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IN THE SUPREME COURT OF FLORIDA

IN RE: PETITION FOR REINSTATEMENT OF BRIAN JOHN MURTHA

Case No.: SC19-1886
Fl. Bar File: 2020-30, 327 (18C)

THE FLORIDA BAR'S

INITIAL BRIEF

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PRELIMINARY STATEMENT

A. Abbreviated Names

Brian John Murtha, the Petitioner, will be referred to as Mr. Murtha or the Petitioner. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

References to the Report of Referee will be cited as (ROR p.**).

The transcript of the final hearing and the sanction hearing will be cited as (T.**).

The Bar's exhibits will be cited as (TFB-Ex. *). When useful the page number within the exhibit will be cited as well.

Petitioner's exhibits will be cited as (P-Ex. *). When useful the page number within the exhibit will be cited as well.

References to specific pleadings will be made by Tab number in the Amended Index of Record and, when appropriate, to a paragraph within the pleading. (Tab #1, ¶5).

The Bar provides an appendix of critical portions of the record to facilitate review. This brief cites to the appendix as (A. **).

NATURE OF THE CASE

The Bar seeks review of a Report of Referee that recommends reinstatement of Brian John Murtha to the practice of law with an 18-month period of probation subject to complex conditions of probation. (ROR p. 1-11) (A. 3-13). Mr. Murtha was suspended for 91-days in 2016, in part for trust account violations, and then suspended again for an additional year, beginning October 16, 2017, in a contempt proceeding for disobeying the earlier suspension order.

Mr. Murtha has filed three petitions for reinstatement, the first two having been voluntarily dismissed. During the Bar's investigation of these petitions, it discovered evidence that it reasonably believed challenged Mr. Murtha's rehabilitation concerning the trust account violations and also raised several serious issues involving disqualifying conduct. This evidence included trust account issues, unreported paralegal activity, and substantial federal income tax irregularities during the period of suspension.

The Referee is recommending reinstatement subject to probationary conditions that the Bar maintains confirm that Mr. Murtha was not rehabilitated for reinstatement. The Bar seeks review because it maintains that competent substantial evidence does not support findings establishing that Mr. Murtha proved his entitlement to reinstatement.

During this proceeding, the Referee also ordered the parties to participate in civil mediation. The Bar is asking the Court to address this order in this review and hold that such mediation is not appropriate in a reinstatement proceeding.

STATEMENT OF THE CASE AND FACTS

A. Mr. Murtha's law practice and his prior disciplinary proceedings

Mr. Murtha is 59 years old and was licensed to practice law in 1987. (ROR. p.8)(A. 10). For most of his career he operated a small law firm in Melbourne, Florida, that specialized in commercial debt collection. (T. 42). He estimated that he has handled 34,000 collection cases. (T. 44). Since 1994 he has used computer software to automate the process. (T. 43). He had little direct client contact and received most of his cases from collection agencies, apparently connected to an organization known as the Commercial Law League of America. (T. 43).

His cases often resulted in debtors making payments over time that were deposited into his trust account. When a payment was received, it was normally split between the client and Mr. Murtha. (T. 44-46).

In 2002, Mr. Murtha received his first disciplinary sanction, a public reprimand for practicing law while administratively suspended due to a

delinquency in his CLE requirements. Case No. SC01-2219; *The Florida Bar v. Murtha*, 819 So. 2d 141 (Fla. 2002).

Mr. Murtha had his first disciplinary proceeding arising out of problems with his trust account in Case No. SC12-333. He received a public reprimand and was placed on probation for two years due to a check that was dishonored for insufficient funds in his trust account. (ROR p. 9); *The Florida Bar v. Murtha,* 103 So. 3d 143 (Fla. 2012). That proceeding also involved a failure to communicate with a client, resulting in a default that was successfully set aside by successor counsel. (ROR p. 9)(A. 11).

During the probationary period in Case No. SC12-333, Mr. Murtha failed to file timely quarterly trust account reports. This resulted in Case No. SC13-901, in which he was held in contempt and suspended for an indefinite period on November 5, 2013. When he complied with these requirements, he was reinstated about ninety days later. *The Florida Bar v. Murtha,* 130 So. 3d 694 (Fla. 2013).

Mr. Murtha was suspended for 91-days for trust account violations in Case No. SC15-2011 on November 12, 2016. He was suspended for a concurrent 91-days in Case No. SC16-581 for mishandling a case for a client, allowing the statute of limitations to run. *The Florida Bar v. Murtha,* 2016 WL 5944709 (Fla. 2016).

In Case No. SC17-988, Mr. Murtha first sought reinstatement in May 2017. He voluntarily dismissed that petition in November 2017 after the Bar filed another petition for contempt in Case No. SC17-1452 for violating the 2016 suspension orders by failing to notify judges of his suspension. This Court held Mr. Murtha in contempt, and imposed a one-year suspension beginning on October 16, 2017. *The Florida Bar v. Murtha,* 17 WL 4585663 (Fla. 2017).

On October 22, 2018, Mr. Murtha filed a second petition for reinstatement in Case No. SC18-1737, which he also voluntarily dismissed.

B. The issues that caused the Bar to contest the third petition for reinstatement.

Mr. Murtha filed this current petition on November 6, 2019, in Case No. SC19-1886. (Tab #1). It is facially sufficient, but the Bar's investigation raised several significant issues.

1. <u>Work as a paralegal</u>

The petition alleged in paragraph 5 that Mr. Murtha "has assisted The Murtha Law Group, P.A., as a paralegal" since his suspension, where he was supervised by Kevin Murtha. Kevin Murtha is Mr. Murtha's younger brother. He is eight years younger than Mr. Murtha. (T. 119). Kevin Murtha was admitted to the Bar in 1998, and initially practiced law with Mr. Murtha. (T.

119). He sees his older brother as his first legal mentor. (T. 119-120). He left to start his own law firm in the same community in 2010. (T. 121). His law firm, The Murtha Law Group, P.A., is the law firm that Mr. Murtha alleged he was assisting as a paralegal.

