IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellant,

IN RE:

PETITION FOR REINSTATEMENT OF MICHAEL HOWARD WOLF,

Petitioner - Appellee.

_____/

Supreme Court Case No. SC08-250

The Florida Bar File No. 2008-51,119(17G) FRE

THE FLORIDA BAR'S INITIAL BRIEF

MICHAEL DAVID SOIFER, #545856
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, Suite 900
Fort Lauderdale, FL 33309
(954) 772-2245

KENNETH LAWRENCE MARVIN, #200999
Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR., #123390
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600

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PRELIMINARY STATEMENT

The Appellant, The Florida Bar, is seeking review of a Report of Referee recommending Petitioner's Reinstatement.

Appellant will be referred to as The Florida Bar, or as The Bar. Petitioner - Appellee, will be referred to as Petitioner, or as Mr. Wolf throughout this brief.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to specific pleadings will be made by title. References to the transcript of the final hearing are by symbol TR, followed by the volume, followed by the appropriate page number. (e.g., TR III, 289).

References to Bar exhibits shall be by the symbol TFB Ex. followed by the appropriate exhibit number (e.g., TFB Ex. 10).

References to Petitioner's Exhibits shall be by the symbol Pet. Ex. followed by the appropriate exhibit number (e.g., Pet. Ex. 10).

STATEMENT OF THE CASE AND OF THE FACTS

In SC04-1374, The Florida Bar v. Michael Howard Wolf, 930 So.2d 574 (Fla. 2006), this Court held that petitioner negligently misappropriated client funds as a result of "sloppy bookkeeping" practices. *Id* at 578. Petitioner had made six deposits of client settlement checks into his operating account. Further, due to petitioner's misuse of client monies, there were shortages in his operating account, which as demonstrated by the Bar's audit, was overdrawn throughout the audit period. This Court, by order dated February 23, 2006, found that rehabilitation was appropriate and ordered that Mr. Wolf be suspended for two years, be required to retake and pass the ethics portion of the Florida Bar examination, and serve one year probation upon reinstatement.

On February 11, 2008, Mr. Wolf filed a petition for reinstatement. Beginning at page 14 of the petition, petitioner states his employment during the suspension as follows: From June 1, 2006 to October, 2006, petitioner was a paralegal/office manager/case coordinator for the Law Office of Arthur Cohen. Thereafter, petitioner was a paralegal/office manager/case coordinator for the Law Offices of Bernace A. DeYoung. The petition also states that he worked as a consultant for the Florida Arcade and Bingo Association from the effective date of the suspension to the present. This was pursuant to an independent contractor agreement. (Pet. Ex. A-26). At page

15, petitioner states that he has not been practicing law, has not had direct client contact, and has not dealt with trust funds or property.

Petitioner failed to disclose on the petition that he conducted a private consulting business separate and apart from the employment he revealed on the petition. At TR II, 251-252, petitioner testified about this omission as follows:

> THE REFEREE: Why didn't you mention it on the form?
>
> THE WITNESS: It says consulting for Florida Arcade and Bingo Association. The last paragraph says consultant to the Florida Arcade and Bingo Association. My private consulting clients come typically through Gale and the Arcade Association so I mean we can split hairs and say that's something different than doing private consulting.

More accurately, in his private consulting business, petitioner met with clients beyond those affiliated with the Florida Arcade and Bingo Association, prepared billing invoices, and billed those clients separately. Those clients directly paid petitioner or his business, Michael H. Wolf and Associates, LLC. (TR II, 253-254). Petitioner operated his consulting business at the offices of both attorneys he was employed by, Cohen and DeYoung, but the consulting was separate and apart from either Cohen's or DeYoung's law practices, and he maintained his own letterhead with the name Michael H. Wolf And Associates, LLC. (TR II, 267; TFB Ex. 6). Petitioner testified that he consulted with people who were considering opening or buying an arcade. (TR II 270). He also provided consulting services to vendors, who are

typically individuals or entities that sell or lease amusement machines to arcade owners. (TR II, 279). And he advised these clients about the necessity of checking zoning restrictions, ordinances concerning parking restrictions, and the correct number of machines to a space, as well as reporting requirements to the Florida Department of Revenue and arcade business promotions regulated by Chapter 849, Florida Statutes. Petitioner testified he would also look up ordinances on his computer for his clients and advise them if a particular jurisdiction had ordinances pertaining to amusement arcades. (TR II, 270-276). And he provided copies of legal forms to his private consulting clients to use as samples, including a 52-page lease for an arcade, which he testified he believed was a good form to use from the aspect of over-protecting the landlord and under-protecting the tenant. (TR II, 276-277).

