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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

-vs-

Case No. 94,573
T.F.B. No. 99-10,581(6E)

JOE RAWLS WOLFE,

Respondent.

AMENDED REPLY BRIEF OF PETITIONER
TO ANSWER BRIEF OF THE FLORIDA BAR

AMENDED REPLY BRIEF FOR PETITIONER, JOE RAWLS WOLFE

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AMENDED REPLY BRIEF OF PETITIONER

STATEMENT OF THE FACTS AND OF THE CASE

The Bar's Statement of Facts does not reflect the record and contains misstatements of facts. The following corrects the errors and places them into context with the record.

1. At page 2, the Bar states in error that after October, 1993, the distributions were to be made annually, rather then monthly from 1982 through October 1994. The Trust required only annual distributions. (Consent Decree, P.2 Appendix 5) Wolfe became trustee in February of 1980. (Appendix 5) All required distributions were made during the 15 1/2 years Petitioner was trustee. (R-232-7 & 229-7)

2. At page 4, the Bar states that the Petitioner "In 1992 paid only $61,460 of interest; and in 1993, only $51,462.27 of interest." The record does not show how much interest was required to be paid in 1992 and 1993.

3. At page 6, the Bar states that the Baumgardner suit was filed 3/5/94. The correct date is 3/5/95. (Hearing Ex.8)

4. At page 6, the Bar states that settlement was reached in the Baumgardner litigation in April 1999. The correct date was July 23, 1998. (Appendix 7)

5. At page 7, the Bar states that Petitioner gave a mortgage to his mother during the trial and, due to selective recording, the mortgage to his mother became superior to the $195,000 Mortgage to the Baumgardner Trust. The Baumgardner

mortgage was on the "Island". (Consent Decree, Pgs. 3 and 4, Appendix 5) The Mortgage to his mother was on the farm property (R-133-22), was incurred prior to the Baumgardner debt, and was not given at the time of trial. (R 134-10 & R 133-12) It was recorded during the trial for the protection and at the request of the mortgage holder. (R-133-20 & 134-3)

6. At page 7, the Bar states that offers for sale of real estate that were turned down and selling his boat for $50,000 to $100,000 could have helped recompense the Baumgardner Trust. The settlement with the Baumgardner Trust was July 23, 1998, and the offers on real estate occurred in 1999. (R-59 & 60, and reports of the Bar investigators) The boat had a first mortgage on it with principal and interest of over $120,000. (Appendix 11) Any sale of the boat for $120,000 or less would have gone solely to the mortgage holder. The 1971 boat was not salable until restored. (R-48-4)

7. At page 8, the Bar states that Petitioner admitted that his improper conduct cost the Baumgardner Trust about $650,000. At page 18 the record states, "I lost a great deal of my own money, and I lost about six hundred and fifty thousand of the trust money." This was not an admission that he cost the trust $650,000. The Baumgardner Trust received personal notes from Petitioner for $671,000. (R-71-23) The $650,000 trust loss has been offset by the trust receiving interest of $154,868.01 on the notes (Paragraph 7, Appendix 6) and $850,000 in full settlement

(Appendix 7). On the $650,000 trust loan loss, Petitioner paid a total of $1,004,868.01 to the trust and received a full release.

8. At page 10, the Bar states that the Petitioner did not make any settlement offers before the litigation. The Petitioner offered to make the trust whole. (Hearing Exhibits 6 and 7)

9. At page 10, the Bar states that the trust value had fallen to about $200,000. This figure ignores the existence of notes signed by Wolfe for $671,000 and the fact that required annual distributions were being made. (R-228-15)

10. At page 10, the Bar states that the mortgage on the "Island" was yet to be seen by Attorney Rogers. The mortgage was attached to the complaint filed by Rogers. (Hearing Exhibit 8)

11. At page 12, the Bar points out that some of Petitioner's creditors received 20% on the dollar out of the reorganization. The Referee found that any creditor that received 20% on the dollar chose to do so, and could have waited for the possibility of being paid in full. (Appendix 11 and 4)

12. At page 6, the Bar states that the three Baumgardners received $151,000 each. There is no evidence as to the total amount paid by the trustee or why the trustee followed a 40% contingent fee agreement signed by only one beneficiary in violation of the spendthrift clause in the Trust. (R-118-4, 197-24, 214-3, 218-12 & 237-7) The amount, validity of fees and costs paid were not permitted under the pretrial order.