The investigation revealed, and it is undisputed, that neither Mr. Murtha nor The Murtha Law Group, P.A. filed quarterly reports under Rule 3-6.1(e) after the first two quarters. (T. 19, 79). That rule clearly requires " [t]he individual subject to this rule and employer" to "submit sworn information reports to the Florida Bar." These sworn reports must include a statement that no aspect of the work of the individual has involved the unlicensed practice of law.

The ultimate explanation at trial was that the two brothers decided that the rule did not really apply to them because Mr. Murtha was not an employee. They contacted the Bar and got no response, so they stopped filing quarterly reports. (T. 122-123). But Rule 3-6.1(a) plainly states that it applies "if the individual is a salaried or hourly employee, **volunteer worker**, or an independent contractor providing services to the entity."

In his sworn statement, Mr. Murtha was asked questions about this issue. He claimed that he was not assisting his brother as a paralegal. (TFB-Ex. 1. P. 61). He explained that he was helping his brother in any manner

that he needed. If his brother received a new collection claim, he was using the computer software that he had long used to prepare complaints. He was doing research. (TFB-Ex. 1 p. 61). But he stopped filing reports after June 2017 because he was not being paid as a paralegal. (TFB-Ex. 1, p. 62-63).

Mr. Murtha explained in his sworn statement that Kevin Murtha had worked for him for "ten, fifteen years" when he "carried" his brother. As a result, he saw payments from his brother to him as "gifts." (TFB-Ex. 1, p. 60).

At trial, Kevin Murtha did not think his brother practiced law during the period of suspension. He explained:

> I've classified Brian as a paralegal. Okay? That was more of the fact that of his experience and the fact that he was an attorney, although suspended. I wouldn't say that that was the function of Brian, but I classified him as a paralegal because of his experience and acting as an attorney.

(T. 125).

Thus, he was apparently classified as a paralegal because he was "acting as an attorney." Both the prehearing investigation and the evidence at trial clearly showed that Mr. Murtha failed to comply with Rule 3-6.1 during his suspension.

2. Tax returns

The Bar used the IRS Form 8821 received in this or an earlier petition for reinstatement to obtain tax information. The tax returns from 2015 to 2018 are in the record. (TFB-Ex. 4, p.8-80)(A. 61-133). The Florida Bar's branch auditor and certified public accountant, Matthew D. Hedeker, reviewed this information and prepared a report. (TFB-Ex. 4)(A. 54).

Mr. Murtha's law firm, The Murtha Law Office, P.A., was an S-corporation. Its tax return for 2015 was unsigned and undated. (TFB-Ex. 4 p. 1)(A. 54). This S-corporation had $50,600 in income for 2015 that was required to be reported on Mr. Murtha's personal tax return. (TFB-Ex.4 p. 2)(A. 55).

Mr. Murtha's 2015 personal tax return was not filed until January 2019. (TFB-Ex. 4, p. 18-19)(A. 71-72). It was prepared by Mr. Murtha using TurboTax software program. It does not report the $50,600 in S-corporation income. Indeed, his personal tax return uses the simple Form 1040A instead of a standard Form 1040 that is used for filers with business income. The return qualifies for an Earned Income Credit giving Mr. Murtha a $1,923 refund. (TFB-Ex 4, p. 19)(A. 72).

In 2016, his S-corporation made $59,483.00 and his personal income tax returned, filed in 2019 on a Form 1040A, did not report this income. (TFB-Ex. 4, p. 2, 29, 38-39)(A. 55, 82, 91-92). Again, he received a small refund.

In 2017, his law firm S-corporation return reported a loss of $31,952. (TFB-Ex. 4, p. 2, 50)(A. 103). The corporation's form shows compensation to officers of $21,202. But Mr. Murtha was suspended for all of 2017, and the corporation had no other officers. He explained that any income he received "would have been given from my brother to me personally." (TFB-Ex. 1, p. 53). At his sworn statement, he had no explanation for this deduction on the form for a law firm that was not really in business. (TFB-Ex. 1, p. 54).

Mr. Murtha did not report this business loss on his personal return in 2017, again filed on a Form 1040A, in January 2019. (TFB-Ex 4, p. 59-60)(A. 112-113). He received another refund. Disturbingly, even though suspended for all of 2017, he reported his occupation as "attorney" when he filed the form in 2019. (TFB-Ex. 4, p. 60)(A. 113).

For 2018, he did not file his return until February 14, 2020. (TFB-Ex 4, p. 72)(A. 125). This time he filed on Form 1040 and reported business income and expenses. Again, he listed his occupation as "attorney," even though the return was filed while this petition for reinstatement was pending.

Due to a self-employment tax obligation and the absence of withholdings, he did pay $2,519 in taxes for 2018.

The CPA also compared the deposits into the law firm's operating account in 2015 through 2017 with the income reported on the tax forms. He found total discrepancies of $170,641.18. (TFB-Ex. 4, p. 3)(A. 56). He could not state that this was unreported income, simply that it was an unexplained positive cash flow.

In his sworn statement, Mr. Murtha was examined extensively on this subject. (TFB-Ex. 1, p. 14-50, 65-70). He had been given this information before the examination. (TFB-Ex. 1, p. 69). He explained that even though he did his own taxes, his ability to fill out tax forms "probably is not the greatest." He just plugged in the information that he had in Microsoft Money into TurboTax. (TFB-Ex.1, p. 22). Somehow that information caused TurboTax to use a Form 1040A despite his business income from an S-corporation.

At both the sworn statement and at the hearing, Mr. Murtha claimed that he went to see an accountant named Ron Motty after he was aware the Bar was questioning his taxes. He told this man that he wanted to "make sure" the returns were "done 100 percent correct." (TFB-Ex. 1, p.23). He claims that Mr. Motty looked at these returns and told him they were okay.

(TFB-Ex. 1, p. 24). No accountant testified for Mr. Murtha at the final hearing to claim these returns were okay.

Concerning the large discrepancy the CPA found between deposits in the operating account and the reported income, at the hearing Mr. Murtha testified that his wife had her own bank accounts. (T. 332). He had suggested that his brother may have given him money (TFB-Ex.1 p.60). But Mr. Murtha called no witness to attempt in any fashion to explain that the discrepancy was not unreported income.

