IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Case No. SC02-1537

Re: PETITION FOR REINSTATEMENT OF ANDREW REYNOLDS MCGRAW, **TFB File No. 2003- 00,019(1A) (NRE)**

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THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant, THE FLORIDA BAR, will be referred to as "The Florida Bar" throughout this Initial Brief.

Petitioner/Appellee, ANDREW REYNOLDS MCGRAW, will be referred to as "Petitioner."

References to the Transcript of the final hearing held on July 25, 2003, shall be designated as "T" with the appropriate number, i.e., "T-155."

References to the Rules Regulating The Florida Bar shall be designated as "Rule" with the appropriate number, i.e., "Rule 3-7.1", or as "Rules."

References to the Report of Referee issued on November 20, 2003, shall be designated as "ROR" followed by the appropriate page number, i.e., "ROR-12."

References to The Florida Bar's Exhibits presented before the referee at final hearing shall be designated as "TFB-Exhibit" with the appropriate number, i.e., "TFB-Exhibit 4."

References to Petitioner's Exhibits presented before the referee at final hearing shall be designated as "P-Exhibit" with the appropriate number, i.e., "P-

Exhibit 3."

References to Florida Lawyers Assistance, Inc. shall be designated as "FLA."

References to Health Care Connection of Tampa, Florida, a drug rehabilitation program shall be designated as "HCC."

STATEMENT OF THE CASE

On January 11, 2000, Petitioner filed a verified Petition for Reinstatement pursuant to Rule 3-7.10. P-Exhibit 3. Subsequently, The Florida Bar discovered that Petitioner had failed to include in his verified Petition that he had been arrested on a DUI charge in January 1999, had pled *nolo contendere* to a lesser offense of reckless driving, was adjudged guilty, and given, *inter alia*, 6-months probation. Upon notice of this omission to Petitioner's counsel, Petitioner filed an Amended Petition disclosing his arrest and subsequent plea. Petitioner's counsel represented to The Florida Bar and later the Referee that Petitioner had informed his counsel of the DUI, and the omission was an inadvertent "mistake." See P-Exhibit 4.

As part of its investigation of the reinstatement petition, The Florida Bar sought a recommendation from Myer J. ("Mike") Cohen, Executive Director of FLA, regarding Petitioner's fitness to return to the practice of law. In an affidavit dated April 19, 2000, Mr. Cohen described Petitioner's lengthy history of noncompliance with FLA contracts from August 1, 1996 through April 2000, and concluded that "reinstatement to practice would represent a danger to his clients and the public." P-Exhibit 2B.

Petitioner's counsel requested a continuance of the final hearing date in May

2000, that was granted by the referee, so that Petitioner could enter Twelve Oaks Treatment Center to participate in a substance abuse treatment program. TFB-Exhibit 1. After treatment at Twelve Oaks in June 2000, with no other known instances of FLA violations by Petitioner, Mr. Cohen submitted a second affidavit dated November 15, 2000, that tenuously agreed to Petitioner's reinstatement, but only under the strictest guidelines for weekly supervision of Petitioner's substance abuse problems. P-Exhibit 2A. A final hearing was held before the Referee on December 13, 2000, in Pensacola, Florida, at which The Florida Bar opposed Petitioner's reinstatement to the practice of law. TFB-Exhibit 7.

Subsequent to the final hearing, the parties' counsel presented an oral argument to the referee on January 4, 2001. Before the proposed report of referee could be issued, however, FLA reported to The Florida Bar that Petitioner had tested positive for cocaine during a random urinalysis test on January 11, 2001. TFB-Exhibit 9. Based on this new development, The Florida Bar moved to reopen the evidentiary record.

The Florida Bar's motion was heard before the referee on January 25, 2001, and a Supplemental Hearing was scheduled for April 24, 2001. Before that date, however, Petitioner filed a Notice of Voluntary Dismissal of his Petition for Reinstatement on March 5, 2001, agreeing not to refile for one year and to pay

taxable costs to The Florida Bar. Based on the Notice of Voluntary Dismissal, the Referee recommended the dismissal of the Petition for Reinstatement. On November 21, 2001, The Florida Supreme Court entered an Order approving the Report of Referee and assessing costs against Petitioner.

On July 10, 2002, Petitioner filed a second verified Petition for Reinstatement pursuant to Rule 3-7.10. P-Exhibit 11. Two months after filing his second Petition for Reinstatement, Petitioner entered HCC, a drug rehabilitation center in Tampa, Florida, on September 10, 2002. The parties' counsel held a telephone status conference with the referee on October 24, 2002, and scheduled a final hearing date of January 7, 2003. Since Petitioner was still in HCC in December 2002, the final hearing was rescheduled for April 2, 2003.

