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Answer Brief

Pursuant to this Court's Order of September 18, 2006, Allan Barry Marks, by and through his undersigned counsel, files his Answer Brief in the above-captioned matter.

Jurisdiction

Mr. Marks agrees and joins in the Board's statement that this Court has jurisdiction of this matter.

Summary Of Argument

At the outset, it is acknowledged, without qualification, that the willful misappropriation of client funds should be the Bar's equivalent of a capital offense. There should be no excuses." *The Florida Bar v. Breed*, 378 So.2d 783, 784 (Fla.1979); *The Florida Bar v. Tunsil*, 503 So.2d 1230 (Fla.1986). It is also important to recognize that the terms and provisions of Mr. Marks' resignation provided him with an opportunity, as provided in this Court's Order of April 8, 1991, to seek readmission by complying with the Court's rules and regulations.

The Florida Board of Bar Examiners is the arm of this Court that is charged with the primary responsibility of handling matters related to bar admission. *Rule 1-12, Rules of the Supreme Court Relating to Admissions to the Bar*. The Board is responsible for determining character and fitness through screening (*Rule 1-14*) and minimum technical competence through the bar examination (*Rule 1-15*). The

Board has made both of these determinations and provided this Court with an unqualified recommendation for Mr. Marks' readmission.

Over the past 15½ years, Mr. Marks has affirmatively acted upon the December 6, 1990 agreement with The Florida Bar, as approved by this Court. He has applied and dedicated himself to demonstrating that the improper acts and errors in judgment of 1990 were aberrations and not ultimately demonstrative of his character. After perhaps one of the most continuous, comprehensive, and thorough inquiries related to character and fitness¹, and after requiring Mr. Marks to pass the Florida Bar examination on two more occasions, the Board has clearly concluded that Mr. Marks is fit to resume the practice of law.

With respect to the particular matters that the Court has requested the parties to present through their briefs, the following clearly demonstrates that Mr. Marks has reestablished a sound financial footing and pays all of his debts and obligations as they become due. Virtually all of the debts arising from or as a consequence of the wrongful acts of 1990 have been satisfied. The two debts remaining from that time have been satisfactorily addressed with each creditor and ultimately await a final public order on the Board's recommendation. Finally, as explained and noted below, while the nature of the wrongful act giving rise to both Mr. Marks' and Stephen A. Papy's resignations are the same, the cases are vastly different with

¹ See SC03-2210.

respect to the evidence offered at the formal public hearings and the quantity and quality of the elements of rehabilitation supporting the Board's decision in each case.

I **The Circumstances Surrounding Mr. Marks' Resignation**

The Board's recitation of the circumstances surrounding Mr. Marks' resignation, as set forth in Section 1 of its Initial Brief are correct and accurate.

II **Information Held By The Florida Bar**

Mr. Marks is not privy to any information held by The Florida Bar with respect to its investigation of Mr. Marks in 1989, other than the documents referred to in the Board's Initial Brief and SC60-76892.

III **Information Regarding The Status Of Mr. Marks' Debt**

With the exception of the two items of indebtedness referred to in the Board's Initial Brief, Mr. Marks meets all of his financial obligations as they become due and payable. *Cf. The Florida Bar re: Roberts*, 721 So.2d 283, 284, n. 1 (Fla.1998). As noted in the Summary of Argument, *supra*, Mr. Marks has satisfied part of his tax obligations, wholly satisfied the judgment in favor of Kahn & Gutter, and has repaid all sums due to David Lipman.

The two items referred to in the Board's Initial Brief, a family indebtedness and outstanding Federal Income Taxes, are not the subject of any adversary

proceedings.² With respect to the first, Mr. Marks has never disputed the obligation and has agreed to a specific plan of repayment. This plan is conditioned upon readmission to the Florida Bar. The Trustee has acknowledged and agreed that Mr. Marks' ability to practice law and earn a living at what he has been trained to do is a reasonable condition to initiating payments.³

With respect to the second, from the date of his resignation Mr. Marks has continuously worked with the Internal Revenue Service regarding payment of the delinquent taxes. This was initially done through a written installment payment agreement, with direct payroll deductions. This agreement resulted in the payment of some of the delinquent taxes and a discharge of some of the Federal Tax Liens. Subsequently, Mr. Marks consulted with an IRS Collections Officer who advised him against continuing to make installment payments and instead, to make an Offer in Compromise. The making of the Offer in Compromise required that payments under the Installment Payment Agreement be discontinued. Mr. Marks has actually made two separate Offers in Compromise. Both offers have been

² The only issue of potential dispute relates to the IRS' failure to apply \$13,977.84 of previous, direct payroll deductions to the outstanding taxes. These payroll-deducted payments were made pursuant to an Installment Payment Agreement that was in effect from approximately 1995 through the date he made an initial Offer In Compromise. The IRS is currently conducting an accounting and audit of its records with respect to these payments.