3. Psychological treatment.

In Exhibit 8 to his petition for reinstatement, Mr. Murtha explains that he had some psychological difficulties relating to his wife's illness and family concerns at the time he committed the violations leading to his suspension. He saw an FLA mental health counselor, Laura Willis, for some personal and group therapy. He has provided a list of the dates that he met with her. (P-Ex. 10). He met with her once in November 2015 for an evaluation. He then met with her three times about a year later, and twice in 2017. He had no visits in 2018, and nine visits in 2019. (P-Ex. 10). Ms. Willis provided a brief letter of evaluation for the court on October 29, 2019, indicating that he was discharged on August 8, 2019, with "excellent" results She recommended that he should be allowed to return to the practice of law. (P-Ex. 9).

Interestingly, she provided a similar letter on March 12, 2017, recommending reinstatement before the nine visits in 2019. (P-Ex. 11)(A. 51).

Ms. Willis also testified at the hearing. She essentially confirmed the content of her two letters. (T. 257-284). At the end of her testimony, the Referee asked if it would help Mr. Murtha to continue this therapy, and she testified that she believed it would. (T. 284-85). In his recommendation, the Referee recommends that Mr. Murtha visit with Ms. Willis twice a month during an eighteen-month period of probation, which the Referee oddly began immediately following the hearing. (ROR p. 3)(A. 5).

4. The operating bank account for the law firm.

The Bar's examination of Mr. Murtha's trust account did not reveal any overdrafts. However, he continued to have an operating account for the law firm. Given that cash flow resulting from cases resolved prior to the suspension continued to arrive after the suspension and part of that cash flow would be earnings for Mr. Murtha's law firm due to the prior work, the Bar does not contend that the existence of this account is improper.

However, the CPA's review of the law firm's operating account found something quite odd. Between January 2015 and December 2019, the account was overdrafted 524 days. (TFB-Ex 4. p.3)(A. 56). It would be overdrawn, sometimes by more than $1,000 for days in a row. (TFB-Ex. 4

p.84-92)(A. 137-145). It was constantly in an overdraft condition from August 19, 2019 to September 9, 2019, which is immediately following his discharge by Ms. Willis. (A. 145). It was overdrawn for fourteen days in a row in December 2019, during the pendency of this petition. (A. 145). These overdrafts resulted in $18,581.00 in bank charges for handling overdrafts. (TFB-Ex. 4 p. 93-95)(A. 146-148).

The Chase Bank statement for The Murtha Law Office, P.A. operating account for January 2017, when Mr. Murtha was suspended, showed 67 entries for ATM and debit card withdrawals that suggest it was being used for ordinary personal expenses, resulting in $1,424 in overdraft charged for the month. (TFB-Ex. 4, p. 96-101)(A. 149-154).

In his sworn statement, Mr. Murtha explained that, except for an employee that stole $80,000 from him over a period of years prior to 2015, he was the only person with access to the operating account. (TFB-Ex. 1, p. 72-73). In this time period, he admitted that he had "always known that my account was overdrawn." (TFB-Ex. 1, p. 75). In both his statement and at trial, Mr. Murtha explained that he and his wife were depleting a savings account during this period, and that this situation was upsetting for his wife, who was unhealthy. He did not want to upset his wife by taking money from the savings account to transfer into the operating account. (TFB-Ex. 1, p.

76-77; T. 63-65). Thus, apparently, he more than spent $18,000 merely to avoid putting $1,500 into the operating account to create a buffer that would have prevented the overdrafts.

5. Trust account activities

Mr. Murtha had a trust account at Chase Bank and at Well Fargo. The good news about Mr. Murtha's two trust accounts during the period of suspension is that no client appears to have suffered any significant harm from the activities in the account. The concerns arise because he did not divest himself of control of the trust accounts. This Court ordered him to close out his practice within 30 days of October 13, 2016, in Case No. SC16-581. Mr. Murtha had not studied the Bar Rules well enough to understand that he needed to reapply to gain admission after a 91-day suspension, and he expected to immediately return to practice. (TFB-Ex. 1, p.49-50). Thus, he seems to have treated the shutdown of his practice too cavalierly and worked out arrangements that were too informal with his brother.

Mr. Murtha suggested that he thought the Bar had given him permission to keep using his trust accounts. (T. 86-87). He had discussed with Patricia Savitz, the bar counsel who handled his discipline case, that he would continue receiving payments from debtors and these payments would include a portion that was his previously earned fee. Somehow he thought

that discussion allowed him to keep using his trust account, but admitted that he may have "misremembered what went on." (T. 86). Ms. Savitz testified that she doubted that happened because it is not a normal part of her job, and she had no recollection of a conversation in which she told him he could continue using his trust account despite an order prohibiting it from this Court. (T. 298-299).

Instead of arranging for his designated inventory attorney or some other attorney to take over full control of his trust accounts within 30 days, he remained on the accounts, handling deposits and issuing checks through February 2017 in the Chase Bank trust account. (TFB-Ex. 4 p. 5; T). The Wells Fargo trust account sat from November 2016 to September 2019 with no activity, but with a balance of over $21,000. (TFB-Ex. 4, p. 6). Then in the fall of 2019, Mr. Murtha wrote checks from this trust account that depleted the account to about $100.

In his sworn statement, Mr. Murtha explained that he was being overly cautious with the account, not wanting to get in trouble. (TFB-Ex. 1, p. 106-111). When he finally distributed funds from the account, he wrote himself a check for $7,200, and distributed the rest to his clients. (TFB-Ex. 1, p. 109). Rule 5-1.1(e) requires trust funds to be delivered to clients promptly, and Rule 5-1.1(f) requires attorneys to distributes attorneys' fees within a

reasonable amount of time even when there is dispute over the ownership of the client's portion. Thus, his delay violated the rules and violated this Court's suspension order.

C. The Pretrial and the Hearing.

On July 29, 2020, at a telephonic case management conference, the Referee sua sponte made a very unusual decision to order the parties to civil mediation. (Tab #29)(A. 44). The Referee provided the names and contact information for three possible mediators.

