

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR**

**Case No. SC02-1537**

**Re: PETITION FOR REINSTATEMENT  
00,019(1A)  
OF ANDREW REYNOLDS MCGRAW,**

**TFB File No. 2003-**

**(NRE)**

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**THE FLORIDA BAR'S REPLY BRIEF**

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## **PRELIMINARY STATEMENT**

Appellant, THE FLORIDA BAR, hereby incorporates and adopts its Preliminary Statement as set forth in its Initial Brief.

Reference to Respondent's Answer Brief will be designated as "Answer Brief" with the appropriate page number.

## LEGAL ARGUMENT

I. IN REINSTATEMENT CASES, THE BURDEN OF PROOF AND STANDARD OF REVIEW IS DISTINGUISHABLE FROM OTHER TYPES OF DISCIPLINARY CASES.

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Petitioner has analogized this reinstatement case to the same principles governing a disciplinary case, and urges the Court to find that "no distinction should be drawn between a referee's recommended discipline and a referee's recommendation that a petitioner be reinstated." See Answer Brief at p. 26-29. The burden of proof in reinstatement cases, however, is clearly distinguishable from other disciplinary cases. In reinstatement cases, the burden of proof is on Petitioner to prove by clear and convincing evidence that he has met the criteria in Rule 3-7.10(f) and the relevant case law in order to be reinstated to the practice of law. See In re Petition of Wolf, 257 So. 2d 547 (Fla. 1972); The Florida Bar re Joe Rawls Wolfe, 767 So. 2d 1174(Fla. 2000). In comparison, in other disciplinary cases, the burden of proof is on The Florida Bar to prove by clear and convincing evidence that the attorney has violated an ethical rule of The Florida Bar. See The Florida Bar v. McClure, 575 So. 2d 176, 177 (Fla. 1991).

Moreover, the primary issue in a reinstatement case is whether the Petitioner can prove clearly and convincingly that he is rehabilitated. In re Stoller, 36 So. 2d 443(Fla. 1948). The answer to that question must be based on many factors, including

his actions during suspension and whether he has demonstrated the moral character and fitness to resume the practice of law. In other disciplinary cases, the issue is different because it pertains to whether or not the attorney has violated an ethical rule. A review of the evidentiary record in this case shows that Petitioner has not met his burden of proof, and should not be reinstated.

The standard of review is also distinguishable in reinstatement cases. Unlike other disciplinary cases relating to rule violations, in reinstatement cases, the Court "may review the factual basis for the referee's recommendation by conducting an independent review of the record." See The Florida Bar re Joe Rawls Wolfe, 767 So. 2d 1174,1178(Fla. 2000). See also The Florida Bar v. Grusmark, 662 So. 2d 1235(Fla. 1995)("With regard to the referee's conclusions and recommendations, the Court's scope of review is wider because we have the ultimate responsibility to enter the appropriate judgment." Id. at 1236).

In 2001, the Court revised Rule 3-7.10 incorporating specific criteria from the relevant case law to be applied to reinstatement cases. See In re Petition of Wolf, 257 So. 2d 547(Fla. 1972), In re Timson, 301 So. 2d 448(Fla. 1974). The Court, however, is not restricted to the specific elements of the rule nor to the case law, but has broader discretion to "consider all aspects of the petitioner's character to determine the applicant's present fitness to return to the practice of law." Grusmark, *supra* at p.1236.

## II. THE FLORIDA BAR CHALLENGES THE REFEREE'S CONCLUSION THAT PETITIONER SHOULD BE REINSTATED TO THE PRACTICE OF LAW

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In the Answer Brief, Petitioner's argument that the thrust of The Florida Bar's appeal is to challenge the referee's finding of fact is inaccurate and misplaced. Petitioner examines at length findings of fact and recommendations of referees in other disciplinary, not reinstatement, cases, and then argues that The Florida Bar has not met its burden to show that the referee's findings of fact are erroneous. See Answer Brief at pp. 24-25, 26-30. The Florida Bar, however, did not challenge the referee's findings of fact in its Initial Brief. The Florida Bar specifically stated that it challenged the referee's *conclusion* that Petitioner should be reinstated to the practice of law. See Initial Brief at pp.17, 19-20. Indeed, The Florida Bar used the referee's findings of fact to support its argument that the referee should have denied Petitioner's reinstatement based on the evidentiary record that showed lack of rehabilitation and misrepresentation in the course of the disciplinary proceedings. The Florida Bar requested the Court on appeal to review the evidentiary record including the referee's findings of fact and the exhibits presented at the final hearing. The Florida Bar contends that, after a review of the evidentiary record, the Court should conclude that Petitioner should not be reinstated to the practice of law.