³ It is also important for the Court to note that Mr. Marks has previously repaid approximately \$26,623.00 of this indebtedness and has not sought application of any of these monies as a credit against the principal amount due.

rejected. More recently, Mr. Marks has learned from the Collection Officer assigned to his case that until a final determination of his status as an attorney licensed in Florida is concluded, the IRS is not amenable to finalizing an agreement.

The status of these two items of indebtedness is subject to the ultimate determination of Mr. Marks' readmission. Both Mr. Marks and each of these creditors realize that the performance of a written commitment for repayment of these obligations can only be realistically premised on a known ability to engage in profession that will afford Mr. Marks the opportunity to maximize his earning potential. *See The Florida Bar Re: Whitlock*, 511 So.2d 524, 525 (Fla.1987). An agreement to the repay these considerable debts with a continuing uncertainty of regular income and employment would be tantamount to financial irresponsibility that would preclude readmission.

IV
Why the Circumstances Of This Case Are Not Controlled By
FBBE re: Papy, 901 So.2d 870 (Fla.2005)

The Court has directed the Board and Mr. Marks to address the issue of why the circumstances of this case are not controlled by the Court's opinion in *Florida Board of Bar Examiners re: Stephen A. Papy, Sr.*, 901 So.2d 870 (Fla.2005). As set forth below, the circumstances are distinguishable on virtually every level, including but not limited to the quantity and quality of evidence of rehabilitation, as well as the

ultimate recommendation of the Board based upon review and analysis of that evidence.

At the outset, Mr. Marks affirms that any differences in the particular facts leading to the resignations of both himself and Mr. Papy are of little, if any, consequence when considered in light of the seriousness of the basic offense to the Court and the public at large. With this acknowledgment in mind, Mr. Marks believes that the facts establishing his rehabilitation, as determined by the Board after formal hearing, are clearly distinguishable from the paucity of evidence of rehabilitation submitted by Mr. Papy. This is most clearly demonstrated by two very significant facts. First, in Mr. Marks' case, the Board's initial determination following the public hearing of November 19, 2004, was that his admission be withheld for twelve months in order to permit him to continue his efforts at rehabilitation.⁴ The Board had independently concluded that Mr. Marks had demonstrated rehabilitation, however for reasons neither explained nor disclosed, determined that after additional rehabilitation efforts, it "would recommend the Applicant's admission to the Florida Bar." Second, after the *Papy* decision was handed down, the Board received Mr. Marks Sworn Report regarding his actions from November 19, 2004 through November 19, 2005. The Board conducted further investigation from November of 2005 through March of 2006 and ultimately

⁴ At this point in time, the Court had not handed down the opinion in *Papy*.

recommended readmission without comment or opposition. It would neither be speculative nor presumptuous to conclude that, cognizant of the *Papy* decision, the Board made the determination that Mr. Marks had complied with the “Elements of Rehabilitation” found in Rule 3-13. As an “administrative arm of the Supreme Court of Florida to handle matters relating to bar admission” (*Rule 1-12*) it is clear that the Board has accomplished its “primary purpose . . . to protect the public and safeguard the judicial system.” (*Rule 1-14.1*).

Tax Obligations

A similarity of circumstances appears to exist from the history of Mr. Marks and Mr. Papy with respect to outstanding tax obligations. At first blush, the circumstances may appear to be identical, but they are vastly different. Specification 2 against Mr. Papy alleged that “Papy exhibited a pattern of financial irresponsibility or lack of respect for the law as evidenced by” failure to timely file tax returns, failure to timely pay income taxes, and the filing of Federal Tax Liens against him. *Papy*, 901 So.2d at 870-871. These specifications were proven and considered disqualifying. Conversely, Specification 2 against Mr. Marks was limited to failure to timely pay taxes for the years 1996, 1997, 1998, and 1999. In its initial Findings of Fact and Conclusions of Law, the Board considered Mr. Marks’ discussions and negotiations with the IRS and encouraged him to “continue to deal responsibly with his obligations to the Internal Revenue Service . . . “ (*March 10, 2005 Findings of*

Fact, Conclusions of Law, and Recommendation, p. 15) (Emphasis added). The most significant aspect of this circumstance is that the Board has found “Specification 2 proven but not disqualifying for admission to the Florida Bar. (*March 16, 2006, Report and Recommendation*, p.3). As noted above, Mr. Marks has timely filed and paid his tax obligations since 1999. Further, he has had continuing discussions with the IRS in an attempt to satisfy the previous tax liabilities through two Offers in Compromise and for the establishment of a payment plan. The absence of an agreement is based upon the decision of the IRS. The Board’s determination in this matter is well founded.