The Bar quickly moved for rehearing. (Tab # 28). Its motion explained that the Florida Rules of Civil Procedure governing mediation did not apply to this original proceeding. It explained that Rule 3-7.10 controlled the proceeding, that the rule did not provide for mediation, and instead required the Referee to hold a hearing, make findings and recommendations in order for this Court to make its ruling. It pointed out that Rule 14-1.1 is the only provision allowing for mediation in Bar proceedings and it was inapplicable here.

Rule 3-7.10(g)(4) does permit the Bar to agree to a summary procedure, but only if bar counsel "is unable to discover any evidence on which denial of reinstatement may be based. . . ." But as demonstrated in

the prior section of this brief, Bar counsel had discovered ample evidence to support a denial of reinstatement.

Petitioner responded to the Bar's motion for rehearing. (Tab. 37). Petitioner understandably did not wish to disagree with the Referee, but admitted this was a quasi-judicial proceeding, that mediation would be a waste of time because the Bar would not be able to agree on a compromise solution, and that the rules did not appear to Petitioner to contemplate mediation. On the other hand, Petitioner did not believe the reinstatement rule expressly prohibited rehearing and indicated that he was willing to mediate the matter.

A hearing was conducted on the motion for rehearing on August 20, 2020, where the parties presented their arguments. The Referee denied rehearing, instructing the parties that he wanted "meaningful mediation in this case. (Tab # 38)(A. 45-47); (August 20 hearing transcript filed 1/04/2021, p. 20). He did not want the Bar to say Mr. Murtha was a "wonderful person," but he wanted the Bar to mediate to see "if you can reach a stipulation to a summary procedure." (August 20 hearing transcript filed 1/04/2021, p. 20-21).

The case, of course, did not "settle" at mediation because the Bar had no legal power under Rule 3-7.10(g)(4) to stipulate to a summary procedure.

The evidentiary hearing occurred over three days, beginning on September 2, 2020. The hearing took three days, in part, because the video-technology used proved to be unreliable. (T. 1-424). Mr. Murtha and his wife testified as did Kevin Murtha, Laura Willis, and several character witnesses. (T. 42-170, 257-293). The Bar presented the testimony of The Florida Bar's branch auditor and CPA, Mr. Herdeker, and its investigator, David Pennell. (T. 181-249). It briefly presented the testimony of its staff counsel, Patricia Savitz, the bar counsel who handled his discipline case, to explain that it was unlikely that she ever gave permission to Mr. Murtha to continue using his trust account and had no recollection of speaking to him following the suspension hearing. (T. 294-301). The prior section of this brief provides summaries of the evidence presented on the Bar's concerns.

Following closing arguments at which the Bar discussed the important precedent, the Referee announced his ruling. (T. 399-421)(A.14-37). He explains that he believes Mr. Murtha is "sloppy and disorganized." (R. 403)(A. 19). He attributed the conduct resulting in the violations to the stress in Mr. Murtha's life at the time. He accepted Mr. Murtha's explanation that he allowed the hundreds of overdrafts in order not to upset his ill wife. (T. 408)(A. 24).

He concluded that Mr. Murtha's sloppiness "needs to end now." (T. 409)(A. 25). As a result, he announced that he was going to reinstate Mr. Murtha with eighteen months' probation. During the probation, he explained Mr. Murtha would be a lawyer, but he could not handle money. All money would be handled by a CPA. (T. 412-414)(A. 28-30). Beginning immediately, in October 2020, he was to meet with a CPA. (A. 28). After April 2021, he could begin to handle money. He also wanted him to continue seeing a mental health counselor. He told him to file timely and complete tax returns in the future using a CPA. (T. 416)(A. 32). He ordered him to conduct therapeutic talks to groups of lawyers about the problems he had faced. (T. 417-418)(A. 33-34). It is not entirely clear whether the Referee thought he was reinstating Mr. Murtha, although some of his pronouncements sound as if he is. He recognized that this Court would conduct a review. (T. 419-421)(A. 35-37).

Following the oral pronouncement, a consistent Report of Referee was prepared and filed by the Referee in this Court.

The Bar filed a motion to assess costs. (Tab #44). The Petitioner responded. (Tab #47). Following a hearing, the Referee entered an order on costs. (Tab #51)(A. 48-49). The Bar agrees with the Referee's award of

costs, but the order is not actually a recommendation to this Court. It is equivalent to a cost judgment in a civil case.

SUMMARY OF THE ARGUMENT

A license to practice law is a conditional privilege. Rule 3-1.1. Once a lawyer's license is suspended, reinstatement is more a matter of grace than of right, and it is dependent upon rehabilitation. *The Florida Bar v. Jahn*, 559 So. 2d 1089, 1090 (Fla. 1990). The petitioner knows when he or she files the petition that the privilege to return to the practice of law must be established by clear and convincing evidence.

But in this case, Mr. Murtha was suspended primarily because he could not keep his trust account in order. During his suspension, Mr. Murtha did little or nothing to learn how to organize himself and maintain proper financial accounts. He did receive some limited psychological help, but his problems with the trust account predated the stress in his life that brought on anxiety, and his problems with trust accounts and finances in general continued after his psychological treatment.

Mr. Murtha's lack of attention to, or disinterest in, both the Florida Bar Rules and this Court's order caused him to:

(1) Work either as a paralegal while violating the quarterly reporting requirements of Rule 3-6.1, or as a lawyer to help his younger brother practice law.

(2) Continue to write checks and deposit money into his trust accounts beyond the 30 days this Court gave him to close his practice.

(3) Leave more than $20,000 in a trust account for nearly three years during his suspension, and then write checks to clients and himself years after he was prohibited from dealing with his trust account.

(4) Fail to file timely tax returns in 2015 through 2018, and then file returns in 2019 and 2020 for those years that omit S-corporation earnings and do not account for sizeable discrepancies in his law firm's operating account.

(5) Keep his law firm's operating account open during the suspension, allowing it to be overdrawn for long and repeated periods of time, incurring bank charges amounting to more than $18,000, supposedly because he did not want to tell his wife about a problem he could solve by transferring $1,500 to that account to prevent overdrafts.

