IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Case No. SC02-1537

Re: PETITION FOR REINSTATEMENT
OF ANDREW REYNOLDS McGRAW

TFB No. 2003-00,019(1A)(NRE)

_____/

PETITIONER'S ANSWER BRIEF

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Answer Brief of The Florida Bar Re: Petition for Reinstatement of Andrew Reynolds McGraw, Case No. SC02-1537, TFB No. 2003-00,019(1A)(NRE), is submitted in 14-point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Anti-Virus for Windows.

_____

John A. Weiss
Counsel for Respondent

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JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Articles V, VI and XV of the Constitution of the State of Florida.

PRELIMINARY STATEMENT

Appellee, Andrew Reynolds McGraw, shall be referred to as "Petitioner" or "Mr. McGraw" throughout this brief. Appellant, The Florida Bar, shall be referred as such or as "the Bar".

References to the transcript of the final hearing held on July 25, 2003 shall be designated as "TR" followed by the appropriate page number. Any other transcript shall be referred to by the designation "TR" with the date of that of that particular hearing and followed by the appropriate page number. The Report of Referee shall be designated "ROR" followed by the appropriate page number.

All exhibits entered into evidence at the hearings in the instant case shall be referred to as "TFB Ex." or "P Ex." for Bar and Petitioner exhibits respectively.

STATEMENT OF THE CASE

Petitioner cannot accept the Bar's statement of the case as written. It is argumentative, states its position on disputed issues as absolute fact and fails to distinguish between the instant proceedings, Case No. SC02-1537, and the

predecessor proceedings, Case No. SC00-69. The Bar's statement of the case gives the appearance that the two cases were but a single proceeding. For ease of this Court's review, Petitioner will set forth the progression of both cases starting with the case before the Court on this date first.

Case No. SC02-1537. These proceedings were initiated by Petitioner's filing his petition for reinstatement in this Court on July 10, 2002. The Honorable Michael Jones, Circuit Judge, was appointed Referee on July 31, 2002. Judge Jones was the Referee that had presided over Petitioner's earlier reinstatement proceedings.

The original final hearing was continued. After discovery was completed, final hearing was held on July 25, 2003.

Subsequent to the July 25, 2003 final hearing, Petitioner filed his motion for leave to submit additional evidence. That motion was granted. Additional proceedings were conducted on October 14, 2003. The Referee's 39-page report was served on November 20, 2003.

Case No. SC00-69. On January 11, 2000, Mr. McGraw filed his first verified petition for reinstatement. After discovery occurred, final hearing was held on December 13, 2000. Oral argument subsequent to final hearing took place on January 4, 2001.

On January 11, 2001, Petitioner tested positive for cocaine during a random urinalysis. The Bar moved to reopen the evidentiary record and, after argument on January 25, 2001, the motion was granted. A supplemental hearing on the Bar's motion was scheduled for April 24, 2001. On March 5, 2001, Petitioner filed a voluntary dismissal of his petition for reinstatement. Subsequently, the Referee recommended that the petition for reinstatement be dismissed and, on November 21, 2001, the Supreme Court approved the Report of Referee, dismissed the proceedings and assessed costs.

STATEMENT OF THE FACTS

Petitioner cannot accept The Florida Bar's statement of facts as written. They are argumentative, fail to distinguish between the instant action and the earlier proceedings, and assert disputed issues as absolute fact notwithstanding findings to the contrary by the Referee. (Petitioner hastens to add that he is not stating that the conduct that led to the dismissal of his first petition is irrelevant in these proceedings; he merely emphasizes that two separate cases have appeared before this Court and they should not be considered as a single proceeding.)

The Referee made extremely detailed findings of fact on pages 3-23 of his report. The overwhelming majority of those factual findings were stipulated. Those findings are quoted below. All emphasis and footnoting are those of the Referee's.

STATEMENT OF UNDISPUTED FACTS[1]

1. McGraw was admitted to The Florida Bar on July 22, 1994.

2. Beginning in March 1997, the Supreme Court of Florida entered three disciplinary orders against McGraw.

3. McGraw was charged with a felony sexual battery upon a person under 16 but over 12 years of age. After the jury trial ended in a hung jury, McGraw pled *nolo contendere* on February 11, 1997 to misdemeanor battery. The court sentenced him to11 months in the Escambia County jail–to be served at a work camp. The court also ordered McGraw to write a letter of apology to the victim, pay for counseling, and pay other fees and costs.

4. In the first disciplinary case, Case No. 90,086, the Supreme Court of Florida granted The Florida Bar's Petition for Emergency Suspension, pursuant to R. Regulating Fla. Bar 3-5.2, on March 25, 1997, effective April 7, 1997.

5. Following McGraw's misdemeanor battery conviction, The Florida Bar opened a second disciplinary complaint, Case No. 92-473, and McGraw eventually entered into a consent judgment with The Florida Bar in that proceeding. The consent judgment provided that McGraw would be suspended from the practice of law for two years, effective April 7, 1997, the date of the initial emergency suspension, and that, following his release from jail, McGraw would enter into a three-year contract with Florida Lawyers Assistance, Inc. ("FLA"), serve three years probation after reinstatement, and pay taxable costs to The Florida Bar.

6. In the third disciplinary case, Case No. 93,175, McGraw received a discipline of suspension from the practice of law for 91 days, to run concurrent with the two-year suspension, for failing to diligently pursue and to properly communicate with a client who was charged with second degree

[1]Portions of the following statement were taken from the parties' JOINT STATEMENT OF CASE, STATEMENT OF UNDISPUTED FACTS, AND STATEMENT OF LAW

murder. In addition to its 91-day suspension of McGraw, the Supreme Court placed him on probation for one year, to run concurrent with the three-year probation in Case No. 92,473, and required him to pay $5,000 in restitution to his former client upon reinstatement, in addition to payment of taxable costs to The Florida Bar. McGraw submitted to The Florida Bar the required notice to clients and affidavit, pursuant to R. Regulating Fla. Bar 3-5.1(g), on September 12, 1999. *See Petitioner's Exhibit 5.* Both the two-year suspension and the 91-day suspension required proof of rehabilitation before reinstatement.

7. Upon release from jail following completion of his incarcerative sentence for misdemeanor battery, McGraw entered into a three-year FLA contract covering October 13, 1997, through October 13, 2000. *Petitioner's Composite Exhibit 1, TFB Exhibit 15.* In it, McGraw agreed to "totally refrain from the use of all mood altering substances, including alcohol," report to David Grady, LMHC, for evaluation and treatment; report to Stan Spring, FLA's monitor, on a monthly basis; participate in a 12-step Self Help Program, with a minimum of 90 AA/NA meetings in 90 days, then 3 meetings per week; and "keep an accurate record of AA/NA meetings and submit an acceptable monthly report to FLA." Additionally, this FLA contract required McGraw to attend one attorney support meeting per week and submit to "quarterly random urine drug/alcohol screens."

8. McGraw tested positive for cocaine on one of his drug screens in April 1998,and he was arrested for DUI in January 1999. *See Petitioner's Composite Exhibit 2,* Cohen Affidavit dated 4/19/00. As noted previously, the DUI charge was resolved when McGraw pled *nolo contendere* to the lesser offense of reckless driving. He was adjudged guilty, given 6 months probation, and required to attend DUI school. He attended Lakeview Center DUI School and received a Certificate of Completion on August 25, 1999. *Petitioner's Exhibit 8.* He satisfactorily completed probation in September 1999.

9. On March 31, 2000, Doris Braddock, an employee at Alvin's Island on Pensacola Beach, filed a police report in which she stated that while she was at work, McGraw approached her to ask the whereabouts of the store manager, and that when she was walking in front of McGraw to take him to this person, McGraw "grabbed her butt." Evidence existed that McGraw had consumed alcoholic beverages preceding the incident. No criminal charges were filed. *TFB Exhibit 6.* McGraw denied Ms. Braddock's allegations. Ms.

Braddock testified at the final hearing on the original Petition for Reinstatement in December 2000, and the Referee considered her testimony to be credible.

10. Pursuant to The Florida Bar counsel's request in the first Reinstatement proceeding, Myer ("Mike") J. Cohen, Executive director of FLA, submitted an affidavit on April 19, 2000, regarding McGraw's fitness to resume the practice of law. *Petitioner's Exhibit 2.* Mr. Cohen detailed McGraw's activities from August 1996 to April 2000 and concluded:

> . . . [I]t is the opinion of Florida Lawyers Assistance, Inc. that Mr. McGraw's chemical dependency is not in sustained remission, that this condition would impair his ability to practice law at this time, and that reinstatement to practice would represent a danger to his clients and the public. (Emphasis supplied)

11. Upon receipt of this FLA affidavit, McGraw's counsel obtained a continuance of McGraw's reinstatement hearing from July 10, 2000, to December 13, 2000.

