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SID J. WHITE
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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant/Appellant,

Case No. 90,228

v.

TFB File No. 97-00188-02

LAWRENCE E. SHINNICK,
Respondent/Appellee.

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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**THE FLORIDA BAR CERTIFIES THAT THIS BRIEF WAS PREPARED
USING TIMES NEW ROMAN 14 POINT TYPE.**

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PRELIMINARY STATEMENT

Appellant/Complainant hereby incorporates and adopts its Preliminary Statement as set forth in its Initial Brief. The Florida Bar would only add that all references to Appellee/Respondent's Answer Brief will be designated as "Answer Brief" with the appropriate page number.

STATEMENT OF THE CASE AND THE FACTS

The Florida Bar hereby incorporates and adopts its Statement of the Case and Statement of Facts as set forth in its Initial Brief. In response to Respondent's Statement of Facts in its Answer Brief, The Florida Bar would clarify the following facts for the record:

1. The Minnesota Supreme Court ruled that Respondent was to be *indefinitely suspended for a minimum of six months* with the right to petition for reinstatement after that time pursuant to Rules 18 and 26 of the Minnesota Rules on Lawyers Professional Responsibility.

2. The Report of the Referee in Florida recommended suspension until such time as Respondent was reinstated to practice in Minnesota. No specific timeframe was stated in the referee's report.

Respondent was suspended indefinitely in the State of Minnesota until such time as he filed a petition for reinstatement and met the criteria for readmission to the Minnesota Bar. Respondent testified at the final hearing that he had taken no steps to be readmitted to the Minnesota Bar after his six-month suspension had ended, and, more significantly, he clearly expressed an intent not to petition for reinstatement in Minnesota in the future. TR 33-34. Consequently, under the Referee's recommendation, Respondent would remain indefinitely

suspended in Florida, unless, and until, he could prove he had been reinstated in the Minnesota Bar.

SUMMARY OF ARGUMENT

The Florida Bar hereby incorporates and adopts its Summary of the Argument as set forth in its Initial Brief. In this Reply Brief, the Florida Bar would state succinctly that, pursuant to R. Regulating Fla. Bar 3-5.1(e) and the prevailing Florida case law, Respondent is required to show proof of rehabilitation and to demonstrate compliance with R. Regulating Fla. Bar 3-7.10 regarding reinstatement procedures before gaining readmission to The Florida Bar.

For the foregoing reasons stated in its Initial and Reply Briefs, The Florida Bar respectfully requests that this Court review the Referee's recommendation for discipline, and incorporate into the Referee's Report the appropriate language requiring Respondent to file a formal petition for reinstatement showing proof of rehabilitation prior to readmission to The Florida Bar.

LEGAL ARGUMENT

THE REFEREE'S REPORT SHOULD BE CLARIFIED TO INCORPORATE THE REQUIREMENTS OF FLORIDA BAR RULE 3-5.1(e)

The sole issue in dispute is whether Respondent must comply with R. Regulating Fla. Bar 3-5.1(e) that states, in pertinent part, a "suspension of more than 90 days shall require proof of rehabilitation." (hereinafter "Rule 3-5.1(e)").

In the Answer Brief, Respondent states that the six-month suspension imposed by the Minnesota Bar "had already been satisfied" and the Referee was not required to impose proof of rehabilitation as an "additional sanction." Answer Brief at p. 7. Further, Respondent erroneously argues that Rule 3-5.1(e) would be applicable only if the Referee had imposed an *additional* disciplinary suspension of more than 90 days, or, if the Minnesota and Florida suspension had not expired prior to the Referee's recommendation of discipline.

The Florida Bar maintains that, in accordance with prevailing Florida case law and the plain language of Rule 3-5.1(e), Respondent's more than 90-day suspension by the Referee mandates that Respondent file a petition for reinstatement before obtaining readmittance to The Florida Bar. Further, The Florida Bar contends that Respondent misconstrues the reading of the Minnesota

disciplinary order as well as the Referee's recommendation. The Minnesota Supreme Court ruled that Respondent was to be *indefinitely suspended for a minimum of six months* with the *right to petition for reinstatement* after that time pursuant to Rules 18 and 26 of the Minnesota Rules on Lawyers Professional Responsibility. See Exhibit A attached to Complaint at p. 6. The Referee recommended suspension until such time as Respondent was reinstated to the practice of law in Minnesota. See RR at p. 5. The six-month Minnesota suspension was, therefore, a *minimum* time period, and the Referee recommended reinstatement to the practice of law in Florida only upon Respondent's reinstatement to the Minnesota Bar. Consequently, the Referee's recommended discipline clearly contemplated a time frame in excess of 90 days.

Generally, Florida case law supports the plain language contained in Rule 3-5.1(e), to wit, "one suspended for more than ninety days must comply with the reinstatement process before being eligible to practice law again." Accord, The Florida Bar v. Caillaud, 560 So. 2d 1169, 1170 (Fla. 1990). See also, The Florida Bar v. Friedman, 646 So. 2d 188, 190 (Fla. 1994); The Florida Bar v. Cohen, 534 So. 2d 392 (Fla. 1988); State ex re. Florida Bar v. Bieley, 120 So. 2d 587(Fla. 1960).