Mr. Murtha was well aware before the hearing in this case, that the Bar's investigation had discovered these problems and regarded them both

as a failure to rehabilitate himself and as multiple acts of disqualifying conduct. Still, he had no legitimate explanation for failing to file the quarterly reports and work within the bounds of an authorized paralegal. He had no rational explanation of how a lawyer with a computerized debt collection practice could use TurboTax and still fail to report S-corporation income. He did not even try to explain the discrepancies between his tax returns and his law firm's operating account. He thought the Bar gave him oral authority to continue using his trust account beyond the 30-day period to close his practice. He explained his delay for three years in clearing his trust account as a matter of being overly cautious.

The Referee recommends reinstatement with a host of conditions of probation that appear designed to rehabilitate Mr. Murtha. The recommendation seems more like the terms of a criminal sentence, than findings of fact and a reasoned explanation about Mr. Murtha proving that he has already rehabilitated himself and has established, clearly and convincingly, that he is ready to return to practice. This Court should reject that recommendation because it is not based on the competent, substantial evidence. It should encourage Mr. Murtha to reapply when he has actually prepared himself to prove his entitlement to return to the privilege of practice.

The Referee also oddly required the parties to engage in civil mediation. As this brief explains, the goals and the procedures of mediation are entirely inconsistent with the goals of this original proceeding, the function of a referee, and the procedures applicable to this proceeding. This Court should hold that the rules governing mediation do not apply in reinstatement proceedings.

THE DECISION-MAKING PROCESS IN A REINSTATEMENT PROCEEDING AND THE STANDARD OF REVIEW

In a typical review of an opinion from a district court of appeal, the parties are obligated to discuss the standard of review in their briefs. But this is an original proceeding filed under this Court's exclusive jurisdiction to "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const.

Nevertheless, it is still useful to begin a review of the referee's report with a consideration of the decision-making process used by the referee in making a recommendation to this Court, and the applicable rules governing this Court's ultimate determination on the issue of reinstatement. It helps everyone focus on the structure that leads to a correct decision.

A lawyer who is ineligible to practice law due to a court-ordered disciplinary suspension of 91 days or more may petition for reinstatement.

Rule 3-7.10(a). When the petition is filed in this Court, the matter is usually referred to a referee who makes a "determination of fitness," considering factors, including (1) disqualifying conduct, (2) character and fitness of the petitioner, and (3) whether the petitioner has been rehabilitated. Rule 3-7.10(f).

"A petitioner seeking reinstatement to The Florida Bar must establish by clear and convincing evidence that he has met the criteria set forth in Rule Regulating the Florida Bar 3–7.10, [the] 'Reinstatement and Readmission Procedures,' and the decisions of this Court. *See The Florida Bar v. McGraw*, 903 So. 2d 905, 909 (Fla. 2005))". *The Florida Bar v. Wolf*, 21 So. 3d 15, 17 (Fla. 2009).

The referee's determination is memorialized in findings of fact and a recommendation, which are filed with this Court as the Report of Referee. Rule. 3-7.10(h) & (j).

This Court reviews the report under Rule 3-7.7. "[I]n connection with a reinstatement proceeding, 'the party seeking review of the referee's recommendation has the burden to demonstrate that the report is erroneous, unlawful, or unjustified.' *The Florida Bar v. Dunagan*, 775 So. 2d 959, 961 (Fla. 2000) (quoting *The Florida Bar v. Grusmark*, 662 So. 2d 1235, 1236 (Fla. 1995))." *The Florida Bar v. McGraw*, 903 So. 2d 905, 910 (Fla. 2005).

In that review, as in most other trial settings, findings of fact and resolving conflicts in the evidence are the responsibility of the referee. *See The Florida Bar v. Hooper*, 509 So. 2d 289, 290–91 (Fla. 1987). To successfully challenge a referee's findings before this Court, a party must demonstrate that there is no evidence in the record to support the referee's findings or that the record evidence clearly contradicts the conclusions. *See, e.g., The Florida Bar v. Elster*, 770 So. 2d 1184, 1185 (Fla. 2000); *The Florida Bar v. Carricarte*, 733 So. 2d 975, 977 (Fla. 1999). The Court defers to the referee's assessment and resolution of conflicting evidence because the referee is in the best position to judge the credibility of the witnesses. *See The Florida Bar v. Batista*, 846 So. 2d 479 (Fla. 2003). *See The Florida Bar v. O'Connor*, 945 So. 2d 1113, 1117 (Fla. 2006).

Issues of law, as in typical appellate review, are reviewed de novo. *See The Florida Bar v. Kane*, 202 So. 3d 11, 19 (Fla. 2016).

But the recommendation for or against reinstatement is ultimately the responsibility of this Court. It is reviewed with a broader standard. *The Florida Bar v. Hochman*, 944 So. 2d 198, 200–01 (Fla. 2006). If the recommendation of reinstatement has a basis in existing case law, the Court will not second-guess the referee. *See The Florida Bar v. Hernandez–Yanks,* 690 So. 2d 1270, 1272 (Fla. 1997).

ARGUMENT

I. The Referee erred by ordering mediation in a reinstatement proceeding.

On several occasions during this proceeding, the Referee seems to have blurred the line between the functions of a trial judge and that of a referee. The entry of a cost order in the format used in civil cases blurs the line, but that is mostly harmless. Beginning Mr. Murtha's probation immediately after the Referee's hearing is probably improper, but Mr. Murtha did not object and the conditions of probation may help him actually achieve rehabilitation so that his next petition should be successful.

But the order to conduct civil mediation cost both sides time and money and could only serve to delay this original proceeding. Hopefully, other Referees will not do this often, but the Bar requests that this Court announce in this case that civil mediation, i.e. Florida Rules of Civil Procedure 1.700 – 1.730 and Chapter 44, Florida Statutes, does not apply in a quasi-judicial reinstatement proceeding.

Rule 3-7.6 discusses the procedures before a referee. It explains in subsection (f):

> (f) Nature of Proceedings.
>
> (1) *Administrative in Character.* A disciplinary proceeding is neither civil nor criminal but is a quasi-judicial administrative

> proceeding. The Florida Rules of Civil Procedure apply except as otherwise provided in this rule.

