**IN THE SUPREME COURT OF FLORIDA**

**FLORIDA BOARD OF BAR EXAMINERS, IN RE:**

**STEPHEN A. PAPY, SR.**

**CASE NO.: SC04-1411**

# PETITIONER STEPHEN A. PAPY SR.'S REPLY TO THE FLORIDA BOARD OF BAR EXAMINER'S RESPONSE

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## ARGUMENT

### THE BOARD'S RESPONSE VALIDATES THE ARGUMENTS RAISED IN THE PETITION BY DEMONSTRATING; THAT THE BOARD'S RECOMMENDATION AND FINDINGS ARE CONTRARY TO ESTABLISHED PRECEDENT, THAT ITS FINDINGS THAT PAPY OWES RESTITUTION AND THAT PAPY FAILED TO ESTABLISH HIS REHABILITATION ARE CONTRARY TO THE FACTS ESTABLISHED IN THE RECORD

This Court is not bound by the Findings of Fact and Conclusions of law determined by the Board of Bar Examiners. *Florida Bd. Bar Examiners Re: LKD* 397 So 2d 673 (Fla. 1981) Accordingly, this Court is free to reject those findings which it determines are not sufficiently supported in the record and order the admission of the applicant. *Florida Bd. of Bar Examiners re J.A.S.*, 658 So. 2d 515 (Fla. 1995). To determine whether Papy should be readmitted, this Court may review the factual underpinnings of the Board's recommendation by conducting an independent review of the record. *Florida Bd. of Bar Examiners re R.D.I.*, 581 So.2d 27, 29 (Fla.1991).

*PAPY'S PAST MISCONDUCT IS NOT INDIVIDUALLY DISQUALIFYING*

The arguments raised in the Response confirm that the Board's focus in this cause was Papy's past misconduct conduct. [T. 222 13-15] (Resp. 19) In fact its first Finding was that Papy was "individually disqualified" by "the proven allegations of Specification I" (Resp. 19) which concerned the misconduct which led to Papy's agreement with the Florida Bar to resign with leave to reapply after three years.

This Court should reject the Board's first finding because the Rules for Admission and the precedent from this Court universally agree that focus of the Board's inquiry should have been whether Papy established his rehabilitation. *Florida*

*Bd. of Bar Examiners re J.C.B.*, 655 So.2d 79, 80 (Fla. 1995); Rule 3-13. Additionally the logical result of the finding is to permanently preclude Papy from readmission despite this Court approving Papy's Agreement with the Florida Bar which provided a final adjudication of discipline for that conduct. *The Florida Bar re Susser*, 639 So. 2d 30 (Fla. 1994) (Holding that prior ruling imposing discipline was a final adjudication of discipline regarding the misconduct in question and precluded additional punishment simply because another state imposed longer punishment for the same conduct.) *Florida Bd. of Bar Examiners ex rel. Simring*, 802 So.2d 1111, 1112 (Fla. 2000); See, also *The Florida Bar v. Sickman* 523 So. 2d 154, 155 (Fla. 1988) (Our previous judgment of suspension was a final adjudication of discipline regarding the misconduct in question.)

The Board's Response, demonstrates the fundamental error in its process that led to its first finding as it relies upon *Florida Bd. of Bar Examiners re W.H.V.D.* 653 So.2d 386 (Fla. 1995) and *Florida Bd. of Bar Examiners ex rel. J.J.T.*, 761 So. 2d 1094 (Fla. 2000) to support its Finding that Papy's past misconduct is individually disqualifying. Remarkably, neither opinion holds an applicant's past conduct individually disqualifying., rather they each confirm that an applicant's past conduct is <u>one of the factors to be considered</u> when evaluating an applicant's rehabilitation. *W.H.V.D.* 653 So.2d at 388; *J.J.T.*, 761 So. 2d at 1096. While it was proper for the Board to consider Papy's past conduct as one of the facts relevant to his rehabilitation it was improper to find his past conduct in and of itself to be "individually disqualifying".