12. McGraw entered the Twelve Oaks Treatment Center for substance abuse treatment on June 5, 2000, and was released on June 23, 2000. *Petitioner's Exhibit 7. See also TFB Exhibit 1.* In the medical discharge summary, Dr. Rick Beach, M.D., Medical Director, stated:

> In summary of treatment progress, the patient was more compliant than accepting. The patient did complete assignments and participated in groups. He appeared to keep a very safe and superficial level in dealing with his drug use and negative consequences. The patient struggled with his ability to see his own behaviors. He was confronted in one of my groups about willingness to go to any lengths for his sobriety and it became evident that he had not been totally honest with his fellow patients and did not have an attitude of willingness to do whatever it would take for his sobriety. To the group process he showed a very wilful attitude in wanting to do things his way. (Emphasis supplied)

TFB Exhibit 1. See also, 1T-81-82.

13. Dr. Beach recommended an extended long-term residential treatment program for McGraw, which McGraw refused to do. Dr. Beach concluded:

> [McGraw's] prognosis for continued abstinence from alcohol and other drugs is most likely very poor without some type of extended treatment in view of his ability to honestly assess his own behaviors. I would have serious concerns about this patient returning to the practice of law and being able to do so with reasonable skill and safety, and having the ability to appropriately represent clients. (Emphasis supplied)

TFB Exhibit 1. See 1T-82-89.

14. Subsequently, Mr. Cohen provided Bar counsel with another affidavit, dated November 15, 2000, acknowledging that after Cohen's first recommendation against McGraw's reinstatement, McGraw began to make a "concerted effort to attend AA and attorney support meetings called for in his FLA contract." *Petitioner's Composite Exhibit 2,* Cohen Affidavit dated 11/15/00. Mr. Cohen noted McGraw's residential substance abuse treatment at Twelve Oaks from June 5 through June 23, 2000, but observed, "Mr. McGraw refused to accept the recommendation made by his treatment team that he enter an extended residential treatment program specializing in treatment of professionals." *Id.* Mr. Cohen concluded:

> 8. Based on the above, it is the opinion of Florida Lawyers Assistance, Inc. that although Mr. McGraw may have remained chemically abstinent since his discharge from treatment, his prognosis is *guarded* at this time. While it is FLA's opinion that his current condition would likely *not* impair his ability to practice law, it is recommended that should he be reinstated to practice, such reinstatement be subject to a minimum three-year probationary period with the following conditions:
>
> a. Weekly urinalysis testing for the first year, twice monthly for the second year, and monthly for the final year;
> b. Face to face meetings with monitor twice monthly;

c. Attendance at the weekly FLA attorney support meeting;
d. Attendance at not less than three 12 Step (AA or NA) meetings per week for the first two years, and two meetings per week for the final year; and
e. That any failure to comply with the conditions of probation result in either immediate placement of Mr. McGraw on the inactive list or imposition of minimum 91 day suspension.

Id. (Emphasis supplied)

15. At the December 13, 2000, final hearing on the first Petition for Reinstatement, McGraw presented a 3-year FLA contract dated December 5, 2000. *Petitioner's Exhibit No. 1.* The contract required McGraw to "totally refrain from the use of all mood altering substances, including alcohol" and included all the standard provisions of the prior FLA contract, with one exception. McGraw agreed to submit to a minimum of 52 random urine drug/alcohol screens during the first 12 months of the contract, a minimum of 24 random screens for the second 12 months, and a minimum of 12 screens annually thereafter. The FLA contract was dated and signed by Mr. Cohen for FLA and by McGraw, but, apparently, it was never submitted to FLA. *Petitioner's Exhibit 1.*

16. McGraw filed the required quarterly employment reports with The Florida Bar, beginning in 1997 through March 2000. *TFB Exhibit 3.* However, as of the December 13, 2000, final hearing on the first Petition for Reinstatement, he had failed to file quarterly employment reports from March 2000 through December 2000.

17. McGraw was CLER delinquent as of December 8, 2000, because, although he had taken three courses to complete the requirement in 1999, he failed to submit a petition for removal of CLER delinquency and pay the reinstatement fee of $150. *TFB Exhibit 2.*

18. On January 11, 2001, McGraw tested positive for cocaine use during a random drug screening by FLA. On January 22, 2001, Judy Rushlow,

Assistant Director of FLA, issued an affidavit verifying that the test was positive for cocaine and attached to it the verification from a second lab test. *TFB Exhibit 9.*

19. On January 25, 2001, McGraw submitted a sworn affidavit to the Referee testifying that he had not used cocaine since 1997. *TFB Exhibit 18*.

20. On March 5, 2001, McGraw withdrew his first Petition for Reinstatement *via* a Notice of Voluntary Dismissal. Based on this, the Referee recommended that the Petition for Reinstatement be dismissed, and the Supreme Court entered an Order dismissing the first Petition and assessing costs on November 21, 2001.

21. On July 1, 2001, McGraw signed another FLA contract, extending from July 1, 2001 through July 1, 2003. It contained standard provisions requiring McGraw to "totally refrain from the use of all mood altering substances, including alcohol," and to submit to "quarterly random urine drug/alcohol screens." *TFB Exhibit 16*.

22. On July 10, 2002, McGraw submitted a second verified Petition for Reinstatement to the Supreme Court of Florida and the Petition was referred to a Referee pursuant to R. Regulating Fla Bar 3-7.10(d). *Petitioner's Exhibit 11*.

23. Two months later, on September 10, 2002, McGraw voluntarily entered Health Care Connection ("HCC"), a drug rehabilitation center in Tampa, Florida. *TFB Exhibit 12A*.

24. Upon arrival at HCC, McGraw tested positive for cocaine. At that time HCC also observed beer bottles in the trunk of McGraw's car. *TFB Exhibit 12A*.

25. Judith R. Rushlow, Assistant Director of FLA, testified in her affidavit dated November 22, 2002, that:

3. Andrew McGraw has been, and continues to be, under contract with FLA since August 1996, most recently having entered into a three-year contract on July 1, 2001.

4. The relevant provisions of the contract are (a) abstinence from all mood and mind altering substances,(b) attendance at weekly meetings of the local attorney support group, (c) attendance at a minimum of two meetings of Alcoholic Anonymous or Narcotics Anonymous each week, (d) regular meetings with an FLA monitor, and (e) random urine tests.

5. Monitor reports from February 2001 through August 2002 indicate exemplary compliance with provisions (b), (c), and (d), and include favorable comments relative to McGraw's attitude and cooperation.

6. Random urine tests were conducted monthly from January 25, 2001, through July 31, 2002, a total of eighteen (18) tests with all Negative results. (Individual Program History Report attached herewith)

7. Random tests scheduled on nine (9) days, beginning May 3, 2001, through April 19, 2002, were missed as a result of McGraw's failure to contact the testing system, according to procedure, or his reported unavailability for testing after being notified to report for testing. (Tests were rescheduled per Rescheduled Test Report attached herewith.)

8. In September 2002, McGraw telephoned deponent and advised her that he was planning to enter a residential treatment program and was referred to Health Care Connection of Tampa (HCC), a chemical dependency treatment program approved by FLA for treatment of lawyers and judges. At that time there was no admission of relapse, nor explanation given for this decision.

9. On September 10, 2002, McGraw entered HCC and the urinalysis obtained upon admission tested Positive for Cocaine.

10. McGraw continues in residential treatment at HCC as of this date.

TFB Exhibit 10. (emphasis supplied)

26. McGraw remained at HCC until January 7, 2003, when he was discharged. *TFB Exhibit 12A*.

27. Before leaving HCC, McGraw signed another FLA contract for five years, extending January 3, 2003 through 2008. *Petitioner's Exhibit 14*.

28. The January 3, 2003, FLA contract contained the following terms that McGraw agreed to:

1. Comply with and satisfactorily complete the aftercare program recommended by Health Care Connection of Tampa (HCC).

2. Reside at a halfway house approved by HCC or FLA, for a period of time to be determined by HCC, and abide by all rules, regulations and requirements of this half-way house.

3. Totally refrain from the use of all mood altering substances, including alcohol.

* * *

5. Accept Stanley Spring, Esquire as monitor of my performance under this Contract and I assume the responsibility of making at least one personal contact per month with my monitor.

6. Provide my monitor with whatever substantiating documentation the monitor may require to assure compliance with this Contract.