13. At page 9, the Bar states that Petitioner's actions cost Bill Baumgardner his home. (R-206-24) The record does not show when the home was sold and the pre-trial order restricted any inquiry as to what other reasons led to the home sale.

PETITIONER'S REBUTTAL ARGUMENT

The Bar argument relies on incorrect statements of the record, incorrect summaries of the Referee's fact findings, and incorrect application of the case law.

PETITIONER HAS MADE FULL RESTITUTION TO THE TRUST

The record shows the trust loans to Petitioner's corporations resulted in Petitioner's personal notes to the Trust of $671,000, with interest of $154,868.01 paid on these notes prior to trial. Also prior to trial, Petitioner made a written offer of property in settlement that was worth more than $671,000 and offered to let the Baumgardners choose any of his assets as long as enough was left to pay other creditors that were due $2,647,488. (Appendix 10) Settlement was rejected, and a trial resulted. The verdict was appealed; the amount due the Baumgardner Trust was set by agreement at $850,000, paid in cash, (Appendix 7) and confirmed by the Bankruptcy Court. (Appendix 11)

The Consent Decree stated, "The actual and ultimate amount of the indebtedness due the beneficiaries shall be determined by other proceedings." (Appendix 5) This Court ruled in the suspension order that Petitioner could apply for readmission if

he obtained a full release. The full release was full restitution.

The amount due the Baumgardners was res judicata as to the reinstatement proceeding and the Referee has denied Petitioner due process by considering the jury verdict entered in the case that was appealed, settled, and released. This consideration influenced the Referee as reflected in the findings and has been focused upon by The Florida Bar in their Answer Brief.

The finding of the Referee that each beneficiary should have received $500,000 is clearly erroneous, unjustified and rebutted by the evidence. The Bar Brief uses this erroneous unsupported finding as to what should have been received to argue that there has not been restitution to the trust beneficiaries.

The Referee found that "During the period of suspension, the Petitioner devoted himself to managing his assets to make restitution, albeit partial, to the beneficiaries." When announcing her decision, the Referee stated that the Petitioner acted responsibly on his financial affairs.

The Referee's recommendation is not based on a finding of lack of restitution. She stated that devotion to restitution was responsible.

THE FOLLOWING BAR ARGUMENTS ARE NOT BASED ON FINDINGS OF THE REFEREE, OR SUPPORTED BY THE RECORD.

1. *During the trial, Petitioner gave a mortgage to his mother on property that he had mortgaged to the Trust.* The

mortgage existed pre-trial and was on different property. (See Item 5 in Reply statement of the facts, above)

2. *Petitioner could have accepted offers on properties exceeding $900,000 and paid the Baumgardners.* The offers came after the Baumgardner settlement. (Item 6 above)

3. Boat could have been sold for $50,000 or 100,000 and paid to the Trust. If sold, the mortgage holder would have obtained the proceeds. (Item 6 above)

4. Failure of Petitioner to apologize. Petitioner stated he made an apology to Richard Baumgardner (R-27-4) and also at the mediation through his attorney. (R-27-7) Petitioner's devotion to restitution was an apology through actions.

5. Petitioner engaged in delaying tactics. There is no testimony that supports this argument. The beneficiaries rejected real estate in settlement and chose to wait until they could receive cash. Bankruptcy protected them and resulted in their receiving much more than without reorganization. (Schedule 1 of Bankruptcy Plan shows they would have received only a share of $267,178 if there was a liquidation)(Appendix 11)

6. Referee found that restitution was coerced and insufficient. There is no such finding by the Referee and the record does not support this argument.