After Petitioner's release from HCC on or about January 7, 2003, the parties' counsel engaged in discovery from January 28, 2003, through March 24, 2003. The Florida Bar filed a Notice of Deposition Duces Tecum on February 5, 2003, and deposed Petitioner on February 25, 2003. The Florida Bar filed a Motion to Compel Discovery that was heard by the referee on March 19, 2003. The Florida Bar filed a Notice of Deposition Duces Tecum and subpoenaed various witnesses for deposition on March 26, 2003, and March 28, 2003. A Second Amended Notice of Final Hearing was filed on March 28, 2003. A final hearing on

Petitioner's second verified reinstatement petition was held before the referee on July 25, 2003.

Subsequent to the final hearing, the parties scheduled an oral argument on September 10, 2003. On the day before the hearing, Petitioner's counsel served the Florida Bar with a Motion for Leave to Submit Additional Evidence. On the day of the oral argument, Petitioner's counsel provided an affidavit of Stanley Spring, who was Petitioner's local FLA monitor. P-Exhibit 15. Over the objection of The Florida Bar's counsel, the referee granted the motion, and set down October 14, 2003, for a supplemental hearing and oral argument.

On this date, Petitioner submitted into evidence Mr. Spring's affidavit. Contrary to his testimony on July 25, 2003, Mr. Spring testified in his affidavit that, based on Petitioner's conduct from July 25, 2003 through September 9, 2003, he had changed his mind, and now supported Petitioner's reinstatement. P-Exhibit 15. The Florida Bar submitted an affidavit of Judy Rushlow, Assistant Director of FLA, indicating that FLA did not agree with Mr. Spring's recommendation, and that he had acted without any prior consultation with FLA. TFB-Exhibit 19.

The parties' counsel submitted to the referee a Joint Statement of Case, Statement of Undisputed Facts, and Statement of Law, as well as individual Proposed Conclusions of Law. The referee issued his report on November 20,

2003, recommending that Petitioner be reinstated to the practice of law in Florida. The Florida Bar filed a Petition for Review of the Report of Referee with the Florida Supreme Court on January 16, 2004.

STATEMENT OF THE FACTS

Petitioner was admitted to The Florida Bar on July 22, 1994. Beginning in March 1997, the Florida Supreme Court entered three disciplinary orders against Petitioner. In the first disciplinary case, Case No. 90,086, The Florida Bar filed a Petition for Emergency Suspension pursuant to Rule 3-5.2. On March 25, 1997, the Court granted The Florida Bar's Petition for Emergency Suspension effective April 7, 1997. Petitioner was initially charged with a felony sexual battery upon a person under 16 but over 12 years of age. After the first trial ended in a hung jury, Petitioner pled *nolo contendere* on February 11, 1997, to misdemeanor battery and was sentenced to 11 months in the county jail to be served at a work camp, to write a letter of apology to the victim, to pay for counseling, and to pay other fees and costs. See Attachments to P-Exhibits 3, 11.

As a result of this conviction, a second disciplinary complaint, Case No. 92,473, was opened by The Florida Bar. Petitioner entered into a consent judgment with The Florida Bar on the misdemeanor battery charge in which he admitted that he committed this offense while he was intoxicated. Petitioner was suspended for two years effective April 7, 1997, the date of the initial emergency suspension. After his release from jail, Petitioner was also required to enter into a three-year FLA contract, to be placed on probation for three years after reinstatement, and to

pay taxable costs to The Florida Bar.

In the third disciplinary case, Case No. 93,175, Petitioner received a discipline of 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 murder. In addition to costs, Petitioner was placed on probation for one year to run concurrent with the three-year probation, and required to pay $5000 in restitution to his former client upon reinstatement. Petitioner submitted the notice to clients pursuant to Rule 3-5.1(g) and filed the affidavit with The Florida Bar on September 12, 1999. See P-Exhibit 5.