7. Actively participate in a 12 Step or other abstinence based self-help program to be approved by FLA. Participation in such a program should include, at a minimum, the following:
   a. Attendance at 90 meetings in 90 days.
   b. After 90 days, attendance at a minimum of three(3) other meetings per week.

c. Identification and enlisting the aid of a sponsor, mentor, or guide, and giving such individual permission to disclose appropriate information as requested by FLA.

d. Securing and reading the literature endorsed by such program.

e. Encouraging my spouse or significant other to attend a self-help program to promote their recovery.

f. Encouraging my child(ren) to attend a self-help program to promote their recovery.

g. Attend open meetings with my spouse or significant other, if possible.

8. Actively participate in a program of recovering professionals, including attendance at not less that one attorney support meeting per week.

9. Keep an accurate written record of self-help and attorney support meetings and submit an acceptable monthly report to FLA.

10. Submit to and pay for a minimum of six(6) random urine drug/alcohol screens annually pursuant to the FLA/First Lab Random Drug Testing Procedure. Receipt of the written Random Drug Testing Procedure is hereby acknowledged.

11. Participate in continuing private and/or group therapy as required by my monitor or FLA.

12. Immediately notify my monitor and/or FLA in the event I: a) use any mind altering substances; ...

* *

*

18. To the modification of these Contract terms as required by my monitor or FLA if dictated by a change in circumstances.

19. To attend the FLA Annual Workshop, if possible.

Petitioner's Exhibit 14.

29. If McGraw abided by the terms of the Contract, FLA agreed to:

1. Provide a trained and certified individual to act as monitor of the performance required by this Contract.

2. Insofar as addiction and recovery is concerned, and where applicable, assume an advocacy role with the Supreme Court, The Florida Bar, Judicial Qualifications Commission, and Board of Bar Examiners, provided the contract terms are agreed to and met.

3. Assume the responsibility to report compliance and non-compliance with the Contract to the appropriate authority.

Id.

30. In the course of its investigation of the merits of McGraw's Petition for Reinstatement, The Florida Bar learned that McGraw failed to include in his January 11, 2000, verified Petition for Reinstatement and in his July 10, 2002, verified Petition for Reinstatement, the existence of a Final Judgment for rent and costs of $926.50, with 10% interest per annum, entered against him and in favor of Wallace Dawson on September 12, 1996, in Case No. 96-2952-SP-11. The Judgment was filed and recorded on September 13, 1996. As of December 2002, McGraw owed Mr. Dawson $1,686.22. *TFB Exhibit 13*.

31. In the course of its investigation of the merits of McGraw's Petition for Reinstatement, The Florida Bar learned that McGraw failed to include in his January 11, 2000, verified Petition for Reinstatement and in his July 10, 2002, verified Petition for Reinstatement, the existence of a delinquent student loan. A Final Judgment totaling $16,806.80 based upon this student loan was entered against McGraw on August 14, 2002, in Case No. 2000CC 5479, and it was filed and recorded on August 15, 2002. *TFB Exhibit 14*.

32. When McGraw's monitor, Stanley Spring, Esq., filed his Monitor's Report with FLA for June 2003, he included the following narrative:

In view of [McGraw's] final hearing scheduled for July 25 at the start of June and on the date of our support meeting, June 2, I instructed [McGraw] that he should attend a meeting (AA) each day and call his sponsor each day as well as taking action on his 4th, 5th steps with his sponsor. He was in substantial compliance with this request until Wednesday 6-11-03 at 4 PM when he called another atty [sic] in recovery and advised he would be at a 7:30 AM meeting the next morning. He did not appear at the meeting and all the efforts to contact [McGraw] calling his cell phone and office were unproductive until 6PM, 6-15-03 when [McGraw] called my home, and was aware that I was at a meeting (AA) I open and prepare at a local church for an AA group that meets there every Sunday at 6PM.

On Monday on 6-16-03 he called and said he went to Biloxi with his girlfriend and had lost his cell phone.

I told him that I would meet him at the atty[sic] support group meeting with instructions later that day.

At the meeting I advised him that this lapse was a serious matter. He denied drinking and again advised he had gone to Biloxi with his girlfriend and has lost his cell phone and forgot to call admitting he had "screwed up."

He was given a meeting attendance form to record each daily AA meeting signed by the chairperson of the meeting to verify attendance.

He also was instructed to prepare an itinerary for each hour from 4PM 6-11-03 until 6PM 6-15-03 showing who he was with, what he was doing and where he was. During the week 6-16-03 and on he advised he was complying.

At our support meeting of 6-23-03 he was told that I needed these items to submit with my monitor's report at the end of the month, in view of the fact that being out of touch with his sponsor and monitor from Thursday 6-12-03 until

Sunday 6PM 6-15-03 was a serious matter involving failure to comply with conditions he had agreed to.

On 6-25-03 he appeared at my residence and said he had lost the meeting sign in form and furnished me with daily hour report sheets reflecting his whereabouts and meetings attended (forms submitted are attached to this report as enclosures).

I told him I found these papers unacceptable in the form they were in and did he want to redo them or did he want me to send them in as is, with my report. He said these are what he was submitting. He initialed each page and gave me his chain of custody form reflecting his urinalysis test on 6-16-03 at LabCorp, Pensacola, FL.(also enclosed)

He was told I had determined that he had also failed to call to call [sic] for lab tests on Thursday and Friday, 6-12-03, 6-13-03 as required by his FLA Inc. contract. He advised he just forgot to call those days.

I further told him that I had been informed by a most credible source that he had been drinking Corona beer and advised his associates who were familiar with his situation, that he had permission to drink beer. He denied the allegation.

It was suggested that he might want to consider withdrawing his petition for reinstatement in view of the short time available in which to restore a credible program of recovery for him.

He thought not and would not withdraw.

TFB Exhibit 11. (Emphasis supplied)

33. Based on Stan Spring's monitor report, FLA director Mike Cohen wrote to McGraw on June 26, 2003, terminating his FLA contract, and stating:

> Your inability or unwillingness to comply with the terms of your most recent contract (including the urinalysis testing provision), as well as the conditions which you agreed to with Stan, indicate that the inordinate amount of time he, Judy, and I have spent on your case simply represents an exercise in frustration.
>
> As such, we are closing your file at this time and taking you off urinalysis testing.

TFB Exhibit 8, and *attachment to TFB Exhibit 11*. (Emphasis supplied)

34. Timothy Sweeney, Director of the Recovering Attorney's Program at HCC, stated in his deposition of July 21, 2003, that "I think [McGraw] needs to clock some more clean time." *TFB Exhibit 12* at p. 37. When asked whether he would recommend that McGraw be reinstated to The Florida Bar, he testified: "...I just don't think we're there yet with [McGraw], and it pains me to say that." *Id.* at p. 38. Further, he stated: "At this particular point in time, I don't have the confident in [McGraw]-- confidence in [McGraw's] current recovery to be able to state with confidence that he's out of the woods with his chemical dependency." *Id.* at p. 39. (Emphasis supplied)

35. In her affidavit dated July 22, 2003, Judith R. Rushlow, Assistant Director for FLA, testified that:

> 2. Mr. McGraw entered into a five-year contract with FLA in January 2003, following his completion of residential substance abuse treatment at Health Care Connection of Tampa (HCC).
>
> 3. The pertinent provisions of Mr. McGraw's agreement with FLA were that he would (a) abstain from the consumption of all mood altering substances, including alcohol, (b) reside in a half-way house for a period of time to be determined by HCC; (c) regularly attend meetings of Alcoholics Anonymous, as well as attorney support meetings; (d) comply with a system for random urinalysis;

and (e) maintain regular contact with his designated monitor, Stanley Spring, Esquire.

4. Sometime in February 2003, Mr. McGraw left the half-way house he had entered pursuant to his contract without discussing the matter with anyone at HCC or FLA.

5. On July 1, 2003, after several telephone calls to the undersigned affiant, Mr. Spring filed his monitor report on Mr. McGraw for the month of June stating that Mr. McGraw was non-compliant with his contract. Among the instances of non-compliance included in the report was [sic] failure to comply with the random drug testing system, failure to meet his 12-step requirements, and reports that Mr. McGraw had been seen drinking alcohol and had, in fact, told someone that he was now permitted by FLA to drink alcohol.[2] (Monitor Report with attachment is attached hereto.)

6. As a result of Mr. Spring's monitor report, and further discussions with him in this regard, it is the considered opinion of FLA that Mr. McGraw has failed to remain abstinent, has failed to comply with his FLA contract in other respects, and should not be reinstated to the [sic] Florida Bar at this time.