*THE BOARD'S FINDING THAT PAPY FAILED TO SHOW REHABILITATION IS BASED ON ITS UNSUPPORTED FINDING THAT PAPY OWES RESTITUTION, AND ITS UNFOUNDED DISREGARD OF ALL OF THE TESTIMONY OFFERED BY PAPY AND ALL OF HIS WITNESSES*

The Response, like the Recommendation and the Board's Findings, ignores the irrefutable proof; to wit, copies of the mutual general releases exchanged between and among Papy, Rose and the insurance carrier, the satisfaction of judgment executed by Rose and the Bankruptcy Court's discharge of all of the Papys' debts, which were provided to the Board in the application process and argues that Papy owes restitution, because he purportedly admitted he had a legal debt to his insurance carrier. (Resp. 26)

There is no competent substantial evidence in the record to support this Finding nor is there any legal support for the Board's argument. Assuming Papy said he had a legally enforceable debt to his insurance carrier, he was wrong; the releases and satisfaction resolved all debt issues. See, *The Florida Bar Re Wolfe* 767 So. 2d 1174 (Fla. 2000) (Lawyer who received a release from beneficiaries of trust was discharged from debt and any requirement of restitution for readmission notwithstanding the applicant's failure to pay the full amount of the judgment against him.)

The Response attempts to distinguish *Wolfe*, by the referee's finding therein that a release had been given. (Resp. at 27) As previously noted, it is an irrefutable fact that releases were exchanged in this case and that copies were provided to the Board during the application process. Hence there is no such distinction between *Wolfe* and this matter. The reason the pertinent documents were not introduced during the hearing is also irrefutable, the Board never raised restitution before the hearing. Accordingly,

Papy had notice that it was an issue. The Response argues that it did not have to be raised because it was an element of Papy's rehabilitation that he had to prove. However, no where in the Rules for Admission nor the case law is there a requirement to show restitution unless it is applicable to the cause. Rule 3-13(f). Restitution was not required by Papy's Agreement, nor had the Board raised it at any time, had it been required Papy would have had to pay same before his application would have been accepted by the Board. Rule 2-13.25.

The facts require this finding be rejected. This argument is simply unsupported by law and is deeply troubling.

The Response also asserts that restitution is owed because Rose was not made whole. That argument was also made and rejected in *Wolfe, supra.* (applicant not disqualified for readmission where release was obtained for payment of $850,000 on judgment of $4.5 million) *Wolfe* 767 So. 2d 1177.

The Board's finding also ignores *Florida Bd. of Bar Examiners re: Kwasnik*, 508 So. 2d 338 (Fla. 1987) In *Kwasnik*, this Court rejected the Board's recommendation to deny admission to an attorney from New York because he declared bankruptcy rather than pay a judgment against him for driving while under the influence and causing the death of another. This Court rejected the Board's recommendation stating:

> … we cannot say that the subsequent failure to make payments on the discharged debts may be considered as a basis to deny admission to the practice of law. We recognize that Kwasnik may have continuing moral obligations to the family of the man he negligently killed, but to permit such considerations in a petition for admission to

> the Bar would require the making of such subtle distinctions that no satisfactory rule could be devised. 508 So. 2d, at 339.

Accordingly, precedent precludes the Board's finding and conclusion that Papy owes restitution.

Finally, the Board apparently seizes on a comment made by Papy in response to a question at the final hearing. The Board relies on this comment in an apparent effort to resurrect a debt which legally does not exist. When discussing all of his creditors as well as the insurance carrier Papy said:

> ... I believe then as to all of the people I owed the money, that I have at least a minimum of a moral obligation to pay that money back, and as to the insurance carrier, you know, I believe legally as well as morally, I *should* pay the money back. (Emphasis added T. page 160 lines 2-4)

Clearly Papy did not admit to owing restitution to anyone, and even if he had it would not provide competent substantial evidence of a legal debt requiring restitution, since there is no legal debt to repay. See, *Plumpton v. Continental Acreage Development Co., Inc.*, 830 So. 2d 208 (Fla. 5 DCA 2002) explaining that clear and unambiguous language of the release provides a complete defense to any claim released thereby; *Morris North American, Inc. v. King*, 430 So. 2d 592 (Fla. 4 DCA 1983); *Sheen v. Lyon*, 485 So. 2d 422, 424 (Fla. 1986) ([W]here the language of a release is clear and unambiguous a court cannot entertain evidence contrary to its plain meaning.)