7. *Petitioner gave precedence to paying off his business creditors.* The record shows that Petitioner kept the Trust distributions current until the trial but not his mortgage

payments. Several mortgage holders received property through foreclosure, but no other creditor received anything until the Trust was paid $850,000. The record shows that major creditors have yet to be paid a net amount of about $850,000. (Appendix 11)

8. Petitioner did not sell off his assets at a loss to pay the Baumgardner Trust. The argument ignores the fact that all of Petitioner's major assets were mortgaged. (Appendix 10) Forced sales of the assets would have resulted in much less being available to the Baumgardner Trust. Petitioner kept trust payments current through the date of trial. Any payments to the trust after the verdict would have been put back into the bankrupt estate of Petitioner.

9. Petitioner did not acknowledge his own conduct to be highly improper and unethical. The record on this point summarized at page 15 of Petitioner's Brief points to a number of statements acknowledging the severity of his conduct. "I totally destroyed their confidence in myself and lawyers and I did the same thing in the community." (R-21-23) His actions and devotion to restitution say far more than any words.

The Bar's position would require Petitioner to confess to a crime he was not charged with and acknowledge that he should have been disbarred rather than suspended in order to grasp the moral implications of his transgressions. The Bar's Answer Brief does not address the issue of the condition precedent imposed by the

Referee that to show unimpeachable character Wolfe must perform "community work or pro bono work".

THE CASE LAW CITED BY THE BAR IS NOT APPLICABLE TO FACTS SHOWN BY THE RECORD.

The cases cited at page 19 that required restitution before readmission are not on point. The Bar, at page 20 discusses the case of The Florida Board of Bar Examiners Re: J.C.B., 655 So.2d 79 (Fla.1995). Unlike Petitioner's case, J.C.B. was disbarred not suspended; neglected a legal matter for four years; was charged with grand theft; failed to act with responsibility toward his creditors, and called his conduct negligence. In addition, five of the character witnesses did not know why he was disbarred. The Petitioner's conduct does not in any way resemble J.C.B.'s failure to take a higher paying job. Petitioner took full responsibility by signing the consent decree and devoting himself to restitution for four years.

The Bar at page 21 cities J.C.B. as requiring positive action to prove rehabilitation. The language cited uses the words that one can prove rehabilitation by, "such things as a person's occupation, religion, community or civic service". Community service is an example of rehabilitation. Examples of positive action taken by Petitioner are summarized in his Brief at page 26 and 27. Since suspension, the Petitioner devoted himself to a successful plan of reorganization, waived his homestead, lived meagerly, and obtained the trust and admiration of his unpaid creditors. Petitioner read books to help

straighten out his thinking. (R-22-5), took college courses (R-51-17), and did all required CLE courses. (R-)

Petitioner's accomplishments from putting all his time into marshaling and selling his assets were of great benefit to all his creditors and particularly the Baumgardner Trust, which received three times the amount that would have been received in liquidation.

THE REFEREE'S FAILURE TO FIND THE NECESSARY CHARACTER IS NOT SUPPORTED BY THE RECORD.

Petitioners Brief at page 25 through 30 sets forth in detail how the required character for the practice of law has been shown by his entire career as a lawyer, his lack of malice and repentance, and his positive actions over the last four years.

The argument that the required character has not been shown due to the severity of Petitioner's conduct prior to the suspension would mean that no one could be readmitted to the Bar. The reasoning of the Referee is circular in nature and requires the Petitioner to agree with the Bar's characterization of the facts. The Petitioner's acts of mitigation are used by the Referee to show that Petitioner lacks the necessary character by not understanding the nature of his conduct. The Referee's reasoning would remove the ability of Petitioner to present his case while the Bar is left free to paint his past conduct in such a way as to deny his reinstatement.