This rule suggests that all rules of civil procedure apply in proceedings before a referee unless the rules actually state otherwise. This may have prompted the Referee to do what he did.

But this Court has clearly explained in *The Florida Bar v. Lobasz*, 64 So. 3d 1167, 1171 (Fla. 2011):

> The Rules of Civil Procedure apply in attorney disciplinary proceedings before a referee **to the extent that they are not inconsistent with any provision of Rule Regulating the Florida Bar 3–7.6** (governing procedures for proceedings before a referee). *See The Florida Bar v. Daniel*, 626 So. 2d 178 (Fla. 1993).
>
> (emphasis added).

Thus, the question is whether the civil rules of mediation are inconsistent with Rules 3-7.6 and 3-7.10.

Civil mediation is a process to bring litigants in civil lawsuits together, privately, in a closed-door setting where they can talk to one another, off the record, with the help of an experienced facilitator. The goal is to achieve a settlement that ends the lawsuit. In almost all cases, that settlement requires compromise by both sides. The nature of many civil claims allows for that compromise.

To assist this process, Rule 1.720(b) requires that the party "or a party having full authority to settle without further consultation" attend the mediation. When the mediation is complete, if the parties reach agreement, under Rule 1.730(b) the parties reduce the agreement to writing. Normally, the agreement requires the filing of a stipulation of dismissal, a voluntary dismissal, or some form of consent judgment.

When this process is compared to a quasi-judicial proceeding for reinstatement, it is obvious that mediation is inconsistent with the procedures under 3-7.6 and 3-7.10:

1. Neither the Court nor the Bar is a true party in a petition for reinstatement. Rule 3-7.10(e) explains that the Bar "may" appoint bar counsel to represent the Bar. The rule further states that it is the lawyer's "duty to appear at the hearings and to prepare and present to the referee evidence that, in the opinion of the referee or lawyer, will be considered in passing on the petition." Thus, the Bar facilitates reinstatement proceedings, acting similar to a party, but it is not given "full authority" to settle the matter.

2. Instead of full authority to settle, the bar counsel is given limited authority to stipulate to the issue of reinstatement under Rule 3-7.10(g)(4). But bar counsel can only do that if he or she has been "unable to discover any evidence" and if "no other person provides any relevant evidence" on

which denial of reinstatement may be based. As explained in the statement of facts, the Bar had discovered ample evidence on which denial of reinstatement could be based. Even when the Bar can enter into a stipulation, it cannot "settle" the case. The stipulation must be submitted to this Court, which has the power to reject the stipulation especially if new evidence emerges.

3. Reinstatement proceedings are not private disputes. Bar counsel cannot shut the doors to sunshine, engage in settlement negotiations that are "confidential," and enter into a compromise settlement agreement with a petitioner. *See* §44.405, Fla. Stat. (2020).

4. The Referee has no authority to dismiss a petition. The standard order to appoint a referee issued in this case on November 7, 2019, states:

> The referee shall thereafter hear, conduct, try, and determine matters which shall be presented at the final hearing, and thereafter shall submit findings of fact and recommendations to the Supreme Court of Florida as provided in rule 3-7.10(h). . . . Pursuant to rule 3-7.10(h), any order by the referee regarding disposition of the case shall be merely a recommendation to this Court. Such an order shall not dispose of the proceedings. This Court shall review and, if appropriate, approve the referee's recommended disposition order

Thus, the referee is required to try the case, not to order meaningful mediation.

5. Both disciplinary proceedings and reinstatement proceedings are regarded as matters that need to be expedited. This Court typically orders that the report must be filed within 180 days, and it closely monitors delays in these proceedings. Civil proceedings generally have no such time requirements. A delay for three or four months to engage in mediation that may remove a case from a trial court docket may be time well spent. But mediation in this context is merely a costly delay.

Accordingly, the Bar asks this Court to hold that the Referee erred as a matter of law in requiring mediation and to state that the civil rules relating to mediation do not apply in reinstatement proceedings.[1]

II. Mr. Murtha did not present competent substantial evidence to support reinstatement.

In the joint pretrial statement in this case, the Bar substantially narrowed the issues for hearing. (Tab # 42)(A. 38-41). It explained that the focus of the hearing would involve disqualifying conduct, which would show

[1] The Bar likewise submits that mediation does not apply in disciplinary proceedings or contempt proceedings. The application of mediation in those contexts is not squarely presented in this case, but it may be appropriate for the Court to clarify that mediation does not apply to any of these original proceedings.

that Mr. Murtha had not yet rehabilitated himself to be qualified to return to the practice of law. The disqualifying conduct identified in the pretrial statement includes:

1. Misconduct in employment. Rule 3-7.10(f)(1(D);
2. Neglect of professional obligations. Rule 3-7.10(f)(1)(H);
3. Financial irresponsibility. Rule 3-7.10(f)(1)(G);
4. Violation of the disciplinary order. Rule 3-7.10(f)(1)(I); and
5. Evidence of mental or emotional instability. Rule 3-7.10(f)(J).

At the end of the case, the Referee was ready to rule even before Mr. Murtha presented his rebuttal. (T. 396-97). The Bar includes the Referee‘s oral pronouncement in the appendix because it is probably a more complete and accurate version of the Referee's findings and recommendations. (A. 14-37).

The Referee focused on matters that were not significantly disputed. Mr. Murtha is not a suspended lawyer who did fraudulent or deceitful acts. He appears to be a good husband and a man who cares about his community. At the time of the events that resulted in his suspensions, he was under significant stress due to his wife's health and other family issues. He showed no malice toward the Bar or this Court.

But the evidence establishes that he has engaged in extensive disqualifying conduct since his first suspension in November 2016. Mr. Murtha did not even attempt to refute or explain much of that conduct, and his mental health issues do not appear to be a basis to overlook this conduct and reinstate him. The Referee did not make actual findings of fact on much of the disqualifying conduct at issue during the hearing.