Accordingly, as a matter of fact and law, Papy does not owe restitution and the Board's Finding that he does is erroneous.

*THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW*

*FAIL TO JUSTIFY THE BOARD'S DISREGARD OF PAPY'S WITNESSES AND EVIDENCE*

The Board used its finding that Papy owed restitution to support its finding that Papy failed to prove rehabilitation. As shown that issue does not exist. Independent review of the record by this Court

[1] will demonstrate that the Board's finding on rehabilitation is equally unfounded.

The offers no specific reasons to reject the testimony of Papy's witnesses instead it simply belittles the testimony, noting, that "It would indeed be rare occasion if a bar applicant at a formal hearing failed to produce favorable character evidence from individuals such as relatives, friends, employers or colleagues." (Resp. 25) Papy cannot speak to what is rare or unusual, but would offer that an applicant cannot prove the elements of rehabilitation, as established by Rule and case law, without calling individuals that fall into one or more of those categories and to challenge their testimony for that reason places the applicant in a "Catch 22" that precludes a finding of rehabilitation, i.e., to prove the elements restitution you must call witnesses that are relatives, friends, employers or colleagues, however, the testimony of relatives, friends, employers or colleagues is circumspect and of little weight, therefore the proof is insufficient.

Papy's witnesses were not the type of close personal friends that the Board's argument implies. They included, a sitting Senior Federal District Court Judge, (Judge King) a past member of a Florida Bar grievance committee, (Newt Porter), a member

[1] The fact that the Board heard live testimony does not insulate its fact-finding from review by this Court. *Florida Board of Bar Examiners v. L.K. D.* 397 So 2d 673, 675 (Fla. 1981)

of the Board of Directors of the Association of Trial Lawyers of America and former President of the Florida Academy of Trial Lawyers (John Romano) and attorneys who were not his colleagues, but rather his adversaries, (Doug Ede, and Henry Salas). Nonetheless the Board's Response fails to cite anywhere in the Record where the Board articulated its perceived failings of Papy's witnesses. Instead, the Response argues what the Board "could have" found in order to reject or give little weight to the testimony offered by Papy's witnesses.

Nowhere is this tortured attempt to create a justification more apparent than in the Response's treatment of Judge Lawrence King's letter. Remarkably the Response argues that the Board could have discounted Judge King's letter supporting Papy's readmission because Judge King did not appear live for cross examination. It is difficult to imagine the sort of cross-examination which the Board and/or its counsel intended to subject someone of Judge King's stature to during the proceeding. Perhaps the Board and/or its counsel believes that through a grueling cross-examination, Judge King would recant his support for Papy's readmission.

The fact remains that Board Counsel stipulated to Judge King's letter being introduced as evidence and as Judge King's opinions were sufficiently covered in the letter, there was no reason to call him as a live witness. Never did Papy suspect that a challenge would be made to Judge King's credibility or that having stipulated to the introduction of the letter, it would be discounted because Judge King was not called as live witness. This is especially true as the Board had the right to take Judge King's deposition and chose not to. Moreover, as Papy relied upon the stipulation it should

be enforced and the Board's argument on this point ignored. *Esch v. Forster*, 123 Fla. 905, 168 So. 229, 232 (1936) (quoting *Smith v. Smith*, 90 Fla. 824, 107 So. 257, 260 (1925)); *Dunscombe v. Smith*, 139 Fla. 497, 190 So. 796, 799 (1939).