At the final hearing, he admitted to being paid regularly and at times substantial sums for his private consulting business. (RR 5). Yet, in addition to not disclosing the existence of the consulting business on the reinstatement petition, petitioner also failed to disclose on the petition his income derived from this business. (TR II, 254). Petitioner kept no records for his consulting clients, except for a billing invoice, and sometimes he did not even prepare an invoice. (TR II, 281). Page 15 of petitioner's reinstatement petition sets forth his approximate monthly earnings and the sources of those earnings during his suspension. Petitioner only disclosed that, in addition to

accrued legal fees earned before the suspension, he earned approximately $500 per week from Attorney Cohen, $1,000 per week from Attorney DeYoung, and $1,000 per month from the Florida Arcade and Bingo Association. In fact, his business tax return for the year 2006 disclosed $197,222 in gross receipts or sales and $142,322 in income for his business, Michael H. Wolf & Associates, LLC. (Pet. Ex. 19, attached to petitioner's supplement to petition for reinstatement). Petitioner admitted that some of those gross receipts were for his consulting business, but the consulting business was not listed on the tax return. (TR II, 255-256). The 2007 tax returns were not provided with the petition, and the bar specifically requested those. (Pet. Ex. A-62). When provided, petitioner's 2007 business tax return disclosed $95,315 in gross receipts or sales and $91,459 in total income for his business, Michael H. Wolf & Associates, LLC. (Pet. Ex. A-25; 25a). After receiving the 2007 tax returns, the bar requested copies of all checks and other documentation relating to the gross receipts or sales declared on the tax return and also requested petitioner provide an affidavit containing a complete description of services he provided from his business for the tax years 2006 and 2007. (Pet. Ex. A-63). The affidavit, dated June 5, 2008, provided by petitioner in response to the said request, stated in pertinent part:

> 3. During the years 2006 and 2007, services and products that I provided, to generate gross receipts as declared on my Federal tax returns (both corporate, Form 1065, and personal Form 1044) were working as a

> paralegal, compliance officer to the Florida Arcade and Bingo Association, consultant, including consulting with and for the Amusement Arcade Industry, and aerobics instructor for L.A. Fitness. (Pet. Ex. A-29).

No further explanation of his "consulting" work was provided by the petitioner on the affidavit. As a result of the evidence at the final hearing, the referee found petitioner gave advice on opening arcades, reported on law changes in the area, reviewed leases, and researched ordinances that would apply to new arcade sites. (RR 5).

The evidence also showed petitioner, pursuant to his "consulting business," was paid $10,000 directly by Global Games, a vendor who was a client of petitioner's prior to his suspension. Petitioner was paid to put together a legal defense team for an owner of an establishment where Global Games owned arcade machines that had been seized by the government and were subject to possible forfeiture. (TR II 284, 286-289; TFB Ex. 6). Petitioner testified that he was hired to select the lawyers for the team and act as a consultant to the lawyers on the team. He testified that part of his job was:

> … to educate those lawyers in strategy, the elements, the defense strategy for defending these type of cases which is markedly different from a typical criminal case … (TR II 287-288).

The petitioner testified the legal team he assembled did not go forward because the establishment owner hired his own attorney. But petitioner continued to have

further involvement with the case. He had discussions with the owner's new attorney about the case and what needed to be done, and offered to be at the trial. (TR II 290-292). In addition, petitioner testified that a separate forfeiture action against Global Games had also been filed and that he called the lawyer for the sheriff to ascertain the status, and was informed the action had been dismissed. (TR II 292).

The referee also found that petitioner "consulted with a State Attorney on the 'proper interpretation' of 'gaming law' for another attorney's criminal client." (RR 5-6). Petitioner's testimony was that he was contacted by Steve DaGrave (phonetic) of M&W Enterprises concerning a legal problem in Key West, FL, involving a cease and desist letter issued by the Key West State Attorney's Office. A meeting was held at Ms. DeYoung's office with Ms. DeYoung present. Ms. DeYoung advised DaGrave to retain counsel in Key West and also suggested he retain petitioner to assist the Key West attorney. Petitioner testified that he was to assist the attorney as follows (TT II, 298):

> Bring him up to speed on the arcade issues, about the law pertaining to amusement machines, application of skill, all of the things that he would need to be aware of in order to go and have an intelligent meeting with the State Attorney's Office down there.