THE REFEREE FOUND THERE WAS REMORSE AND REPENTANCE

The record shows the remorse and repentance of the Petitioner. The Referee found that the "Petitioner has made appropriate assurances as to his sense of repentance and his desire to conduct his law practice in an exemplary fashion in the future." "Although his remorse seems sincere, he has not taken actions to restore the public's confidence in him as a trustworthy individual." (Appendix 4)

While finding that there was repentance and remorse, the Referee also found that the Petitioner has not taken action to restore the public's confidence in him. Remorse and repentance are not the same thing as restoring the public's confidence. Remorse is something the Petitioner believes. Repentance is doing things to demonstrate remorse. Restoring public confidence is influencing the way others feel about the Petitioner. The record supports the Referee's finding that the Petitioner has shown remorse, repentance and the desire to conduct his law practice in an exemplary fashion in the future.

PETITIONER HAS SHOWN RESTORED PUBLIC CONFIDENCE

The Referee found that Petitioner has not taken action to restore public confidence due to the failure of the Petitioner to do community service or pro bono work. The Referee did not determine the public's confidence in the Petitioner, but avoided reaching the question by first requiring a showing of public service. Her finding is rebutted by the record that shows

restored confidence. Her finding an erroneous condition precedent rebuts her finding.

The Referee did find clear evidence of Petitioner's good reputation for professional ability. (Appendix 4) No evidence called into question the legal ability of Petitioner. The evidence shows Petitioner was admired by clients for his honesty, ability, wise advice, and giving his full attention to cases. Those who knew of his actions while suspended reinforced this belief. (R-105-15) (Petition Exhibit 8/2, 8/6, 8/9, Appendix 12)

By use of the word "restored", it is implied that the actions of the Petitioner since the suspension should be considered. The record shows that Petitioner's remaining creditors have complete confidence in him, and his actions since the suspension are admired and saluted by those members of the public who know what he has done. (R-118-1, R-91-17-23, Petition Exhibits 8/2, 8/5 and 8/10, Appendix 12) All witnesses, except for the aggrieved parties, have complete confidence in the Petitioner. The Bar's extensive investigation of the Petitioner confirms that there is restored confidence in him. The Bar questioned several of the remaining creditors about Petitioner's plans to obtain the funds to repay them and they all expressed confidence in his ability and honesty.

The comments of the aggrieved parties and Bill's attorney are based on the Petitioner's actions prior to his suspension. All four stated they have no knowledge about Petitioner's

activities since his suspension except for the settlement of their case. (R-164-1, R-175-23, R-187-19, R-209-12)

Bill Baumgardner said that if Petitioner had said "Well, you know, I know I owe you more. As I sell my assets off, I'll pay you off. If he had done something like that, we wouldn't be here today." (R-209-3-6)

The record shows that the public has restored confidence in the Petitioner, and those who say they don't know what he has been doing, or who may have revenge, or think they have something to gain by opposing Petitioner do not rebut this.

The Referee will not share the public's confidence in Petitioner unless the Petitioner performs community service or pro bono work. Prior case law and this Court's prior order does not require these. The Referee does not have the power to change this Court's prior order or the case law by a post facto condition.

THE SEVERE ERRORS PETITIONER MADE WERE UNDERSTOOD AND ADMITTED BY PETITIONER AND NO ONE HAD TO PROVE THEM

The Referee stated that the Petitioner did not understand the severity of his action, but the only supporting evidence she cited was his lack of post suspension community or pro bono work. How can one have remorse if they don't understand what they did? The Referee's finding of remorse and repentance is contrary to her reasoning that Petitioner does not understand the severity of his actions.

Similarly, the Referee found that the Petitioner has the desire to conduct his law practice in an exemplary fashion in the future. This desire could not exist unless Petitioner understands the severe nature of his past transgressions.