Petitioner has a long history of crack cocaine and alcohol abuse. He has failed to comply with five FLA contracts that he signed from August 1, 1996 through January 7, 2003. Petitioner's FLA contracts and his noncompliance with those contracts can be summarized as follows:

FLA Contracts	**Noncompliance**
8/1/96-court ordered	Signed by Petitioner but no compliance
1/97-per request of Judge John P. Kuder	Contract never executed and no compliance
10/13/97 - 10/13/00 pursuant to consent judgment and Supreme Court Order	Positive cocaine test 4/15/98-Petitioner denied use and refused evaluation DUI arrest- January 1999

June 9, 1998-amended adding Pathways Program, psychotherapy, monthly urinalysis	No meetings with monitor-10/97-2/98 No attendance at AA and FLA meetings- 3/98-11/98 Resumed drinking alcohol-12/98 No attendance at meetings-8/99-11/99 No meetings with monitor and continued drinking- 1/99-8/99 3/00 -Failed to complete Pathways Program
12/5/00-12/5/03 Presented at 12/13/00 hearing	Positive cocaine test- 1/11/01 Contract never filed with FLA
7/1/01-7/1/04 trunk HCC -	Positive cocaine test and beer bottles in of Petitioner's car upon admission to 9/11/02
1/3/03 - 1/3/08 recommended by HCC	Use of alcohol - 5/03 FLA terminates contract and closes file- 6/26/03

See P-Exhibits 1A, 1B, 14; TFB-Exhibits 15 and 16.

On January 11, 2000, Petitioner's counsel filed a Petition for Reinstatement to the practice of law. P-Exhibit 3. This petition was voluntarily withdrawn on March 5, 2001, after Petitioner tested positive for cocaine on January 11, 2001. Petitioner filed a second verified petition for reinstatement on July 10, 2002, that was granted by the referee on November 20, 2003. P-Exhibit 11.

Petition for Reinstatement #1-January 11, 2000

After Petitioner filed his first petition for reinstatement, Mr. Cohen reviewed

Petitioner's past FLA contract history from August 1, 1996 forward, and concluded in an affidavit dated April 19, 2000, that Petitioner would pose a danger to his clients and the public, and he should not be reinstated into the practice of law. P-Exhibit 2B.

Upon receipt of this FLA affidavit, Petitioner's counsel moved for a continuance of Petitioner's reinstatement hearing that was scheduled for July 10, 2000. In June 2000, Petitioner entered Twelve Oaks, a drug rehabilitation center, for three weeks of treatment. P-Exhibit 7. In his discharge summary, Dr. Rick Beach, Medical Director at Twelve Oaks, wrote that Petitioner needed an extended long-term residential treatment program, and he did not recommend Petitioner's return to the practice of law. TFB-Exhibit 1; TFB-Exhibit 7 at p. 81-82. By the final hearing, however, FLA presented a guarded recommendation for reinstatement on condition that Petitioner strictly complied with the December 5, 2000, FLA contract that he had signed. P-Exhibits 1A and 2A. The three-year FLA contract called for 52 random urine drug/alcohol screens for the first year, 24 random screens for the second year, and one random screen monthly for the third year. Based on Petitioner's agreement to comply with the terms of the FLA contract, Mr. Spring also testified in support of Petitioner's return to the practice of law.

After Petitioner tested positive for cocaine on January 11, 2001, however, he

withdrew his petition on March 5, 2001. TFB-Exhibit 9. Petitioner also failed to file the December 5, 2000, contract with FLA. Subsequently, he signed another standard FLA contract in July 2001, that required only a minimum of four random urine drug/alcohol screens per year. TFB-Exhibit 16.

Petition for Reinstatement #2 - July 10, 2002

On July 10, 2002, Petitioner submitted a second verified Petition for Reinstatement to The Florida Supreme Court and the Petition was referred to a Referee pursuant to Rule 3-7.10(d). P-Exhibit 11. Two months after filing his second reinstatement petition, on September 10, 2002, Petitioner entered HCC, a residential drug treatment program in Tampa, Florida. Upon arrival at HCC, Petitioner tested positive for cocaine and HCC also discovered beer bottles in the truck of his car. Petitioner remained at HCC until January 7, 2003, when he was discharged. TFB-Exhibit 12A. Before leaving HCC, Petitioner signed another FLA contract for five years beginning January 3, 2003 through 2008. P-Exhibit 14.

As part of HCC's recommended aftercare program, Petitioner was to contact Licensed Mental Health Counselor David Grady on a regular basis. Mr. Grady testified at the July 25, 2003, final hearing that Petitioner had admitted to him that he had been drinking beer on two occasions at the end of June 2003, several weeks before Petitioner's final hearing on reinstatement. T-46-49.Petitioner testified

it was May 2003. T-242. Mr. Spring wrote in his June monitor's report to FLA that he had been told by a credible source that Petitioner had been drinking Corona beer on Pensacola Beach, and had advised his associates that he had permission to drink beer from FLA. See attachment to TFB-Exhibit 11.