Petitioner was paid directly by M&W Enterprises a fee of $2,500 plus travel expenses for this purpose. Petitioner met with the Key West attorney and prepared

him for the meeting with the State Attorney's office. Petitioner attended the meeting at the State Attorney's office and presented argument, which referenced case law and Attorney General Opinions. (TR II 297-304; TFB Ex. 8). TFB Ex. 8 also contains another check for $1,000 payable directly to petitioner from M&W Enterprises. Ms. DeYoung did not receive any payment for her participation in the consultation. (TR II, 310; TFB Ex. 8).

In another matter, petitioner was paid $1,000 directly by a company called Las Vegas Games to assist a Starke City attorney, Dudley Hardy, on arcade issues with the City Council. Petitioner wrote a letter to Mr. Hardy, dated July 13, 2007, wherein he gives legal analysis to a proposed ordinance. The letter refers to case law, Attorney General Opinions, and an Appellate Brief in addressing legal issues raised in the ordinance. The letter was written on Ms. DeYoung's letterhead and signed by petitioner purportedly in the capacity of Director, Arcade Compliance Division for Ms. DeYoung's firm. Yet, the matter did not involve a client of Ms. DeYoung and the letter was written without Ms. DeYoung's supervision or signature. (TR II 293-296). The billing statement was sent on petitioner's consulting business letterhead. Copies of the letter, invoice, and $1,000 check paid directly to petitioner are in evidence as TFB Ex. 7.

The referee also found the evidence demonstrated petitioner "allowed a check to be used for a direct retainer for another attorney to be written to him." (RR 4-5). Petitioner's testimony was that in two instances, David Schneider of D&E Stables and a client prior to the suspension, gave him a check to pay for a lawyer to handle a legal issue. One check was for $20,000 and the other was for $2,000. (TFB Ex. 12, Pet. Ex. A-37). Both checks were made payable to petitioner and were deposited into his business account. A garnishment lien on the $20,000 deposit was asserted by Biloxi Casino Corporation, which had an outstanding personal judgment against petitioner. Ms. DeYoung had to file an emergency motion on petitioner's behalf to dissolve the lien. (TR II, 312-315, 319; TFB Ex. 13).

The referee further found that petitioner cashed a check made out to him which was payment for legal services of another attorney. (RR 5). The evidence demonstrated that while in Attorney Cohen's employ, petitioner received funds directly from clients in payment of sums that Cohen owed petitioner in back pay. (TR I, 121-123). Andrew Soowal testified that his company, Top Branch Environmental Services (Top Branch) was petitioner's client and that it went to Cohen for legal services after petitioner became employed there. (TR I, 70-71). On September 26, 2006, Cohen billed Top Branch for legal work performed between July 11, 2006 and September 4, 2006, for which Top Branch paid petitioner directly. (TR I, 76; TFB Ex.

1). Petitioner also received $1,900 directly from another prior client who became Cohen's client, Inter Ocean Industries. (Pet. Ex. A-67; TR I, 126). Cohen also paid petitioner directly from his trust account, client settlement proceeds in three personal injury cases: Petakas, Smith, and Twitty. (Pet. Ex. A-47; TFB Ex. 3 and 4). In the Smith file, which was opened after petitioner's effective suspension date, Cohen testified he paid petitioner $3,725.88 of the total fee of $4,162.50, for back pay owed, despite indicating on the trust account check paid to petitioner that it was payment for prior fees earned. (TR I, 132-135).

In the report of referee, the referee also noted that two checks paid directly to petitioner by clients of his consulting business contained a description indicating it was payment for "legal consult" and "for legal services." (RR 5; Pet. Ex. A-37).

Petitioner also received funds directly from Attorney DeYoung that were intended for payment of petitioner's employee, Deborah Carter. Petitioner deposited those funds into his bank account. Those funds were not held intact by petitioner and as a result, checks that petitioner wrote to Ms. Carter resulted in overdrafts to his account. (TT II, 335-337).