See TFB Exhibit 11. (Emphasis supplied)

36. Following the final hearing, the Referee permitted McGraw, over The Florida Bar's objection, to submit additional evidence in the form of a September 9, 2003 affidavit of the monitor, Stanley A. Spring, in which he stated:

2. Mr. McGraw and I attended the annual [FLA] workshop together and his participation was exemplary. He chaired at least one meeting while there and did an excellent job. Since our return from

[2] As noted above, McGraw vehemently denies making such a statement, and no evidence was presented to the Referee from which he could make a determination that such a statement was actually made. Stan Spring testified that someone, whom he would not name but whom he trusted, reported that McGraw made the statement to him when he saw McGraw with a beer and confronted him about it.

Naples, Mr. McGraw has worked closely with me and we have spoken virtually every single day since then.

3. Mr. McGraw's attitude towards his recovery program has been excellent. It is obvious to me that he is enjoying his work for his father [an attorney]; his attitude towards his employment as a paralegal is that of an individual who enjoys his work as opposed to one who merely goes to work for the salary.

4. Perhaps the most important development in Mr. McGraw's recovery program is his relationship with his new girlfriend. Mr. McGraw has introduced her to AA and he has indicated he very much wants me to meet her. It is clear that he is encompassing her into his recovery program, to her benefit, rather than leaving the program to please her.

5. I suggested to Mr. McGraw that I submit an affidavit to the Referee detailing these new developments in his recovery program. Based on my continued close interaction with Mr. McGraw since final hearing, and taking into account that even after FLA terminated its relationship with him he continued to work closely with me, I have come to the conclusion that Mr. McGraw should be reinstated to the practice of law. I do believe, however, that he should be subject to three years probation with monitoring by FLA.

Spring's September 9, 2003 Affidavit. (Emphasis supplied)

37. In response to Mr. Spring's affidavit, The Florida Bar was permitted to submit the affidavit of Judith R. Rushlow, dated September 22, 2003, in which she stated:

4. Mr. McGraw's [January 2003] contract with FLA was terminated by FLA on June 26, 2003, due to his non-compliance, and no random urine testing or monitoring has been done by FLA. Mr. Spring's affidavit was therefore based on his own observations

and conclusions and does not represent FLA's position or recommendation in this matter.

5. FLA's opinion as to Mr. McGraw's fitness for reinstatement to the [sic] Florida Bar is unchanged since the testimony of your deponent and Myer J. Cohen, Executive Director of FLA, given at the hearing on July 25, 2003 and deponent's affidavit of July 22, 2003.

6. It is FLA's considered opinion, based on several years' experience with Mr. McGraw, that he should *not* be reinstated to the practice of law until he is able to demonstrate strict compliance with a rehabilitation program for a period of *not less than one year*.

Rushlow's September 22, 2003 Affidavit. (Emphasis supplied)

38. McGraw has now been suspended from the practice of law for over six years as a result of the two-year and the 91-day suspensions.

39. Since McGraw was discharged from HCC on January 7, 2003, he has actively worked a demanding rehabilitation program. Regarding the requirements of McGraw's January 2003 FLA contract, he has exceeded almost every one of them. Specifically, as to:

1. *Comply with and satisfactorily complete the aftercare program recommended by Health Care Connection of Tampa (HCC).* While McGraw's two incidences of non-sobriety prevented his satisfactory completion of the program, he was excelling in almost every other area of the program when FLA terminated the contract.

2. *Reside at a halfway house approved by HCC or FLA, for a period of time to be determined by HCC, and abide by all rules, regulations and requirements of this half-way house*. While there was some confusion regarding the reasons McGraw left the Many Nations Halfway House after a few weeks, his therapist, David

Grady, and his monitor, Stan Spring, had no concerns about this, and David Grady opined that it was a "pretty successful move."

3. *Totally refrain from the use of all mood altering substances, including alcohol*. As noted, McGraw consumed alcoholic beverage on two separate occasions, including one time in which he drank alcohol at a party and the following weekend when he had two beers, but no evidence exists that he has possessed or used any non-prescribed controlled substances since his entry into HCC in September, 2002.

* * *

5. *Accept Stanley Spring, Esquire as monitor of [his] performance under this Contract and . . . assume the responsibility of making at least one personal contact per month with [his] monitor*. McGraw has forged a strong relationship with his monitor, Stan Spring, and has been in contact with Mr. Spring daily since January 2003, with the exception of the three days from June 12-15.

6. *Provide [his] monitor with whatever substantiating documentation the monitor may require to assure compliance with this Contract.* McGraw's documentation of the three-day period from June 12-15 was inadequate and not in compliance with Spring's request and instructions. However, Spring expressed no concerns with any other response to requests for documentation from McGraw.

7. *Actively participate in a 12 Step or other abstinence based self-help program to be approved by FLA. Participation in such a program should include, at a minimum, the following*:

   a. *Attendance at 90 meetings in 90 days*. McGraw exceeded this requirement.
   b. *After 90 days, attendance at a minimum of three(3) other meetings per week*. McGraw exceeded this requirement. In fact, he often attended more than one meeting per day, up to and past the final hearing.

c. *Identification and enlisting the aid of a sponsor, mentor, or guide, and giving such individual permission to disclose appropriate information as requested by FLA.* McGraw satisfied this requirement.

d. *Securing and reading the literature endorsed by such program.* There is no evidence of anything other than compliance with this requirement.

e. *Encouraging [his] spouse or significant other to attend a self-help program to promote their recovery.* McGraw apparently did not have a "significant other" from January until June 2003. While no evidence was presented that his new "girlfriend" attended meetings before the final hearing, Spring testified that she has done so since that time and is a positive influence on McGraw's recovery.

f. *Encouraging my child(ren) to attend a self-help program to promote their recovery.* N/A

g. *Attend open meetings with [his] spouse or significant other, if possible.* See *e.*, above.

8. *Actively participate in a program of recovering professionals, including attendance at not less that one attorney support meeting per week.* McGraw was in compliance with this requirement. Further, he was instrumental in establishing an additional attorney support meeting on Tuesdays and Thursdays in Pensacola, although he missed the inaugural meeting because it occurred during the June 12-15 time frame when he lost contact with his sponsor, his monitor and the person with whom he had been working to start the new meeting.

9. *Keep an accurate written record of self-help and attorney support meetings and submit an acceptable monthly report to FLA.* Although McGraw did not have a formal, accurate record of meetings, he complied with the requirements and expectations of David Grady and Stan Spring. They were satisfied with his attendance. Spring took the information McGraw shared with him in his daily contacts and he gleaned from others who attended the meetings with McGraw and prepared the monthly reports himself.

10. *Submit to and pay for a minimum of six(6) random urine drug/alcohol screens annually pursuant to the FLA/First Lab Random Drug Testing Procedure. Receipt of the written Random Drug Testing Procedure is hereby acknowledged*. McGraw substantially exceeded this requirement, except for the period from June 12-15 when he failed to contact his monitor.

11. *Participate in continuing private and/or group therapy as required by my monitor or FLA.* David Grady, a licensed mental health counselor and certified addiction professional, first saw McGraw from October 1997 until September 1998 as a result of an FLA referral. From 1998 until January 2003, he did not professionally treat McGraw. Grady established a treatment plan with McGraw independent of the FLA contract requirements, and McGraw exceeded the treatment plan's provisions. McGraw had weekly therapy sessions with Grady beginning in January 2003. These sessions continued at least through the date of the final hearing in July, 2003.

12. *Immediately notify my monitor and/or FLA in the event I: a) use any mind altering substances*; ... McGraw immediately notified Grady he had used alcohol on two occasions in June 2003. According to Grady, McGraw was "very distraught and very upset about" it, "was beating himself up pretty bad," and had"a lot of remorse about it." McGraw also immediately notified his sponsor, but he did not immediately advise his monitor, Stan Spring, because, according to McGraw, he assumed his monitor already knew.

* *

*

19. *To attend the FLA Annual Workshop, if possible*. McGraw attended the FLA Annual Workshop, which occurred subsequent to the final hearing and after FLA terminated the January 2003 contract, with his monitor, Stan Spring. According to Spring, McGraw actively participated, and in some instances, took a leadership role.

40. While he admitted consuming alcohol on two occasions in the spring of 2003, T-47, there is no evidence before the Referee that McGraw has used any mood-altering substances since September 10, 2002, the day he checked into HCC. McGraw promptly told his sponsor and his counselor, Mr. Grady, of his alcohol use and appeared to Mr. Grady to be genuinely remorseful about it. McGraw testified he did not reveal it to Mr. Spring because he believed Spring had already found out about it from an anonymous source.