At the final hearing on July 25, 2003, Mike Cohen, Judy Rushlow, and Stan Spring, all representing FLA, did not recommend Petitioner's reinstatement to The Florida Bar. T-162, T-289. Timothy Sweeney, Director of Recovering Attorney's Program at HCC, also agreed in his deposition of July 21, 2003, that Petitioner should not be reinstated to the practice of law. He stated "I think Drew needs to clock some more clean time." TFB-Exhibit 12 at p. 37. When asked whether he would recommend that Petitioner be reinstated to The Florida Bar, he testified: "...I just don't think we're there yet with Drew, and it pains me to say that." TFB-Exhibit 12 at p. 38. Further, he stated: "At this particular point in time, I don't have the confident [sic]in Drew-- confidence in Drew's current recovery to be able to state with confidence that he's out of the woods with his chemical dependency." TFB Exhibit 12 at p. 39.

The only witnesses presented by Petitioner at the hearing were David Grady, and Petitioner's mother and father who testified in support of their son. T-19, T-87, T-114.

Less than six weeks after the final hearing, Mr. Spring submitted an affidavit to the referee claiming that, based on Petitioner's conduct from July 26, 2003, through September 9, 2003, he had changed his mind and now recommended that Petitioner be reinstated into The Florida Bar. P-Exhibit 15. FLA did not agree with Mr. Spring, and stated in an affidavit dated September 22, 2003, that Petitioner should not be reinstated to the practice of law until he could demonstrate strict compliance with a rehabilitation program for at least one year. TFB-Exhibit 19.

Misrepresentation

Petitioner also engaged in misrepresentation in the course of the reinstatement proceedings. At the final hearing on his first petition, on December 13, 2000, Petitioner denied that he used crack cocaine despite a positive cocaine test by FLA on April 15, 1998. TFB-Exhibit 7 at pp. 133-134, 157-158. Petitioner claimed that alcohol was his nemesis, not cocaine. TFB-Exhibit 7 at p 136. Petitioner admitted at his second hearing, however, that he had used crack cocaine from 1997 until September 10, 2002, when he entered HCC for treatment. T-47-49, 179, 183-185, 230-235, 239, 242-244. Further, Mr. Grady testified that ever since he met Petitioner in 1996 that smokeable crack cocaine was always Petitioner's problem. T-46-49.

Petitioner tested positive for cocaine use again on January 11, 2001. TFB-

Exhibit 9. When The Florida Bar moved to reopen the proceedings to admit evidence of the positive cocaine test, Petitioner filed a signed, sworn affidavit with the referee dated January 21, 2001, in which he testified under oath that he had not used crack cocaine at any time since 1997. TFB-Exhibit 18. Petitioner admitted at his final hearing on his second reinstatement petition that this sworn affidavit was false. T-250-251.

On his first petition for reinstatement, Petitioner failed to disclose a DUI arrest in January 1999 that was reduced to reckless driving. P-Exhibit 3. He claimed he just "forgot." Petitioner also failed to list two judgments for prior debts on both his first and second petitions. One final judgment, for past due rent and costs, was entered on September 12, 1996 by Wallace Dawson, and as of December 2002, with no payments having been made, showed an accrued balance of $1,686.22. TFB-Exhibit 13. A second final judgment for a student loan of $16,806.80, outstanding since 1993, was filed and recorded on August 15, 2002. TFB-Exhibit 14. The Bar's investigation discovered these two debts after the second petition was filed.

When confronted by his monitor, Mr. Spring that Petitioner had been seen drinking and had alleged that he had permission to do so, he denied such statements to his monitor and to the referee at the second hearing. TFB-Exhibit 11;

T-287-288, 292.

SUMMARY OF ARGUMENT

The Florida Bar petitions for review of the referee's report issued on November 22, 2003, challenging the Referee's conclusion that Petitioner should be reinstated to the practice of law in Florida. The Florida Bar contends that there is ample evidence in the record to show that Petitioner is not fit to return to the practice of law at this time and his reinstatement petition should be denied.

First, Petitioner failed to show by clear and convincing evidence that he meets the requirements of Rule 3-7.10(f) and the criteria in the relevant case law. Petitioner was suspended from the practice of law for over six years due to his own failure to maintain a consistent program of drug rehabilitation. During this period of time, Petitioner entered into five FLA contracts, and failed to comply with all of them.

Petitioner's continued noncompliance resulted in FLA representing to The Florida Bar before the final reinstatement hearing that Petitioner was unfit to return to the practice of law. This recommendation was supported by Mr. Sweeney of HCC who declared in his July 21, 2003, deposition that after a four-month residential rehabilitation program at HCC and six months of Petitioner living on his own, that Petitioner needed more "clean time" and he could not say with confidence that Petitioner was fit to return to the practice of law at that time. At the

time FLA and Mr. Sweeney made their recommendations to the referee at the final hearing, they were not aware of Mr. Grady's testimony that Petitioner had been drinking on two occasions in May 2003, just weeks before his reinstatement hearing. T-270.