Lastly, it must be noted that the letter was written by Judge King in response to the Board's inquiry. Accordingly, the Board's argument that the letter should be given little weight because the Board was not afforded an opportunity cross-exam him is the equivalent of a party objecting to a witness testifying after they chose not to take his deposition.

Perhaps no specific comments were made about Papy's witnesses because unlike those commented upon in other cases, Papy's witnesses were familiar with the basis for his resignation and those who did testify by affidavit did not have it prepared for them, they prepared their own affidavits. *Florida Bd. of Bar Examiners ex rel. J.J.T.* 761 So.2d 1094 (Fla. 2000); *Florida Bd. of Bar Examiners ex rel. M.L.B.* 766 So.2d 994 (Fla. 2000)

It is respectfully submitted that review of the record demonstrates there was no cause for the Board to ignore the witnesses testimony whether live or by affidavit or by stipulation.

2. Papy proved the necessary elements of rehabilitation

Review of the record leads to the inescapable conclusion that Papy established through the testimony of each of his witnesses' and his own that he has an unimpeachable character, moral standing in the community and a good reputation for professional ability. Papy established that he has no malice or ill feeling toward those

who by duty were compelled to bring about the disciplinary, judicial, administrative or other proceedings. Further Papy gave his personal assurances, supported by corroborating evidence, of his desire and intention to conduct his life in an exemplary fashion in the future. Papy also showed his personal actions in the community by service to his religion, and community.

The Board did not call a single witness to dispute any of the testimony by Papy or his witnesses. There was no testimony that Papy lacks an unimpeachable character, moral standing in the community or a good reputation for professional ability. Nor was there any testimony that Papy has ill will towards anyone who involved in his disciplinary process, nor any specific findings to challenge the credibility of any witness. Accordingly there is no basis to dispute their testimony and no competent substantial evidence to defeat Papy's readmission claim of rehabilitation.

The Board gives no specific guidelines for determining whether sufficient rehabilitation has been shown. In this case as in others, it has simply found the amount done wanting. Papy respectfully submits that when all the circumstances of his past conduct and life changes are viewed he meets the test of sufficient rehabilitation as set forth in Rule 3-13 and *Florida Bd. of Bar Examiners re P.T.R.,* 662 So.2d 334 (Fla. 1995)

3. Papy's past conduct

Papy has never diminished the severity of his past conduct. However, as this Court has stated, every case is dependent on its own facts and circumstances.

While Papy disagrees with the Board that his past conduct is individually

disqualifying he agrees that it is a factor that must be considered. The Response argues that Papy agreed to his punishment and therefore there is no consideration of the problems he had with alcohol and prescription pain killers during the time frame of his violations. Papy submits that this Court having held in prior bar disciplinary cases that an addicted attorney who has demonstrated positive efforts to free himself of his drug dependency should have that fact recognized by the referee and that it should be considered by this Court when considering the appropriate discipline to be imposed, should be applied to the instant matter as well. also consider it when weighing Papy's conduct to determine the severity of his past conduct. See, *The Florida Bar v. Jahn*, 509 So.2d 285, 287 (Fla. 1987) *citing to, The Florida Bar v. Knowles*, 500 So. 2d 140 (Fla. 1986); *The Florida Bar v. Rosen*, 495 So. 2d 180 (Fla. 1986). This Court has recently confirmed that the circumstances which give rise to the conduct can mean the difference between suspension and disbarment including cases involving the misuse of clients funds. *The Florida Bar v. Smith* 866 So. 2d 41 (Fla. 2004) citing to Fla. Stds. Imposing Law. Sancs 4.12; *Florida Bar v. Mason*, 826 So. 2d 985 (Fla. 2002); *Florida Bar v. Tauler*, 775 So. 2d 944 (Fla. 2000).