41. Obviously, McGraw struggles with his sobriety. But, clearly his commitment to sobriety and rehabilitation is stronger now than it has been in the past. There is no evidence he has used drugs within the past year. There appear to be no adverse consequences resulting from his alcohol consumption on two occasions in the spring of 2003, T-50, other than the obvious failure to maintain his commitment to sobriety and the interruption in his rehabilitative process. His counselor, Mr. Grady, said McGraw was upset about it, regretted it and learned from it. T-48, 50.

42. Mr. Grady opined that if McGraw "continues to maintain the behaviors and activity that he's doing now," his prognosis is favorable, "much more favorable than anytime in the past." T-56. Mr. Grady explained that working as a lawyer would be beneficial to McGraw in that it would give him focus, structure, and help with his self-esteem and self-worth. T-58. He feels that "as long as [McGraw] doesn't overwork or stress himself out. And as long as he maintains in the recovery program and can put that ahead of his work, . . . there's no problem getting back to work." T-58.

43. Until his voluntary enrollment in the HCC residential treatment program in September 2002, McGraw's efforts toward sobriety, recovery, and eligibility for reinstatement were uninspired, ineffectual, and mostly nonexistent. His father took him to COPAC, a long-term residential substance abuse treatment program for professionals in Mississippi in 1996, but McGraw soon left the program. In the subsequent period prior to September 2002, McGraw participated in treatment programs, both nonresidential and residential, through Lakeview and Twelve Oaks, and addiction counseling with Mr. Grady, but never actually became engaged in the programs or committed to recovery. His successful completion of the residential treatment program at HCC and his subsequent efforts to comply with the requirements of the January 2003 FLA

contract and Mr. Grady's treatment plan corroborate other evidence that his commitment to work his program of recovery and sobriety is sincere and genuine.

44. Mr. Grady, McGraw's mother and McGraw's father testified they believe he is on the road to recovery. It is noteworthy that McGraw's parents testified at the July 25, 2003, hearing, because they did not testify at the December 13, 2000, hearing. Explaining why she did not testify at that earlier reinstatement hearing, his mother said:

> Well, based on what I know, I didn't feel that [McGraw] was ready to make the kind of commitment that I knew he was going to have to make to handle this thing, to try to get a grip on it. And I just didn't think that he was at the point that he was willing to tell the judge that he was at the point that he was willing to do that, and I certainly wasn't willing to tell the judge that he was.

T-122.

She testified that she now has confidence in McGraw's recovery program and, thus, she feels comfortable testifying to his sobriety and recovery. T-130.

45. McGraw's father, Artice McGraw, has practiced law for almost 35 years. He employed McGraw in his firm to do general paralegal work upon his return to Pensacola from the HCC residential treatment program in Tampa. McGraw does research, preparation of pleadings, discovery and investigative work. He also takes statements from potential witnesses, and performs general office work as needed. T-88. As McGraw's father testified regarding any changes he saw in his son after his return to Pensacola:

> It was almost . . . as if he was a different person. He looked different; he looked more healthy; his mental and physical status were healthier. His energy level was higher. His - - he looked like his old personality had returned.

> And he was conscientious about his work, diligent. He even started working out, getting in shape. And his attitude had improved, and his overall conduct had improved. His personality had improved.
>
> The work product was different. Before I would catch mistakes that I didn't like, and that I reviewed and would get on to him about it. . . . And afterwards, the work product was good. . . . But the work product was a lot better, good, pleadings were good, research, the memorandums [sic] that he wrote were better. And so, the general answer is the work product was a lot better, improved.

T. 95-96. McGraw's father also testified that McGraw has "done a good job" in the area of "work ethics", defined as "dependability, punctuality, stays at work and accomplishes his tasks and assignments," since returning to work for him in January 2003. T. 98. McGraw's father testified regarding McGraw's recovery, "I have confidence in his recovery program because I do know that he wants it. He wants to work it. He wants to get his life back. He wants to be a responsible member of the Bar. I know he has the desire. I know that." T. 99.

46. Since returning to Pensacola from his residential treatment through HCC in Tampa, McGraw has helped people attend AA meetings by giving rides to those without drivers' licenses, and he, along with another attorney, started an AA meeting on Tuesdays and Thursdays in downtown Pensacola. T. 2112-213. When he accompanied his monitor, Stan Spring, to the annual FLA workshop in Naples, Florida, his participation was exemplary and he chaired at least one meeting. September 9, 2003 Affidavit of Stanley A. Spring.

SUMMARY OF ARGUMENT

The Florida Bar has the burden to show that the Referee's report is "erroneous, unlawful, or unjustified." Rule 3-7.7(c)(5), Rules of Discipline. They have not, and indeed, cannot do so.

The Referee's findings of fact are supported by the overwhelming bulk of the evidence presented. His findings can be overturned only upon a showing by The Florida Bar that there is no competent, substantial evidence in the record to support the Referee's findings. The Referee specifically alluded to the evidence that supported each and every finding that he made. The Florida Bar has shown no finding that was not supported by the evidence.

The Referee's conclusion that Mr. McGraw met the criteria for reinstatement was based on his findings of fact. The Referee discussed each and every element required to be shown in reinstatement proceedings and, after reviewing them, found that Petitioner met his burden and should be reinstated. This Court gives deference to referees and will uphold their recommendations unless clearly off the mark. Such is not the case at bar.

The Referee's failure to specify conditions of probation do not warrant rejection of his entire report. The Referee specifically required three years probation upon reinstatement, consistent with this Court's original order of discipline. Petitioner will agree to a rigorous random testing procedure and to adherence to FLA contracts during his suspension. The Referee specifically rejected the Bar's last-minute request for the Bar examination and stated on the record that he felt that the CLER requirement for new lawyers and an ethics course would meet any competency requirements.

ARGUMENT

POINT I

THE FLORIDA BAR HAS NOT MET THE BURDEN PLACED UPON IT TO DEMONSTRATE THAT THE REFEREE ERRED IN RECOMMENDING THAT PETITIONER SHOULD BE REINSTATED TO THE PRACTICE OF LAW IN FLORIDA.

The thrust of The Florida Bar's appeal is that it disagrees with the Referee's findings and recommendations. It points to no finding of fact that is wrong. It points to no conclusion reached by the Referee that was not supported by the evidence. Indeed, the Referee's work product in this case is a model of excellence for other Bar referees. Every single finding of fact is supported by specific citation; every conclusion is explained, and, when necessary, citations are given.

The Bar's bare assertion of disagreement with a referee's finding is not sufficient to overturn his findings and recommendations. The Rules of Discipline so state. Specifically, Rule 3-7.7(c)(5) reads:

> *Burden.* Upon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful, or unjustified.

This Court has construed that rule very strictly. For example, in *Florida Bar v. Vining*, 721 So.2d 1164, 1167 (Fla. 1998) , this Court stated that an appellant's burden on review is:

> . . . to demonstrate "that there is no evidence in the record to support [the referee's] findings or that the record evidence clearly contradicts the conclusions." *Florida Bar v. Spann*, 682 So.2d 1070, 1073 (Fla. 1996); *see also Florida Bar v. Jordan*, 705 So.2d 1387, 1390 (Fla. 1998) (quoting same). Where the referee's findings are supported by competent, substantial evidence, "this court is precluded from reweighing the evidence and substituting its judgment for that of the referee."

The Florida Bar does not meet the burden incumbent upon it to show that the Referee's findings are erroneous

> by simply pointing to the contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings.

Florida Bar v. Vining, 761 So.2d 1044, 1048 (Fla. 2000).

In a case such as this, where the referee's recommendation is based in large part on the sincerity of the petitioner seeking reinstatement, the referee's conclusions, i.e., his judgment, must be upheld unless the Bar can demonstrate clearly and convincingly that there is no evidence supporting his judgment. As this Court stated in *Florida Bar v. Fredericks*, 731 So.2d 1249, 1251 (Fla. 1999):

> However, "[t]he referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." Florida Bar v. Thomas, 582 So.2d 1177, 1178 (Fla. 1991); see also *Florida Bar v. Hayden*, 583 So.2d 1016, 1017 (Fla. 1991) (stating that where testimony conflicts, referee is charged with responsibility of assessing credibility based on demeanor and other factors). Here, we find no such evidence and therefore defer to the referee's assessment of the credibility of witnesses.

The Referee's report shows that he considered *all* of the evidence before him when he concluded that Petitioner met his burden of proving rehabilitation and should be reinstated. None of the Bar's arguments point to evidence that the Referee ignored or missed; the Bar merely argues that he should have concluded otherwise. Such arguments do not meet the Bar's burden of demonstrating "that there is no evidence in the record to support the referee's findings . . .". *Vining*, p. 1167. The referee is this Court's fact finder. He observes the witnesses, weighs their credibility, compares it to the exhibits before him and makes his decisions. This Court specifically addressed the issue of conflicting evidence in *Florida Bar v. Stalnaker*, 485 So.2d 815, 816 (Fla. 1986), where this Court stated:

> [T]he evidence presented before the referee boil[ed] down to a credibility contest . . . . The referee listened to and observed both [witnesses], and, as our fact finder, resolved the conflicts in the evidence. Our review of the record

> discloses support for the referee's findings, and, therefore, we will not disturb them.