Second, Petitioner has engaged in misrepresentation and made false statements during the reinstatement process to the referee during the first hearing on reinstatement. After the first hearing, Petitioner submitted a false affidavit to the referee. The Florida Bar has serious concerns about Petitioner's credibility when he engages in deceitful actions to achieve his own selfish ends. His personal assurances of continuing to maintain a strong program of sobriety have proven untrue in the past. TFB-Exhibit 7 at pp. 159-160. Petitioner's lack of candor and truthfulness during the reinstatement proceedings mitigate against lending any credence to his testimony that he will do better in the future maintaining his drug rehabilitation program.

Petitioner failed to disclose on his first petition for reinstatement that he had been arrested and charged on a DUI in January 1999 that was reduced to reckless driving. Petitioner also failed to disclose two debts, one a 1996 final judgment for nonpayment of rent, and the other a 1993 unpaid student loan, on both petitions for reinstatement. Petitioner's actions involving false and misleading statements should be sufficient standing alone to warrant denial of his petition for reinstatement.

LEGAL ARGUMENT

I. BASED ON THE EVIDENTIARY RECORD, THE REFEREE ERRED IN CONCLUDING THAT PETITIONER SHOULD BE GRANTED REINSTATEMENT TO THE PRACTICE OF LAW IN FLORIDA.

In a case pertaining to a petition for reinstatement, the burden of proof is upon the Petitioner seeking reinstatement to the practice of law in Florida to establish that he is entitled to resume the privilege without restriction. The Florida Bar In re Keith a. Seldin, 577 So. 2d 1319, 1321 (Fla. 1991). The standard of proof for Petitioner is clear and convincing. The Florida Bar v. Price, 478 So. 2d 812, 813 (Fla. 1985). "Reinstatement is more a matter of grace than of right, and is dependent upon rehabilitation..." In re Stoller, 36 So. 2d 443, 444 (Fla. 1948). To practice law in Florida is a privilege, not a right. Debock v. State, 512 So. 2d 164, 168 (Fla. 1987). Petitioner must show by clear and convincing evidence that he has met the criteria for reinstatement as set forth in Rule 3-7.10(f) and in the relevant case law before resuming his membership in the Florida Bar. See Petition of Wolf, 257 So. 2d 547 (Fla. 1972); The Florida Bar In re Timson, 301 So. 2d 448 (Fla. 1975); The Florida Bar re Michael Joseph Jahn, 559 So. 2d 1089 (Fla. 1990).

The Florida Bar contends that the referee's conclusion that Petitioner should

be reinstated to the practice of law is erroneous based on the clear and substantial oral and written testimony in the evidentiary record. In challenging the referee's recommended order, The Florida Bar has the burden to show that the conclusions of the referee are erroneous, illegal or unjustified. See The Florida Bar re: Grusmark, 662 So. 2d 1235, 1236 (Fla. 1995), citing to The Florida Bar in re Inglis, 471 So. 2d 38, 39(Fla. 1985). Further, this Court has broad discretion to conduct an independent review of the conclusions and recommendations of the referee in a reinstatement case, and to enter an appropriate judgment. Grusmark at p. 1236; The Florida Bar re Joe RawlsWolfe, 767 So. 2d 1174(Fla. 2000).

The Florida Bar contends that there is ample evidence in the record to show that Petitioner is not fit to return to the practice of law at this time and his reinstatement petition should be denied. First, Petitioner has failed to show by clear and convincing evidence that he meets the requirements of Rule 3-7.10(f) and the criteria in the relevant case law. Second, Petitioner has engaged in misrepresentation and made false statements during the reinstatement process that reflect the lengths to which he would go to manipulate the system to achieve his own selfish ends. By his deceitful conduct in the reinstatement proceedings, Petitioner has clearly demonstrated his lack of moral character and fitness that is a crucial element to resuming a position of trust and confidence among the ethical

practitioners of The Florida Bar. In re: Petition of Dawson, 131 So. 2d 472, 474 (Fla. 1961).

Failure to meet reinstatement criteria

Petitioner has failed to show by clear and convincing evidence that he is fit to return to the practice of law because he has not met the criteria of Rule 3-7.10(f) that states generally:

> In determining the fitness of the petitioner to resume the practice of law, the referee shall consider whether the petitioner has engaged in any disqualifying conduct, the character and fitness of the petitioner, and whether the petitioner has been rehabilitated, as further described in this subdivision. All conduct engaged in after the date of admission to the Florida Bar shall be relevant in proceedings under this rule.