Rehabilitation and Community Service

Another area of comparison of circumstances relates to evidence of rehabilitation. As noted in the Board’s Initial Brief, the issue of the sufficiency of the evidence of rehabilitation was never reached in *Papy*. Nonetheless, reference was made to evidence provided to the Board’s hearing panel of three (3) certificates of appreciation for coaching baseball, three (3) character affidavits, two (2) character letters⁵, and six (6) character witnesses.⁶ *Papy* at 871. Mr. Papy also received the

⁵ In previous proceedings before the Court, Mr. Marks has filed or caused to be filed some forty-eight (48) character letters. *See* SC60-80822.

⁶ Mr. Marks has not reviewed these exhibits or read a transcript of Mr. Papy’s hearing before the Board, so he is unable to comment on the quality of this evidence.

Board's commendation for his involvement in his church's festival to benefit the poor. *Id.*

In comparison, since the date of his resignation, Mr. Marks has spent time working with organizations dedicated to feeding senior citizens on Miami Beach and delivering religious holiday material to Russian immigrants. He has donated literally "gallons" of blood and platelets for both the American Red Cross and its successor, Community Blood Services of South Florida. He has dedicated almost one thousand (1,000) hours to recording books on tape (and now digitally) for Recording for the Blind & Dyslexic (*Learning Through Listening*) ("RFB&D"), the majority of those books consisting of hornbooks and legal treatises to assist judges, attorneys, and law students who are visually impaired. Mr. Marks was personally responsible for the creation of the Miccosukee Golf Classic Benefiting Recording for the Blind & Dyslexic. Since the tournament's inception in 2002, it has raised almost \$100,000.00 that has gone directly to RFB&D. Most recently, Mr. Marks and his wife have undertaken rescue and foster-parenting of abandoned dogs in the Miami-Dade County area. While this involvement is new to the Marks', they have successfully foster-parented abandoned puppies and rehabilitated unsocial dogs, placing them in loving homes. The Board recognized "the extensive involvement the applicant has in his community." (*March 10, 2005 Findings of Fact, Conclusions of Law, and Recommendation*, p. 15). It is also important to note that the Board acknowledged

“the high regard that the applicant is held by those who testified on his behalf . . .” *Id.* Mr. Marks is reticent to contrast or denigrate any quantum or quality of community involvement or social action, including that of judging Mr. Papy. However, if a comparison is required to be drawn for purposes of distinguishing the Board’s action, the differences speak for themselves.

Finally, Mr. Marks believes that the Board’s concluding sentence in Section 4 of its Initial Brief is insightful as to the relationship of the *Papy* decision to the Board’s recommendation in Mr. Marks’ case. “The results of these two cases might best be compared if and when Papy decides to reapply.” This simple point should be well taken by the Court. Papy’s denial of readmission was the result of a first attempt, some seven years after his resignation. The Board’s specifications were determined to be disqualifying, and the question of rehabilitation was not an issue. Conversely, Mr. Marks is reapplying for a second time some fifteen years after his resignation, and as noted by the Board, “Marks has redoubled his efforts at rehabilitation, especially in the area of community service, and dealing responsibly with his debts and timely payment of federal income taxes.” The Board’s recommendation of March 2006 is based upon “an extended track record of significant community service over the seven years since his first formal hearing on top of the quality community service he performed prior to his first formal hearing.” Mr. Marks believes that the Board’s comment is that Mr. Marks’ case should not be

decided on the result in *Papy*, but rather, if Mr. Papy elects to reapply, the decision in his case should be guided by the Board's decision in Mr. Marks' case.

Conclusion

When Mr. Marks placed his signature on his resignation in December of 1990, he accepted the consequences of his actions as they pertained to his license to practice law. These were not the only consequences. Notwithstanding, and without hesitation, Mr. Marks immediately started a reevaluation of his life and dedicated himself to performing those acts and conducting himself in such a manner as would ultimately support his application for readmission and permit him to rejoin a learned and honorable profession. Fifteen years later, he comes to this Court with the recommendation of the arm of this Court responsible for determining his present character and fitness to be a member of The Florida Bar. The Board has concluded that the evidence presented to it has "established Marks's rehabilitation by clear and convincing evidence, which led to the Board's recommendation of readmission."

Mr. Marks respectfully requests that the Court enter its order consistent with the Board's recommendation.

Dated this _____ day of November, 2006.

Respectfully submitted,

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Certificate Of Service

I hereby certify that a true and correct copy of the above and foregoing Answer Brief was served via United States Mail, Postage Prepaid, this _____ day of November, 2006 on Robert G. Blythe, Esq., Deputy General Counsel, Florida Board of Bar Examiners, Tippin-Moore Building, 1891 Eider Court, Tallahassee, Florida 32399-1750.

Roberto Villasante, Esq.

Certificate Of Type Size And Style

I hereby certify that size and style of type used in this Answer Brief is 14 Times New Roman and the computer disk filed with this Brief has been automatically scanned by Norton Anti-Virus and found to be free of viruses.

Roberto Villasante, Esq.