### III. PETITIONER HAS FAILED TO SHOW PROOF OF REHABILITATION.

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Petitioner maintains that the "past prevarications" and prior false statements were part of petitioner's past addiction to alcohol and crack cocaine, and he has now turned over a "new leaf." The record, however demonstrates that Petitioner continued to engage in dishonest conduct and lack of rehabilitation even after his release from HCC in January 2003. Within weeks before his final reinstatement hearing, Petitioner began to resume the use of alcohol, and, more importantly, he adamantly denied that he had used alcohol when faced with the fact by his monitor Stan Spring. Petitioner was still in denial as to his addiction problems in June 2003, demonstrating his continuing lack of honesty and credibility almost up to the date of his reinstatement hearing.

Petitioner states that "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." Answer Brief at p. 37. Mr. Spring's testimony at the final hearing, however, shows that Petitioner's noncompliance with additional requirements, and his "lost weekend" in Biloxi were not the only reasons for his recommendation that Petitioner was unfit to return to the practice of law. Mr. Spring recommended that FLA find another monitor because Petitioner lied to him about the fact that he had been consuming alcohol. T-268, 277-278.



Mr. Spring testified at length that one of the most important fundamentals of rehabilitation and recovery is honesty in dealing with drug addiction. T-268, 285-288. Petitioner's adamant denial of using alcohol in June 2003 when confronted by Mr. Spring indicated that he was not being honest with his monitor nor himself. One month before his reinstatement hearing, Petitioner had the same lack of truthfulness and honesty in dealing with his rehabilitation as he had in the past. Further, Mr. Spring's monitor report and testimony at hearing reveal that Petitioner continued to demonstrate the same flippant attitude when confronted with his use of alcohol. When his associates observed him drinking in violation of his FLA contract, he informed them that he had permission to drink beer. This cavalier attitude demonstrates that Petitioner is not ready for reinstatement to The Florida Bar. Petitioner's actions show a lack of moral character, integrity and honesty that are necessary for a finding of rehabilitation and reinstatement to The Florida Bar.

FLA had Petitioner under contract with a file that spanned almost seven years of testing and tracking Petitioner's drug addiction problems before issuing its recommendation against Petitioner's reinstatement to the Florida Bar on July 25, 2003. Despite Mr. Spring's surprising turnabout six weeks after the final hearing, FLA continued to maintain its position that Petitioner should not be reinstated to practice in Florida without at least one year of "clean time." Petitioner relied on FLA's

recommendation in December 2000 to support his return to the practice of law. FLA had no more contact with Petitioner then, than it did over the seven years of tracking his case. FLA's opinion should be just as credible when it supports The Florida Bar's position as it is when it supports Petitioner's objectives. FLA has a great deal of experience dealing on a daily basis with similar drug addiction problems of attorneys throughout the Florida without requiring personal daily contact to conduct its evaluations.

IV. IF PETITIONER IS REINSTATED, THE COURT HAS DISCRETION TO RECOMMEND ANY SUBSEQUENT CONDITIONS OF REINSTATEMENT

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Under rule 3-7.10(j), if Petitioner is reinstated, the Court has the discretion to impose additional requirements on Petitioner's reinstatement beyond the three-year probation and restitution in the original court order. If an applicant has been suspended for more than three years, the Court has the discretion to impose a requirement of taking the Florida Bar examination before reinstatement.

Petitioner has agreed that he would accept a more stringent FLA contract, but requests that "the random tests conducted by Mr. Grady count towards the total number." Answer Brief at p. 46. FLA's testing includes a broad spectrum of drugs. There is no proof that Mr. Grady's testing would detect the same spectrum of drugs.

If FLA does the testing, then there would be no need for Mr. Grady performing additional tests. The Florida Bar would therefore request that all testing be performed through FLA to comply with any future FLA contract.

**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 Reply Brief has been furnished by U.S. Mail to 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 May, 2004.

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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.

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Bar Counsel