While *Stalnaker* is not on point, the premise behind the quoted language is equally true in this reinstatement case. A referee's recommendation should be afforded deference by this Court unless it is clearly erroneous or not supported by the evidence. *Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994). The recommendation by Judge Jones in this case

> is presumptively correct and will be followed unless clearly off the mark.

Florida Bar v. Vining, 707 So.2d 670, 673 (Fla. 1998). *See, also, Florida Bar v. Dunagan*, 731 So.2d 1237, 1242 (Fla. 1999). Said another way in *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997), this Court:

> will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law.

No distinction should be drawn between a referee's recommended discipline and a referee's recommendation that a petitioner be reinstated. His conclusions are presumed to be correct. Where, as here, the evidence overwhelmingly supports his decision, it should not be overturned.

The Referee's findings of fact were set forth completely in the Statement of Facts portion of this brief. They are extremely orderly, detailed and are supported by

specific citations to the record. There can be no doubt that the Referee's findings are supported by the evidence and should be upheld. Similarly, his conclusions, i.e., the reasons for his recommendation that Petitioner be reinstated, are detailed and point to specific reasons for his decision. Beginning on page 26 and extending through page 36 of his report, the Referee sets forth with specific detail his "Findings as to Criteria for Reinstatement." He considered every single relevant criteria set forth in Rule 3-7.10(f) of the Rules of Discipline. Under disqualifying conduct, the Referee specifically considered, pursuant to Rule 3-7.10(f)(1): (A) unlawful conduct; (C) false or misleading statement or omission of relevant information and acts involving dishonesty, fraud, deceit or misrepresentation; (G) financial irresponsibility; (J) evidence of mental or emotional instability and, quite extensively; and (K) evidence of drug or alcohol dependency.

The Referee's findings under Rule 3-7.10(f)(1) conclusively shows that he considered all of the negative evidence before him regarding Mr. McGraw's suitability for reinstatement. Every point raised by the Bar was specifically considered by the Referee in making his determination. Simply put, the Referee felt the negatives did not outweigh the positives.

The positive elements of Mr. McGraw's proceeding were set forth by the Referee beginning on page 31 in the section captioned "Determination of Character

and Fitness, Rule 3-7.10(f)(2)". There, the Referee considered (B) recency of the conduct; (C) reliability of the information concerning the conduct; (D) seriousness of the conduct; (F) cumulative effect of the conduct; (G) evidence of rehabilitation; (H) positive social contributions since the conduct; (I) candor in the discipline and the reinstatement processes; and (J) materiality of any omissions or misrepresentations. The Referee's findings as to the elements of rehabilitation are so significant that Petitioner sets them forth hereunder. Beginning on page 34, the Referee found:

> *Elements of Rehabilitation*
>
> Strict compliance with the specific conditions of any disciplinary . . . or other order.
>
> • Since entry into HCC's residential treatment program in September 2002, and returning to Pensacola in January 2003, McGraw has displayed an extraordinary commitment to maintaining his sobriety and recovery program, with some exceptions. Contrasting the incidents of noncompliance with his compliance efforts, which have exceeded the requirements of his contract and plan, the Referee determines McGraw has *strictly* complied with almost all of his conditions and *substantially* complied with the others.
>
> Unimpeachable character and moral standing in the community and good reputation for professional ability.
>
> • Other than McGraw's parents, therapist, and monitor, who encouraged his reinstatement, little evidence was introduced to establish these criteria one way or the other. McGraw has not practiced since 1996, and he was a relatively new member of the Bar then. His father testified that McGraw's work product was much improved since returning from Tampa.

Lack of malice and ill feeling toward those who by duty were compelled to bring about the disciplinary, judicial, . . . or other proceeding.

- No evidence of malice or ill will of McGraw against those who brought about the proceedings or those who have objected to his efforts at reinstatement was presented, and McGraw and his father testified he holds no such malice or ill feelings.

Personal assurances, supported by corroborating evidence, of a desire and intention to conduct one's self in an exemplary fashion in the future.

- McGraw testified at the July 25, 2003 final hearing as follows:
  I don't think that prior to my long-term treatment, I had ever been in recovery before. That's the difference. I'm in true recovery now. And you know, it takes being in recovery, to make one realize what he has to lose and what he's done, and to have clarity of thought, and I have that now. And it's made me a different person, as far as my goals and my understanding of, you know, the past damage that I have done. I have clarity of it. And I don't want it to happen again, and I'm working for it not to. . . . As an addict, you - - being someone that grew up the way I did, having basic fundamental beliefs and morals, being an addict is a, such a departure from what I know to be right. It's a horrible life, you know. And I couldn't take it anymore, you know, the shame of it, the remorse, the damage I was causing my family and all my relationships. . . . And I was about to cross to the point into not having, you know, anything; no family, nothing. I was almost to the point of no return. And I realized that, so I pulled myself up by the boot straps and checked myself in to long-term treatment. T. 177-178.

- McGraw's assurances were corroborated by his therapist, his family, and his monitor.

Restitution of funds or property.

- McGraw must make restitution of $5,000 to his former client, Eva Robinson, after he is reinstated to the Bar, in accordance with his suspension order.

Positive action showing rehabilitation.

- McGraw has been employed in his father's law firm as a paralegal since he returned from the residential treatment program in January 2003, and his father testified he is producing a good work product and making contributions.

- McGraw has actively engaged in a rehabilitative program of recovery since January 2003. He has been active in his participation and contributions at daily AA meetings since that time and has helped to start another meeting in Pensacola to benefit other recovering professionals.

Mr. McGraw has now been suspended for six years upon a conviction of misdemeanor battery and for failing to diligently pursue and communicate with a client. His original suspension of two years began on April 7, 1997, seven years ago. Mr. McGraw hereby acknowledges the propriety of the Referee's statement, however, that:

> The cause for the delay has been McGraw's own doing, and he alone is to blame for the de facto extension of his period of suspension. ROR 36.

Mr. McGraw also recognizes the validity of the Referee's concern about Mr. McGraw's "history of deception and lack of verisimilitude." Mr. McGraw acknowledged the falsity of his December 2000 and January 2001 statements and expressed his apology. His false statements must be considered part of his addiction.

Mr. McGraw asks this Court to accept the Referee's following statement, which was made with all of the negative factors in the forefront of the Referee's mind:

> On the other hand, McGraw has made extraordinary and significant strides in dealing with his addiction and recovery with candor and courage. He has been brutally candid with Mr. Grady [Petitioner's health care professional], his mother, and in most circumstances, with Stan Spring, his monitor. The difficulty he now faces is that of regaining credibility with others, including this Referee.
>
> Because of McGraw's past prevarications, the Referee gives greater weight to McGraw's actions and others' observations of him than to his contemporary statements of sincerity. To his substantial credit, his actions have been significantly positive and encouraging.
>
> The monitor, Stan Spring, with his experienced eye for addicts and addiction, recognizes McGraw's commitment to recovery and sincerity towards sobriety to be genuine. McGraw's father's observations of McGraw's work ethic and work product since returning from HCC in January 2003 are that McGraw serious and dedicated to rehabilitation and recovery and restoration to the practice of law. The Referee agrees with Mr. Spring and with McGraw's father.

Mr. McGraw's misdemeanor conviction and his two-year suspension stemming therefrom had nothing to do with the practice of law. His subsequent reckless driving conviction, which was the result of a DUI *arrest* had nothing to do with the practice of law. All of the negative factors that have contributed to Mr. McGraw's delay in reinstatement have been the direct result of addiction to alcohol and cocaine.

Since 1982, this Court has enunciated a policy of encouraging rehabilitation for lawyers appearing before this Court in disciplinary proceedings whose conduct was the result of addiction. In *Florida Bar v. Larkin*, 420 So.2d 1080 (Fla. 1982), a case where the lawyer's misconduct stemmed "totally from the effects of alcohol abuse . . .", the Supreme Court declared on page 1081 of its opinion that:

> In those cases where alcoholism is the underlying cause of professional misconduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take those circumstances into account in determining the appropriate discipline.