In Caillaud, based on felony convictions outside Florida, the referee

recommended a three-year suspension nunc pro tunc, and reinstatement without proof of rehabilitation. Although in agreement with the referee's recommended discipline, The Florida Bar filed a petition for review regarding the portion of the referee's report recommending immediate reinstatement without compliance with the requirement of a separate petition for reinstatement . This Court agreed with the Bar's position and held that a petition for reinstatement must be filed in cases where the suspension was greater than ninety days in accordance with R. Regulating Fla. Bar 3-5.1 (e). Id. at 1170-1171. Further, in distinguishing the distinct and separate purposes of a trial for disciplinary violations and a trial for reinstatement, the Court reasoned that these proceedings mandated a different inquiry by the Florida Bar under the disciplinary rules, and subjected the disciplined attorney to two different procedural requirements. The Court therefore concluded that the referee had erred in recommending reinstatement without proof of rehabilitation. Id. at 1171.

In the present case, the referee recommended that Respondent be suspended until he was reinstated in the Minnesota Bar. At the final hearing, Respondent admitted that he had taken no steps to be readmitted to the Minnesota Bar, and indicated that he had no intention of petitioning for readmission in the future. TR 33-34. If the Court were to accept Respondent's specious arguments in

the Answer Brief, it is conceivable that Respondent could be automatically reinstated in the Florida Bar to practice law while at the same time would be indefinitely suspended by the Minnesota Bar. This incongruous result would be contrary to the referee's recommendation, as well as the prevailing case law and Rule 3-5.1(e). Absent the requirement of a petition for reinstatement, The Florida Bar would also be foreclosed from presenting any evidence as to Respondent's fitness for readmission to the practice of law in Florida.

Respondent's reliance on The Florida Bar In re Russell T. Sickmen, 523 So. 2d 154 (Fla. 1988) and The Florida Bar Re: Gary Eric Susser, 639 So. 2d 30 (Fla. 1994) is misplaced. In the Sickmen case, the proceeding before the Court was a petition for reinstatement based on a prior final adjudication of discipline. Subsequent to Florida's imposition of a three-year suspension, the attorney was disbarred by another state. The Court rejected The Florida Bar's position that the disbarment should preclude reinstatement in Florida, and refused to impose " a more severe sanction for the same misconduct." Id. at 155. Similarly, the Court held in Susser that the attorney was entitled to reinstatement after compliance with Florida's disciplinary order despite the fact that he was subsequently disbarred in another state.

In this case, however, Respondent is at the initial stage of the

disciplinary proceeding, and not petitioning for reinstatement. Further, at this point in time, the referee's recommended discipline has not been finalized by the Court as it was in the Sickmen and Susser cases. Moreover, at this level, the Court would not be imposing any additional or added sanctions on a prior final adjudication by the Florida Supreme Court.

Further, Respondent misstates the holding In re: The Petition of William B. Dawson, 131 So. 2d 472 (Fla.1961). In Dawson, the point in dispute was whether the attorney petitioning for reinstatement should be required to take a bar examination as a condition of reinstatement. In this 1961 case, the Court stated "unless the disciplinary order expressly requires the taking of a bar examination as a condition to reinstatement, no such requirement is authorized." Id. at 474. Currently, in Rule 3-5.1(e), a suspension of more than 90 days "may require" passage of all or part of the Florida bar examination. This permissive part of Rule 3-5.1(e) apparently was not in effect when Dawson was considered by the Court.

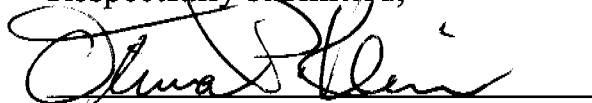
The portion of Rule 3-5.1(e) contested in this case, however, states that a "suspension of more than 90 days **shall require** proof of rehabilitation." Generally, the use of the term "shall" is mandatory and not permissive. See White v. Means, 280 So. 2d 20 (1st DCA 1973). Juxtaposed to the remaining part of that sentence in the Rule, the Court should construe the first half of the Rule

relating to suspension over 90 days as mandatory, while the second half of the Rule requiring a bar examination as permissive. There was no need in the present case for the referee to explicitly condition the recommended discipline upon Respondent's filing of a petition for reinstatement because Rule 3-5.1(e) mandates compliance for suspensions over 90 days. The Florida Bar does not seek to contest the report of the referee, but merely to petition the Court, for the sake of clarity, to incorporate the requirements of Rule 3-5.1(e) in its final disciplinary Order.

CONCLUSION

WHEREFORE, The Florida Bar requests that this Court review the Referee's recommendation for discipline and incorporate in its final order the clarifying language that Respondent must petition for reinstatement with The Florida Bar subsequent to his reinstatement in the State of Minnesota, in accordance with the referee's report.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief in Support of Petition for Review regarding TFB File No. 97-00188-02 has been mailed by regular U.S. Mail, to Counsel for Respondent, Christopher W. Boyden, Esq., 321 Northlake Blvd., Suite 107, North Palm Beach, Florida 33408, on this 9th day of November, 1998.



OLIVIA PAIVA KLEIN

Bar Counsel

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Billy J. Hendrix, Director Lawyer Regulation