Unlike the cases where this Court has held evidence of rehabilitation lacking, *Florida Bd. of Bar Examiners re: L.H.H.*, 660 So.2d 1046 (Fla. 1995) Papy has provided evidence of the specific actions he has undertaken. Unlike the applicant in *Florida Bd. of Bar Examiners ex rel. J.J.T.* 761 So.2d 1094 (Fla. 2000) Papy demonstrated an ongoing commitment, beginning in 1998 and continuing through the present and there has never been effort by Papy in any of the proceedings for the

purpose of an ulterior motive. Papy proved that he has participated in efforts in his Parish Community and in other Parishes in Miami and shared his story in an effort to help others avoid his pitfalls, that he co-chaired the festival for the Poor for two years at his Parish, that was no small undertaking, (See Letter of Father Fetcher and testimony of Mrs. Papy and the undersigned, and that he has participated in a substantial way with the YMCA and Khoury League youth baseball programs, see copies of plagues, and certificates introduced into evidence and see the affidavit of Douglas Ede.

It is true that Papy benefited from these experiences (never monetarily) but that does not reduce the importance of his contribution or his efforts. *Florida Bd. of Bar Examiners re P.T.R.,* 662 So.2d 334 (Fla. 1995)

Perhaps the most significant evidence of Papy's change is that set forth in his Parish Priest's letter that he knew of the changes in Papy and had the changes not been made Papy would not have been invited to continue with the unique school the Parish offers, and the unchallenged evidence that Papy has not consumed any alcohol or had any reoccurrence of any problem with pain killers since before his surgery.

However, contrary to the Board's approach of accepting his admissions and going no further, the precedent from this Court require all of the facts and circumstances be taken into consideration,

*THE BOARD'S SECOND FINDING IS NOT INDIVIDUALLY DISQUALIFYING NOR DOES IT PROVIDE COMPETENT SUBSTANTIAL EVIDENCE THAT PAPY IS NOT REHABILITATED OR UNWORTHY OF ADMISSION*

The Board's second finding is that the allegations of Specification II were

proven and are individually disqualifying. Specification II is based on personal income tax liens that existed against Papy prior and were satisfied prior to his resignation, tax liens that have arisen after his resignation for taxes due or penalties arising before his resignation, that taxes owed and declared and filing late returns. Papy had admitted the substance of Specification II in his Answer. Hence the issue is whether the conduct is "individually disqualifying" or is such nature that it rebuts Papy's evidence and precludes his rehabilitation.

To be individually disqualifying the facts must be such that a reasonable man would have substantial doubts about the applicant's honesty, fairness, respect for the rights of others, the laws of Florida and the United States and further must be rationally related to Papy's fitness to practice law. *Florida Board of Bar Examiners v. G.W.L.*, 364 So 2d 454 (Fla. 1978); *The Florida Bar re Jahn*, 559 So.2d 1089, 1090 (Fla. 1990). *Florida Bd. of Bar Examiners ex rel. T.J.F.*, 770 So. 2d 676 (Fla. 2000)

A review of the record shows that there is not any allegation, let alone any basis that any of Papy's tax matters were due to his simply refusing to file his returns, or failing to report his income. Only that Papy legitimately contested the amount due in earlier years and has been unable to pay in all of his taxes in subsequent years. That in light of Papy's activities and resolving all debts but his tax debts no reasonable man would have substantial doubts about the his honesty, fairness, respect for the rights of others, the laws of Florida and the United States and further that such is not rationally related to Papy's fitness to practice law.

## CONCLUSION

The Board's Response attempts to justify the Recommendation but is flawed by the lack of findings, legal support and irrefutable facts that are contrary to its findings. For the reasons set forth above the Recommendation should be rejected.

Respectfully submitted

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## CERTIFICATE OF SERVICE

I CERTIFY, that a true and correct copy of the foregoing Petition was served via U.S. Mail this 18th day of October 2004 on Thomas Pobjecky, General Counsel Florida Board of Bar Examiners at 1891 Eider Court, Tallahassee, FL 32399-1750.

By,_____
Juan P. Bauta, II
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## CERTIFICATE OF COMPLIANCE

The undersigned, Juan P. Bauta, II certifies that this Motion complies with the font requirements of Rule 9.100 (l) Fla. R. App. P.

By,_____
Juan P. Bauta, II
Fla Bar No. 894060