Petitioner's actions show that he understood the problems he created. He gave the trust beneficiaries a detailed report, signed and made payments on personal notes for a corporate debt before any suit or bar investigation. He fully cooperated with the Bar investigation and signed a detailed Consent Decree agreeing to the violations he caused. Petitioner understood and admitted the severe errors. No one had to prove them.

The Petitioner has devoted all his available time to set the damage straight by paying his creditors. The creditors have agreed to his efforts and the Bankruptcy Court has discharged Petitioner. The positive actions of Petitioner to pay his debt, study his problems, improve his skills, and the way he handled himself in the Reorganization Plan, together with the results obtained, prove rehabilitation as suggested in the J.C.B. case. (Infra)

CASES FOR THE COURT'S CONSIDERATION

Petitioner's positive actions required a great deal of effort and are much more extensive than those set forth in Florida Board of Bar Examiners Re P.T.R. 662 So.2d 334 (Fla. 1995). The Court found that positive actions do not become unacceptable due to their benefit to Petitioner.

It is clear that this Court's scope is broad in reviewing the recommendations of a Referee, "as it is ultimately our responsibility to enter an appropriate judgment." The Florida Bar in Re Inglis, 471 So.2d 36 (Fla. 1985). The appropriate focus under Inglis is the Petitioner's professional competence, ability, his good moral character, personal integrity and general fitness for a position of trust. As the Court has pointed out in The Florida Bar v. Sickmen, 532 So.2d 154 (Fla. 1988) "Our previous judgment of suspension was a final adjudication of discipline regarding the misconduct in question." The fact that a New York Court imposed a greater sanction based on the same conduct should not be considered. In the case before you, the judgment of the Referee and the Bar as to the severe nature of the original conduct should not serve to change this Court's prior order.

As set forth in The Florida Bar v. Jahn, 559 So.2d 1089 (Fla. 1990), finding a lack of moral character involves a review of acts and conduct that would cause a reasonable man to have substantial doubts. It is not possible to do this by looking only at the original acts that caused the suspension. The question is rehabilitation and not whether the marks from the conduct that caused the suspension are so bad that Petitioner cannot show good character. It is also important to note that a 3-year suspension of Petitioner has become a more than 4-year

suspension. The Florida Bar v. John D. Rue, 663 So.2d 1320 (Fla. 1995).

The public deserves a right to benefit from Petitioner's services as a lawyer. A Bar disciplinary action must serve the purposes of a judgment fair to society, fair to the attorney, and severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Lawless, 64 So.2d 1098 (Fla. 1994). While a referee's recommendation for discipline is persuasive, the court has the ultimate responsibility to determine the appropriate sanction. The Florida Bar v. Reed, 664 So.2d 1355, 1357 (Fla. 1994).

The Petitioner has carried his burden by showing three things as to the Referee's findings; (1) They are erroneous and not supported by the record; (2) The findings as to amounts owed were res judicata; and (3) The findings were unjustified. The case of The Florida Bar v. Grusmark, 662 So.2d 1235 (Fla. 1995), required a showing of only one of these three things.

"Petitioner deserves reinstatement and an opportunity to earn a living in the field in which he is trained", The Florida Bar v. Whitlock, 511 So.2d 524 (Fla. 1987).

Respectfully submitted,

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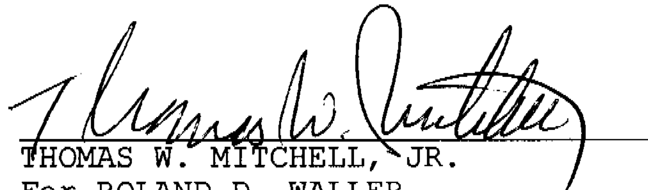
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Reply Brief of Petitioner was furnished by UPS Next Day Air to: Thomas E. DeBerg, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607; and John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 14th day of January, 2000.



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