The Florida Bar would argue that, based on the clear evidence on which the referee relied to make his findings, he should have concluded that Petitioner did not meet the requirements of the Rule, and should have denied the reinstatement petition.

Specifically, the referee found that Petitioner engaged in disqualifying conduct that was unlawful, made false and misleading statements or omissions involving deceit and misrepresentation, showed financial irresponsibility, evidenced mental or emotional instability, and demonstrated a long history of substance abuse

with smokeable crack cocaine and alcohol. See ROR -26-31; see also Rule 3-7.10(f)(1). The referee also delineated specific instances of lack of character and fitness relating mainly to Petitioner's overall drug history, and found lack of candor by Petitioner on numerous occasions during the disciplinary proceedings. See ROR- 31-34; see also Rule 3-7.10(f)(2). The referee discussed various elements of rehabilitation and enumerated many instances where Petitioner failed to meet them. See ROR-34-36; see also Rule 3-7.10 (f)(3).

The evidentiary record clearly demonstrates that Petitioner had a serious, long-term problem with chemical dependency on crack cocaine up through September 10, 2002, and on alcohol, up through June 2003. P-Exhibit 2B; TFB-Exhibits 1, 9. Beginning with his first FLA contract in August 1, 1996, until FLA's termination of Petitioner's *sixth* FLA contract on June 26, 2003, the record shows a continuous pattern of Petitioner returning to drug and alcohol dependency. Petitioner's own counselor, David Grady, confirmed that Petitioner has had a long history of substance abuse, in particular, crack cocaine and alcohol. T-24-25. Mr. Grady also testified to Petitioner's return to the use of alcohol in May 2003. T-46-49.

The Florida Bar postponed the final hearing date on several occasions in order to allow Petitioner an opportunity to demonstrate strict compliance with his

new FLA contract beginning January 2003. But within only six months, Petitioner was drinking on at least three occasions just prior to his final reinstatement hearing despite the fact that alcohol abuse was at the root of his prior misdemeanor battery.

At the final reinstatement hearing on July 25, 2003, the testimony of qualified professionals in FLA and at HCC highlighted the fact that Petitioner needed more "clean time" in order to insure that he could free himself from his long-term chemical dependency on crack cocaine and alcohol. (cite Judy, Mike, Sweeney Dep) Only David Grady advised that Petitioner could return to the practice of law because he though it would be "therapeutic" for him to focus on a legal practice as long as Petitioner was not under too much stress and continued his rehabilitation program. T-83.

Within six weeks after the final hearing, Petitioner's counsel moved to reopen the record to submit Stan Spring's Affidavit dated September 9, 2003. See P-Exhibit-15. Mr. Spring recanted his prior recommendation at the final hearing, and, without any consultation with FLA, stated unilaterally that, in his own opinion, that he had now come to the conclusion that Petitioner should be reinstated into the practice of law. One of the reasons that he gave for this change of position was that Petitioner had attended the annual FLA workshop in Naples. What Mr. Spring

failed to mention was that such a recommendation had been included in prior FLA contracts but Petitioner had failed to attend any prior annual FLA workshop for six years despite Mr. Spring's recommendation to do so. Mr. Spring also believed that the difference of six weeks of closely working with Petitioner, a new girlfriend, and his attitude towards his work would now transform Petitioner into a lawyer fit to return to the practice of law.

Mr. Spring's optimism, however, is not shared by FLA or by The Florida Bar. Beginning June 26, 2003, Petitioner was no longer subject to random urine screens by FLA. Further, Mr. Spring's affidavit makes no mention of any drug testing program that Petitioner submitted to after June 26, 2003.

Petitioner's record of "lapses" over six years relating to the use of alcohol and drugs is well documented in the FLA affidavits and testimony in the record. See P- Exhibits 2A and 2B; TFB-Exhibits 1, 9, 10, 19. From June 25, 2000 through January 11, 2001, Petitioner logged "clean time" according to FLA reports, but then tested positive for cocaine. TFB-Exhibit 9. Petitioner was called 18 times for random urine screens between January 25, 2001 and July 31, 2002, but Petitioner failed to appear nine times for random drug screens from May 3, 2001 through April 22, 2002. See TFB-Exhibit 10. These nine random drug screens were missed as a result of Petitioner's failure to contact the testing system, or his

reported unavailability for testing after being notified to report for testing. Petitioner tested positive for cocaine when he entered HCC on September 10, 2002, yet he never tested positive for cocaine under his FLA contract anytime during this time frame.