Obviously, the case before the Court today is one of reinstatement, not determining a discipline to be imposed. However, the philosophy still holds firm; where the lawyer seeking reinstatement has acknowledged that addiction is the cause of his problems (ROR 31), and where he is willing to cooperate in seeking rehabilitation (ROR 32), he should be given the benefit of doubt. The Referee obviously felt that way. On page 32 of his report, the Referee stated:

> Mr. McGraw has shown significant and substantial evidence of rehabilitation since January 2003, with acknowledged setbacks in May, involving two episodes of alcohol [beer] consumption, and in June, involving failure to report to his monitor or call in for his random urinalysis from June 12-15, McGraw's diligent and good faith participation in mental health treatments, exceeding most of the requirements of his FLA contract and his therapist's treatment plan, and substantial efforts to work his program of recovery and

> sobriety, with the exceptions noted, corroborated by the testimony of his counselor, his monitor, and his parents, reveal he is serious and dedicated to rehabilitation and recovery . . . .

This is a case where the Court should give the same benefit of doubt to the lawyer seeking reinstatement.

There is no doubt until Petitioner's voluntary checking into HCC on September 10, 2002 that Petitioner's track record on his recovery program was poor. Finally, the message sank in. Four months later, he checked out of HCC and embarked on a sincere and diligent program of recovery. According to the Referee, he has not just met, but has exceeded most of the requirements of his FLA contract and Mr. Grady's treatment plan. ROR 32, 33. Mr. McGraw has "displayed an extraordinary commitment to maintaining his sobriety. . . ." (ROR 34.) He has "strictly complied" with most of the conditions of his FLA contract and "substantially" complied with the rest. (ROR 34.) .The message has finally stuck; sobriety is necessary. It is time to give Mr. McGraw a chance to resume the practice of law to show society that he is now able to practice in a professional manner.

The Florida Bar bases its opposition to Mr. McGraw's reinstatement in large part on the position of Florida Lawyers Assistance, Inc., hereinafter referred to as "FLA." The Executive Director, Mike Cohen, and the Assistant Executive Director,

Judy Rushlow, both testified to the Referee and expressed their opposition to Mr. McGraw's current reinstatement. Both acknowledged, however, minimal direct contact with Mr. McGraw. Mr. Cohen testified that the overwhelming bulk of the knowledge that FLA has regarding Mr. McGraw came from Mr. Spring. TR. 152.

The individual from FLA who had the most contact with Mr. McGraw was his monitor, Stan Spring. Mr. Spring either met with or spoke to Mr. McGraw virtually every single day after Mr. McGraw returned from his four-month stint at HCC on January 6, 2003. For all intents and purposes, Mr. Spring is the *only* representative of FLA with any direct, personal knowledge of Mr. McGraw's recovery program. Mr. Spring is well known in the Pensacola community for his work with recovering addicts and, clearly, the Referee put great store in Mr. Spring's "experienced eye for addicts and addiction." ROR 37.

At Mr. McGraw's July 25, 2003 hearing, Mr. Spring did not support Mr. McGraw's reinstatement. In essence, Mr. Spring was frustrated with Mr. McGraw because he did not report in to Mr. Spring for three consecutive days in June and because Mr. McGraw drank beer on two occasions without telling Mr. Spring. Mr. Spring acknowledged that up until June 11, 2003, he would have fought for Mr. McGraw's reinstatement. TR. 291. Mr. Spring withdrew his support because of Mr. McGraw's failure to abide by the special conditions that Mr. Spring attached to Mr.

McGraw's FLA contract at the beginning of June. TR. 290. Mr. Spring acknowledged that Mr. McGraw was required to contact Mr. Spring at least once per month and he generally exceeded that requirement by 30 contacts or more per month. TR. 295. In essence, Mr. Spring's opposition was based on a three-day period in June. TR. 295. Until then, Mr. McGraw was attending 7-10 AA meetings per week. TR. 298.

Mr. Spring admitted that the reason for FLA's terminating Mr. McGraw's contract was Mr. Spring's recommendation that Mr. McGraw get a new monitor. TR. 300.

Notwithstanding the fact that FLA terminated Mr. McGraw's participation in FLA, he continued to see Mr. Spring almost every day. It was this continued working with Mr. Spring that led Mr. Spring to submit his September 9, 2003 affidavit, P. Ex. 15. Mr. Spring stated in his affidavit that:

> Based on my continued close interaction with Mr. McGraw since final hearing, and taking into account that even after FLA terminated its relationship with him he continued to work closely with me, I have come to the conclusion that Mr. McGraw should be reinstated to the practice of law. I do believe, however, that he should be subject to three years probation with monitoring by FLA.

The Bar's reliance on Mr. Sweeney's recommendation is ill-placed. Mr. Sweeney had virtually no contact with Mr. McGraw after he left HCC in January 2003.

Mr. McGraw's mental health counselor, David Grady, testified on July 25, 2003 about Mr. McGraw's superlative adherence to Mr. Grady's program. Mr. McGraw met with Mr. Grady at least 29 times since January 2003 and was subject to weekly random drug testing. They were all negative. TR. 27, 33. Mr. McGraw "followed pretty much to the letter" Mr. Grady's recovery program and "on many of the things, he's exceeded." TR. 28. Mr. McGraw probably doubled the requirement that he attend 90 AA meetings in his first 90 days home from HCC and continued such a regimen up through final hearing.

The Florida Bar complained about Mr. McGraw's not meeting the requirement of his FLA contract that he stay in a halfway house subsequent to leaving HCC. Mr. Grady, however, testified that Mr. McGraw's leaving the halfway house was pursuant to discussions with Mr. Grady and worked out well. Mr. Spring knew about Mr. McGraw's leaving the halfway house and never objected.

Mr. McGraw reported his slips with alcohol to Mr. Grady. TR. 47, 48. Mr. Grady testified that Mr. McGraw was "very distraught and very upset . . ." and "was beating himself up pretty bad . . ." about the slips. TR. 48. Mr. Grady noted that Mr. McGraw was "moved to tears, . . ." and that Mr. McGraw exhibited "a lot of remorse about it." TR. 48, 49.

Most importantly, Mr. Grady testified that Mr. McGraw learned from his slips. As he testified to the Referee:

> I can't say that the lesson has been learned; however, the response from what happened was definitely good. He didn't continue to go out. He didn't continue to binge. He didn't say to hell with it. After coming to me and going back to meetings, he hasn't–he's not using.
>
> . . .
>
> And so far, since January, he's returned, this is the only violation that he's inflicted upon himself, and the only use. I wish it didn't happen, but I think it's–sometimes, you know, they say it's the best thing that can happen, because it teaches you humility, and it teaches you that you're not a social drinker. It reinforces the fact that, yeah, I'm an alcoholic.

R. 50.

Mr. Grady also testified that he thought Petitioner "needs to go back to work, and he needs to be a lawyer, . . ." TR. 56. He pointed out that working as a lawyer would be beneficial to Mr. McGraw's recovery program. TR. 58.

The Referee was obviously most impressed with the testimony of Mr. Spring and Mr. Grady. As the Referee said on page 34 of his report:

> Contrasting the incidents of non-compliance with his compliance efforts, which have exceeded the requirements of his contract and plan, the Referee determines McGraw has *strictly* complied with almost all of his conditions and

> *substantially* complied with the others. (Emphasis in original.)

The Referee summed up his findings on Mr. McGraw's dedication to sobriety on page 37 of his report when he stated:

> The monitor, Stan Spring, with his experienced eye for addicts and addiction, recognizes McGraw's commitment to recovery and sincerity towards sobriety to be genuine. McGraw's father's observations of McGraw's work ethic and work product since returning from HCC in January 2003 are that McGraw is serious and dedicated to rehabilitation and recovery and restoration to the practice of law. *The Referee agrees with Mr. Spring and McGraw's father.* (Emphasis supplied.)

The Florida Bar also urges this Court to reject the Referee's report because Mr. McGraw gave false testimony to the Referee in December 2000 and submitted a false affidavit in January 2001. That false testimony, in the throes of addiction, was not disregarded by the Referee. Indeed, he specifically considered those "past prevarications" in his report. Mr. McGraw's testimony, which took place over three and one-half years before, was improper. The Referee specifically noted that he looked to others to corroborate Mr. McGraw's present testimony and, just as important, he looked at Mr. McGraw's present actions in determining the Petitioner's credibility. The Referee was impressed and recommended reinstatement.

It should be noted that Mr. McGraw's transgressions in December 2000 and January 2001 have resulted in a delay of his reinstatement by four years. That delay gave him an opportunity to finally realize that he was an addict. In September 2002, he, for the first time, voluntarily and wholeheartedly, entered a long-term rehabilitation facility. The reason that the four months at HCC worked was because he went there voluntarily. The Drew McGraw that left HCC on January 6, 2003 was a different individual than the one who testified to the Referee in December 2000. He finally acknowledged that he was an addict and that he needed help.