The Referee explained that he has an extensive background in criminal court and mental health court. (T. 410, 415). His pronouncement reads like a judge in a criminal division imposing probation on a defendant who needs mental health rehabilitation during the term of his sentence. He begins by examining Mr. Murtha's state of mind in 2015 and 2016, at the time of the trust account violations that led to his suspension. (T. 404). That perhaps is not irrelevant, but it is only the baseline from which one evaluates whether a suspended lawyer has established by clear and convincing evidence that he is rehabilitated and ready to return to the practice of law.

Then the Referee explains:

> And, Mr. Murtha, I'll say I don't know that you're capable of ending this, but I'm going to – what I'll end up doing here hopefully will help and give you tools to do so, because it has to end. It's going to be your downfall completely if it doesn't end.

The Referee concludes:

> And the Court finds with safeguards being put in place that the burden has been met by Mr. Murtha for him to be – with safeguards – to be reinstated as a member of The Florida Bar. He's shown sufficient evidence to satisfy the standard of law required. There needs to be a lot of tools in Mr. Murtha's life to catch him before he falls. Anxiety is not cured, it's addressed and rears its ugly head, as I said.

But the long list of "safeguards" in the conditions of probation demonstrate that Mr. Murtha is not ready to handle money unsupervised. He needs to work with a real CPA to understand how to get his law firm in order, and he never did these steps during his suspension.

Unauthorized work as a paralegal or work as a lawyer.

Turning to the disqualifying acts, as explained in the statement of the facts, the Bar presented undisputed evidence that Mr. Murtha continued to work either as a paralegal or a lawyer after June 2017 without filing the quarterly reports required by Rule 3-6.1(e). That is both misconduct in employment and neglect of a professional responsibility. The Referee simply ignored this conduct as "sloppiness." For more than two years both Mr. Murtha and his brother ignored a rule that is clear upon its face. They ignored a rule that they knew about and had even obeyed for six months. That sloppiness is clear neglect of a professional responsibility.

Mr. Murtha alleged in his own petition that he worked as a paralegal. He testified that he prepared complaints with his software program and did

research. Frankly, without the quarterly reports, it is hard to tell whether he crossed the line to practicing law, but there is no dispute that he performed as an unauthorized paralegal.

Part of the problem is that Mr. Murtha turned to his younger brother for whom he had been a mentor. Mr. Murtha had a skill set that would easily have allowed him to work in debt collection for a collection agency or for another law firm. But instead of taking a path on which it would have been easy to obey the rules and demonstrate that obedience, he put his younger brother in a difficult spot.

Mr. Murtha simply left The Murtha Law Group, P.A. in existence as a law firm without a lawyer when he was suspended. Kevin Murtha did not join that law firm or even deal with its trust account. (T. 125). Kevin Murtha had payments from creditors deposited into his law firm's trust account after he took over that function. Mr. Murtha left his firm's trust accounts open with money undistributed for years. He left its operating account open, seemingly treating it as if it were his personal account for general use. In 2019, he filed late tax returns for 2017 – for a law firm that had no lawyer.

<u>Serious financial irresponsibility concerning his taxes.</u>

The Bar also demonstrated serious financial irresponsibility concerning the law firm's and Mr. Murtha's personal federal income tax returns and

payments. Knowing that accurate tax returns would be a requirement for reinstatement, Mr. Murtha did not file timely tax returns while on suspension. His 2015 returns for the law firm, filed in 2019 reported $59,483.00 in S-corporation income. Despite his legal training and proficiency with a computer program designed to run a debt collection law firm, Mr. Murtha claimed he did not figure out how to input data in TurboTax so that he could properly pay the personal income tax he actually owed for 2015.

His tax return for 2016 had identical problems. His tax return for 2017 was also filed on a Form 1040A, and it was filed in 2019, explaining that his occupation was "attorney." His 2018 return was not filed until 2020, after this petition was filed. One would think that a suspended lawyer who knew he was "probably not the greatest" at filling out tax forms – and was years behind on tax forms that he knew needed to be in total order when he applied for reinstatement – would arrange to have his taxes done by a qualified CPA. But even when the Bar discussed this problem with Mr. Murtha, he supposedly went to Ron Motty who told him his returns looked okay, and that he did not need to do anything unless the IRS called him.

Ron Motty did not testify. Knowing that this issue would be central to his hearing, Mr. Murtha presented no evidence to explain his taxes. Even in closing argument his attorney avoided this subject.

The Bar's branch auditor and CPA also found "discrepancies" between the deposits to the law firm's operating account and its income between 2015 and 2017. These discrepancies totaled more than $170,000. Knowing about this problem well in advance of the hearing, Mr. Murtha presented no significant testimony to demonstrate that this was not simple tax evasion when he filed his returns in 2019. The failure to present anything of substance on these discrepancies can only indicate that Mr. Murtha could not explain why these sums were not income.

A licensed lawyer who knows he failed to report large sums of S-corporation income from his law firm on his personal tax return, even by accident, should be expected to rectify the problem and pay his fair share to the federal government. It is not enough to sit silently hoping that the IRS does not contact you within the statute of limitations.

As the Bar discussed with the Referee, before Mr. Murtha filed this petition, this Court had already placed applicants on notice that income tax irregularities and the failure to disclose unfiled returns could result in a denial of a petition. *See The Florida Bar v. Lopez*, 545 So. 2d 835, 836 (Fla. 1989). It is a violation of Bar rules to fail to file tax returns. *See The Florida Bar v. Erlenbach,* 138 So. 3d 369, 370 (Fla. 2014).

The Referee made no findings of fact about the tax returns. Instead, he states:

> I want you to make sure your tax returns – your CPA will – will be filed timely and completely and signed. No sloppy, sloppy, sloppy. No sloppy, sloppy, sloppy.

With all due respect, the Bar is not convinced that the competent substantial evidence in this case demonstrates that Mr. Murtha's failure to use a proper Form 1040 and his failure to input the income from his law firm when using TurboTax is a matter of sloppiness. Mr. Murtha was well-experienced with a sophisticated computer program used to perform commercial debt collection, but somehow could not use tax software designed to be used by people with far less education. The IRS provides online instructions and explanations for virtually all tax issues, which may sometimes be hard for a high school graduate to fully comprehend. But with his law degree, Mr. Murtha cannot justify omitting S-corporation income from his personal tax return merely with an explanation that he is not good with tax forms. The evidence suggests this is serious financial irresponsibility that is either intentional or grossly negligent, and Mr. Murtha did not present evidence to the contrary.

