely is supported by the testimony of Amy Hyman, Esq. (tr. 34) and Ken Segal, Esq. (tr. 40).

I find that petitioner has clearly established the required showing of rehabilitation as set forth in Wolf and I therefore recommend his reinstatement as an active member of The Florida Bar.

## IV. STATEMENT OF THE COSTS OF THE PROCEEDING AND RECOMMENDATIONS:

The costs of the proceeding were as follows:

| | | |
|---|---|---|
| Administrative Costs | | $ 750.00 |
| Investigative Costs | | 98.00 |
| Transcripts | | 926.00 |
| | Total | $ 1,774.72 |
| | Pre-paid | 500.00 |
| | **Balance due** | $ 1,274.72 |

I recommend that the costs be taxed against the petitioner.

Rendered this 28th day of June, 1995, at West Palm Beach, Palm Beach County, Florida.

**ROBERT V. PARKER, REFEREE**

copies furnished to:

David M. Barnovitz, Esq. - Bar counsel
Raymond W. Russell, Esq. - Attorney for Respondent