Another basis for the Bar's opposition to Mr. McGraw's reinstatement was the omission of his January 1999 DUI charge, which resulted in a reckless driving conviction, on his January 11, 2000 petition for reinstatement. The Bar glosses over the fact that the omission was Mr. McGraw's lawyer's fault, not his. Petitioner's Exhibit 4 at his December 13, 2000 hearing was the undersigned's March 29, 2000 letter to the Bar. That letter stated in its entirety:

> Thank you very much for the facsimile that I received from you on Friday, March 24, 2000. I was out of the office all day on the 23rd and 24th, or you would have received notice prior to your facsimile of our amending Mr. McGraw's petition for reinstatement. The enclosed amendment was received by me on the afternoon of March 23, 2000. It was the result of Mr. McGraw calling me on March 6, 2000 to advise me that I had neglected his DUI on the petition, and that he had missed the omission when he signed it. Indeed,

> Mr. McGraw told me about his DUI on July 28, 1999. Simply put, I missed it when I drafted the petition. If you need testimony to this effect, my client will waive the privilege to the limited extent that we can allay any concerns you have regarding our oversight.

Petitioner caught the omission on March 6, 2000, less than two months after the petition was filed. His amendment notifying the Bar of the DUI was signed prior to the Bar's contacting the undersigned about the omission.

The Bar also makes much of Petitioner's failure to include two judgments against him. The Referee specifically considered all three omissions on the two petitions on page 34 of his report. The Referee found that Mr. McGraw's failure to list the DUI was not the result of any effort by him to mislead the Referee and noted that it was corrected in a timely manner. The Referee also found that Mr. McGraw's failure to include the two judgments was the "result of inadvertence and neglect, rather than willful concealment."

The Referee correctly noted on page 36 of his report that:

> The Supreme Court does not demand absolute perfection from a suspended lawyer during the period of suspension. *The Florida Bar re: Rue*, 663 So.2d 1320 (Fla. 1995).

That is a correct statement of the law. Mr. Rue was reinstated over the Bar's objections notwithstanding the Court's finding

> . . . evidence in the record suggesting that Rue has been less than zealous in his efforts to comply with our disciplinary order. This evidence further suggests that Rue has failed to exhibit the level of commitment and initiative that this Court expects of a suspended attorney seeking reinstatement. It is apparent that the referee gave Rue the benefit of the doubt in spite of this evidence. P. 1321.

In upholding the referee's recommendation in *Rue*, the Court specifically noted that the referee's findings of fact are presumed correct and should be upheld if supported by competent substantial evidence. The Court specifically noted that it extends "deference" to a referee's findings. The Court also noted that Mr. Rue's 91-day suspension had effectively become a one-year suspension due to the Bar's appeal. P. 1321.

Another example of a lawyer being reinstated despite an imperfect record during suspension is *In the Matter of Hodges*, 229 So.2d 257 (Fla. 1969). There, the Supreme Court reinstated a disbarred lawyer despite the fact that he still had outstanding debts arising from his disbarment proceeding. In so doing, the Court observed:

> We do not condone his failure to be more verbally remorseful, but take his statement into consideration along with all facets of his conduct and rehabilitatory efforts reflected in the referee's report . . . . The referee finds petitioner's rehabilitation satisfactory and that he is worthy of reinstatement to the practice of law. The referee concludes,

> The testimony of Mr. Hodges, in the opinion of the referee, indicated a complete and meaningful rehabilitation.
>
> . . . We believe greater ultimate harm would result in denying or deferring the reinstatement that has been recommended by the referee and will be the case if reinstatement is granted.

P. 260.

The same is true in the case at bar.

Similar financial irresponsibility cases are *Florida Bar re: Whitlock*, 511 So.2d 524 (Fla. 1987), and *Florida Bar re: Grusmark*, 662 So.2d 1235 (Fla. 1995). Those petitioners were reinstated notwithstanding Whitlock's failure to make restitution and Grusmark's filing for bankruptcy.

The Florida Bar's reliance on *Florida Bar re: Jahn*, 559 So.2d 1089 (Fla. 1990), as support for its position is completely misplaced. Mr. Jahn, by a 4-3 decision, was suspended for three years for delivering cocaine to a 15-year-old and an 18-year-old. The dissent argued for disbarment. During his suspension, Mr. Jahn falsified a job application to NCNB Bank to secure a better paying job in Miami. The Court specifically found that his "lying, primarily for personal pecuniary gain . . ." was sufficient cause to overturn the referee's recommendation of reinstatement. Mr. Jahn's

lying had taken place shortly before his reinstatement hearing. His statements were not the result of his addiction, rather they were for pecuniary gain.

Mr. McGraw's conduct in December 2000 and January 2001, wherein he lied about his cocaine addiction, occurred three years before his referee hearing. Unlike Mr. Jahn, Mr. McGraw's remarks were during the throes of his addiction. Most importantly, however, the Referee specifically considered the past prevarications and, in a detailed report, compared that conduct with the conduct of Drew McGraw since he left HCC six months earlier. The Referee, after examining Mr. McGraw's conduct and heeding the testimony of Mr. McGraw's witnesses, in a well reasoned report, found that the prevarications of December 2000 and January 2001 were not characteristic of the man before him in July 2003. In other words, sufficient time had passed for Mr. McGraw to show that he had rehabilitated from such conduct and that the cause of the conduct, i.e., addiction, was unlikely to occur again.

POINT II

THERE IS NO ERROR IN THE REFEREE'S FAILURE TO RECOMMEND CONDITIONS OF PROBATION THAT WERE ALREADY IMPOSED IN PETITIONER'S ORIGINAL DISCIPLINARY ORDER; THE OTHER SPECIFIC TERMS RECOMMENDED BY THE BAR WERE SPECIFICALLY REJECTED BY THE REFEREE.

The Supreme Court of Florida, in suspending Mr. McGraw for two years, ordered him to serve three years of probation upon reinstatement. The Referee acknowledged that a three-year probation was appropriate and neither party contests this Court's imposing three years probation upon reinstatement. Mr. McGraw has no objection to 52 randoms during the first year of reinstatement, 24 randoms during the second year of reinstatement, and monthly randoms during the third year of reinstatement. He only asks, due to the expense of those randoms, that the random tests conducted by Mr. Grady count towards the total number.

At the October 14, 2003 hearing, subsequent to proceedings being completed, The Florida Bar for the first time asked that Mr. McGraw be required to take the Bar exam. The Referee rejected that request and suggested, instead, the "course for the new lawyers . . . ." He also recommended an ethics course. TR 10/14/03, 64.

Mr. McGraw was not suspended for any lack of legal competency. He has continued to work as a law clerk during the entire period of his suspension with the exception of the time that he spent at HCC and, briefly, at other rehabilitation facilities. He has kept abreast of his CLER requirements. His work product has been good. His 91-day suspension was not for a lack of competency but for a failure to communicate and for a failure to diligently pursue his client's case. There is no need to saddle him with passage of the Bar exam. If nothing else, it would delay his

reinstatement until at least April 2005, when the grades for the February 2005 exam are released (assuming a ruling is done in time for him to take the February 2005 exam).

The Bar's reliance on *Florida Bar in re: Inglis*, 471 So.2d 38 (Fla. 1985), is misplaced. Mr. Inglis had been suspended for 20 years at the time of his reinstatement proceedings. Unlike Mr. McGraw, he had no showing of non-stop law clerking work during his period of suspension. The two cases are not even remotely similar.

The Referee did not recommend any competency requirements but rather left it to this Court. Petitioner hereby advises the Court that while he feels that his normal CLER and work requirements protect the public from his lack of knowledge, he certainly would not object to 20 hours of CLE courses, in addition to his normal CLER requirements, during his first 12 months of probation.

Mr. McGraw acknowledges that he must refund $5,000.00 to his client, Jimmy Robinson, or his sister, Eva Robinson, during the first year of probation as ordered in Case No. 93,175.

CONCLUSION

The Referee findings of fact should be upheld. They were very specific and cited to the appropriate testimony and exhibits. Absent a showing by The Florida Bar that there is no evidence in the record to support the Referee's conclusions, they must be upheld.

The Referee's conclusion that Mr. McGraw should be reinstated to the practice of law was well grounded. The Referee specifically reviewed each element required to be shown in reinstatement proceedings and gave the reasons why he felt each element had been fulfilled. His recommendation that Mr. McGraw should be reinstated is proper and should be upheld by this Court.

WEISS & ETKIN

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Answer Brief has been furnished by U. S. Mail to Olivia Paiva Klein, Bar Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and by U.S. Mail to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this ____ day of April, 2004.

_____

John A. Weiss