Trust account violations.

This Court ordered Mr. Murtha to close his practice within thirty days of October 13, 2016 in SC15-2011. This Court ordered that closure, in part, due to trust account issues. But it is undisputed that Mr. Murtha violated that order by continuing to make deposits and write checks on his Chase trust account until at least February 2017. The Referee made no findings on this, but this conduct is a clear violation of a disciplinary order from this Court, as well as neglect of a professional obligation.

To be clear, this Court held Mr. Murtha in contempt and suspended him for an additional year due to a violation of this same order. But that violation stemmed from failing to notify judges he was suspended, not from these trust account violations.

Moreover, Mr. Murtha left more than $21,000 in his Wells Fargo trust account for nearly three years, until September 2019, without arranging for an inventory attorney or for some other attorney to have check-writing authority on the account to distribute the funds timely. Then, in violation of this Court's order, he wrote checks on the Wells Fargo trust account to clients and to himself to reduce the balance to about $100. Mr. Murtha's explanation was that he violated the rules because he was trying to be overly cautious. The Referee did not make findings or discuss this violation.

Especially when the conduct causing a suspension is trust fund related, this Court has already explained that further trust fund violations are a ground to deny reinstatement. *See The Florida Bar v. Wolf,* 21 So. 3d 15, 18 (Fla. 2009).

<u>Financial irresponsibility with the operating account.</u>

Mr. Murtha allowed the law firm's operating account to remain overdrawn for 524 days during the period of his suspension. Although Mr. Murtha called no witness from the bank, he claimed that the bank covered these overdrafts, charging him a fee. The law firm sustained bank charges in excess of $18,000, when simply placing a cushion of even $1,500 in the account would have kept it out of the red.

Mr. Murtha explained that he did this because his wife was ill and upset about using their savings to live during the suspension. The Referee found this explanation to be truthful. The Bar does not challenge that finding.

But Mr. Murtha did not need to place money into this account to spend. The records show that the account simply had a very low balance. The account was never more than $1,500 in the red. Thus, it would have been a fairly simple explanation to his wife that he was not going to spend this $1,500; he was simply going to move it to another account where the return on the investment would be far higher because it would avoid bank charges.

As explained in the statement of facts, Mr. Murtha continued to overdraft this account after he finished his psychological treatment and even after he filed this petition for reinstatement. It is one thing to explain his trust account violations years ago on the then-existing stress in his personal life. It is quite another to justify this continuing irrational overdraft conduct on psychological problems. Without regard to whether this conduct is caused by sloppiness, mental health issues, or something else, the handling of the operating account is financial irresponsibility. It probably is not as bad as the overdrafts in *The Florida Bar v. Roberts*, 721 So. 2d 283, 285 (Fla.1998), where the suspended lawyer made good on the numerous checks that were declined, but it is still financial irresponsibility.

This financial irresponsibility by itself might not prevent reinstatement, but when it is coupled with disqualifying conduct involving trust account issues, the unauthorized work as either a paralegal or a lawyer, and the federal tax issues, the combined set of disqualifying conduct clearly warrants denial of this petition. *See The Florida Bar v. Wolf,* 21 So. 3d 15, 18 (Fla. 2009).

<u>Evidence of mental or emotional instability.</u>

The Bar in this review is not claiming that emotional instability would be sufficient disqualifying conduct to require denial of reinstatement in this

case. Laura Willis, both in 2017 and 2019, opined that Mr. Murtha was psychologically ready to return to practice. The Referee explained that Mr. Murtha had "the normal anxiety that happens in life, and you need to deal with it because there's a lot on your plate." (T. 415).

But the Bar submits that most of the disqualifying conduct – the serious problems with the tax returns in 2019 and 2020, the handling of the Wells Fargo trust account, the unreported paralegal work, and the irrational overdrafting of the operating account – all occurred long after the period of stress and even after Laura Willis believed he had made a good psychological recovery in 2017. There is no evidence tying the disqualifying conduct to any period of acute mental instability. Instead, it appears that the disqualifying conduct is the result of Mr. Murtha's indifference to knowing the rules and practicing within those rules.

This pattern of indifference to knowing the rules and practicing within those rules goes all the way back to 2002 and his first disciplinary problem when he practiced law while administratively suspended for a CLE issue. It occurred again in 2012 with his first trust account violation. This is not a problem that arose when his wife got ill thereafter.

Mr. Murtha has practiced, essentially as a sole practitioner, performing commercial debt collection, where attention to detail and total

compliance with trust account requirements is critical. And yet, even as he applied the third time for reinstatement, he did not seem to understand the rules or care to study them enough to appreciate what steps he needed to take to overcome a long-term serious problem that has been generously described by the Referee as being "sloppy and disorganized."

It is the Bar's position that, prior to filing a petition for reinstatement, Mr. Murtha must be prepared to show by clear and convincing evidence that during his period of suspension he has rehabilitated himself – (1) by learning the steps it takes to stay organized, (2) by obtaining the necessary professional help to keep his law firm and personal finances separate, organized, and lawful, and (3) by familiarizing himself with all of the Bar Rules, including the rules related to trust accounts, that govern the activities of licensed lawyers in order to comply with those rules when reinstated. But Mr. Murtha clearly failed to take to take these steps before he filed this petition or the prior two petitions. The Bar respectfully suggests that the Referee is recommending a period of probation, hoping that Mr. Murtha will eventually accomplish that which he should have done before he ever applied for reinstatement.

The Bar submits that the Referee's recommendation is not supported by competent substantial evidence. This Court should deny Mr. Murtha's

petition for reinstatement, and he should be encouraged to reapply when he has actually performed the steps needed to prepare to practice law.

CONCLUSION

This Court should deny the petition for reinstatement. It should award costs to the Bar as recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 15th day of January 2021 to:

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