Petitioner's "on again-off again" use of drugs and alcohol as well as the anxiety disorder diagnosed by HCC make him a poor candidate for reinstatement in the practice of law. His prior record indicates that there are periods when his drug use had gone undetected even by FLA although he has admitted use of drugs during those time frames. Petitioner also appears to have the ability to repeatedly avoid random testing when it suits his purposes. In less than six months after his release from HCC where he underwent four months of intensive, residential drug treatment, he resumed the use of alcohol just weeks before his final reinstatement hearing.

The referee found that Petitioner remained suspended from the practice of law since April 1997, but the cause for such a long suspension was of Petitioner's own making. ROR-36. From August 1, 1996, when he executed the first FLA contract, through June 26, 2003, Petitioner has failed to comply with *six* separate FLA contracts. See P-Exhibits 1A, 1B, 2B, 14; TFB-Exhibits 9, 10, 11, 15, 16, 19. Mr. Cohen canceled Petitioner's FLA contract on June 26, 2003, based on

Petitioner's noncompliance. TFB-Exhibit 8. At final hearing, Ms. Rushlow, testified that FLA would not recommend Petitioner's reinstatement into the practice of law at this time. Mr. Sweeney of HCC concurred that Petitioner "needed to clock more clean time." TFB-Exhibit 12 at p. 37-39. As of the final hearing on July 25, 2003, Petitioner's monitor, Stan Spring, testified that he did not recommend Petitioner's reinstatement to the practice of law up to that point in time based on Petitioner's sudden changed behavior in the weeks preceding the final hearing. T-289; TFB-Exhibit 11.

Even after Stan Spring's affidavit dated September 9, 2003, was submitted to the referee, FLA continued to maintain that Petitioner should not be returned to the practice of law. Judy Rushlow's affidavit dated September 22, 2003, confirmed FLA's prior position stating:

> 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. TFB Exhibit 19.

The Florida Bar has tracked Petitioner's long history of drug and alcohol abuse since 1996. Qualified experts have advised that more "clean time" is needed to assess whether Petitioner's drug rehabilitation program will effective over the long

term. The Florida Bar is contesting Petitioner's reinstatement because it is, in large part, relying on the advice of FLA and HCC. Both of these organizations have dealt with attorney substance abuse problems on a broad scale for many years. For over 6 years, despite numerous opportunities, and constant guidance by FLA and Mr. Spring, as well as four-months residential treatment at HCC, Petitioner's record demonstrates that he cannot sustain a program of sobriety for any prolonged period of time without resuming the use of drugs or alcohol, or both. The Florida Bar re Louis C. Corbin, 591 So. 2d 178 (Fla. 1992)(The referee specifically found that the attorney's misconduct was unlikely to repeat itself. Id. at 179).

Misrepresentation

Petitioner's misrepresentations to the referee during his sworn testimony at the prior reinstatement hearing on December 13, 2000, and in a sworn affidavit dated January 25, 2001, raise serious questions as to Petitioner's credibility concerning his testimony at the final reinstatement hearing on July 25, 2003. Petitioner's personal assurances that he will continue to refrain from the use of drugs and alcohol in the future are reminiscent of the same testimony at the December 13, 2000, hearing. At the former hearing, Petitioner denied the use of cocaine to the referee, and testified that alcohol abuse was his problem. He recited all the meetings and activities he had engaged in for the prior six months to assure FLA and the referee that he was a

changed individual and would try harder in the future to abstain from alcohol.

On January 11, 2001, however, in a random drug screen, Petitioner's assurances quickly dissipated when he tested positive for cocaine use. With his reinstatement to the Bar still pending before the referee, Petitioner submitted a sworn affidavit to the referee testifying that he had not used cocaine since 1997. At his second reinstatement hearing, Petitioner admitted that this sworn affidavit was false. T-250-251.

At the first hearing on December 13, 2000, Petitioner denied the use of cocaine and testified that the April 1998 positive test by FLA was a "mistake" because he did not use cocaine. TFB-Exhibit 7 at p. 158. At the second reinstatement hearing, however, Petitioner admitted that he did use crack cocaine from April 1998 through September 10, 2002. T-47-49, 179, 183-185, 230-235, 239, 242-244. Petitioner's testimony at the first hearing was, therefore, a false statement to the referee during the reinstatement proceedings.

Petitioner has made other misleading and false representations to his monitor, Stan Spring, and upon his admission to HCC demonstrating that his attitude in trying to "play" the system that was pointed out in June 2000 by Dr. Beach has not changed. TFB-Exhibit 1. When confronted by Mr. Spring in June 2003, with the fact that he had been seen drinking, Petitioner adamantly denied it. TFB-Exhibit 11;

T-287-288, 292. Upon Petitioner's admission to HCC on September 10, 2002, he informed the doctors that he had been clean and sober for two years, and informed his counselor that he had been sober for one year before his admission to HCC. Petitioner's purported objective was to stay at HCC so he could keep out of trouble until his reinstatement hearing. When questioned by HCC about his positive cocaine test and beer bottles in the trunk of his car, Petitioner responded that he wanted "one last blast" before entering the treatment center. T-184. This attitude is reflective of Petitioner's other attempts to do what he needs to do to get past his reinstatement hearing, but elicits grave concern at to how long he will maintain his rehabilitation program once he is reinstated in The Florida Bar.

Petitioner has engaged in misrepresentation by omission by failing to disclose his use of alcohol in May 2003 to his monitor, Mr. Spring. Petitioner knew that by telling his AA sponsor and Mr. Grady, no word would get back to FLA and to The Florida Bar. It was not until the final hearing during Mr. Grady's direct testimony that The Florida Bar learned of Petitioner's use of alcohol in May-June 2003. Further, Petitioner did not disclose the 1996 Dawson judgment and the 1993 student loan that was reduced to judgment in August 2002 until after the discovery of these debts by The Florida Bar.

II. THE REFEREE DID NOT RECOMMEND ANY SPECIFIC TERMS IF

PETITIONER IS REINSTATED TO THE PRACTICE OF LAW

The original disciplinary order dated March 12, 1998, required Petitioner to abide by all terms of the conditional guilty plea and consent judgment in Case No. 92,473. Petitioner was to be placed on three years probation after his reinstatement to The Florida Bar. It was contemplated that after a two-year suspension, at least for one year after Petitioner's suspension, he would remain on his three-year FLA contract and be monitored by The Florida Bar. Petitioner has now been on suspension for over six years, and his FLA contract dated January 3, 2003, was terminated by FLA on June 26, 2003. Since that time, Petitioner has not been monitored by FLA, nor has he been subject to random drug screens or tracked as to his compliance with the other FLA terms.

Due to Petitioner's lengthy absence from the practice of law, if Petitioner is reinstated, The Florida Bar contends that Petitioner should be required to provide to The Florida Bar a certification by The Florida Board of Bar Examiners that he has completed and passed an examination for admission to The Florida Bar and has taken the Ethics portion of the Bar before being reinstated to the practice of law in Florida. See Rule 3-7.10(j); see also, The Florida Bar in re Inglis, 471 So. 2d 38 (Fla. 1985). Further, Petitioner should be required to enter into an FLA contract within 30 days of the date of this Court's final order with the same provisions that he

agreed to in his December 5, 2000, FLA contract. See Petitioner's Exhibit 1A. The FLA contract provisions should include 52 random urine drug/alcohol screens for the first year, 24 random screens for the second year, and one random screen monthly for the third year. Further, if Petitioner tests positive on any of these random drug screens, he should be subject to an immediate 91-day suspension for violation of his probation requirements, and Petitioner should be required to report any positive test to The Florida Bar. The Florida Bar v. Dubbeld, 748 So. 2d 936(Fla. 1999).

Clarification of paragraphs 36 through 46 of the Report of Referee

At the direction of the referee, the parties' counsel prepared a Joint Statement of the Case, Statement of Undisputed Facts, and Statement of Law. This pleading was a joint effort by the parties' counsel and was submitted to the referee for his consideration. In the final report of referee, under Statement of Undisputed Facts, only paragraphs 1 through 35 constitute the parties' agreement as to undisputed facts. Paragraphs 36 through 46 are findings by the referee that were not jointly stipulated to by the parties during the reinstatement proceeding. The Florida Bar would not dispute paragraphs 1 through 38 as undisputed facts, but paragraphs 39 through 46 are findings of fact by the referee based on the evidentiary record and were not agreed to by The Florida Bar.

CONCLUSION

For the foregoing reasons, The Florida Bar would respectfully request that the Court reject the conclusion of the referee reinstating Petitioner and deny Petitioner's Petition for Reinstatement to The Florida Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail to Respondent's counsel, John A. Weiss, Petitioner's Counsel, at his record Bar address of 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, Florida 32308-3825, this _____ day of March, 2004.

_____

OLIVIA PAIVA KLEIN
Bar Counsel

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

Undersigned counsel does hereby certify that The Florida Bar's Initial Brief 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 AntiVirus for Windows.

_____

OLIVIA PAIVA KLEIN
Bar Counsel