The referee found that petitioner is "horrible at financial management." (RR 6). The referee also found that petitioner is behind in filing and paying income taxes, failed to keep good financial records about his private consulting business, and that his

bank accounts continue to be often overdrawn. (RR 4-5). Petitioner admits he failed to repay any of the judgments or tax liens listed in his reinstatement petition. (TT II 334). Exhibit 18 to the petition sets forth ten tax liens filed from 1996 through August 2007, and seven judgments filed from 2001 through October 2006.

The referee considered petitioner's failure to notify two clients and one judge of the suspension as required by Rule 3-5.1(g), R. Regulating Fla. Bar, not to be significant. (RR 6).

The final hearing was conducted on July 21, 2008, with final argument heard on July 24, 2008. At the final hearing, the referee elaborated on her concerns about petitioner's conduct during his suspension, including his failure to mention the consulting business or the income he derived therefrom on his reinstatement petition, his direct receipt of client funds, and his continued inability to manage his finances. The referee stated at TR II, 265-266:

> I guess one of my concerns is if I'm going to let you go practice law again, one of the concerns we had two years ago was the ability of you to manage the finances and the bookkeeping end of it and, you know, one of my concerns is I still see some indications here that that is not your forte and how do I -- I can't -- clearly I believe there is a one-year probation from the time I reinstate you so I get to watch for a year I guess. I guess I get to watch for that year, but I still see some signs and clearly your first five months there with Mr. Cohen's practices were not as good as I would like to have seen Mr. Cohen's practices to have been.
>
> It looks to me like DeYoung is much more in line of the regiment that someone like you is going to need. I have no guaranty that she is

> going to be willing to take -- or that you are going to be willing to work something out so I guess I am concerned.
>
> The fact is you don't mention the consulting and you probably had such income there, and you don't mention on page fifteen that amount of money and the fact is there are, you know, checks written to you where people are under the belief that you might be being a lawyer for them still. Whether it's three or four out of I don't know how many, there is still some indications whether Cohen allows it or not you accept checks coming straight to you from his clients under conditions that, you know, we all were going to be watching.
>
> Those are all red flags. Had you never had the problems, they wouldn't be red flags because I guaranty you there are hundreds of lawyers out there that probably do stuff like that. But once you become a Bar client, those tiny little things become so incredibly crucial.

The referee determined that the law is unclear as to the scope of legal work allowed for a suspended attorney acting as a paralegal and found the evidence insufficient to show petitioner was practicing law. (RR 5). The referee recommended petitioner be reinstated with the following conditions; that he attend and successfully complete LOMAS within one year and employ someone qualified to handle his professional finances and/or work in an office that provides such assistance and oversight for a period of one year. The Bar petitioned for review of the Report of Referee, requesting this Court to reject the referee's recommendation of reinstatement.

SUMMARY OF ARGUMENT

The ability to practice law in Florida is a privilege and not a right. A suspended lawyer who seeks to be reinstated bears the heavy burden of proving to this Court's satisfaction, that he should be allowed this privilege once again.

Petitioner failed to produce clear and convincing evidence of his rehabilitation as required by Rule 3-7.10(f)(3), R. Regulating Fla. Bar. Petitioner's disciplinary history is related to abysmal financial practices, and during the suspension he continued to practice poor financial record keeping, improperly handled client monies, continued to have overdrawn bank accounts, and unsatisfied tax liens and judgments. The petition for reinstatement contained material omissions concerning his employment and income during the suspension for activities that constitute the unlicensed practice of law. The referee also erred in recommending reinstatement in the presence of disqualifying conduct set forth in Rule 3-7.10(f)(1), R. Regulating Fla. Bar. This conduct included the unauthorized and unsupervised practice of law, direct contact with clients, and the direct handling of client monies and funds held in trust. Petitioner also failed to strictly comply with Rule 3-5.1(g), R. Regulating Fla. Bar, and otherwise failed to strictly comply with the specific conditions of the disciplinary order. The Florida Bar respectfully requests this Court to protect the public by denying reinstatement.

ARGUMENT

THE REFEREE'S RECOMMENDATION TO REINSTATE PETITIONER IS ERRONEOUS AND UNJUSTIFIED BECAUSE PETITIONER ENGAGED IN DISQUALIFYING CONDUCT DURING THE PERIOD OF HIS SUSPENSION AND FAILED TO MEET HIS BURDEN OF PROVING REHABILITATION.

The practice of law is a privilege, not a right. A petitioner seeking reinstatement to The Florida Bar must establish by clear and convincing evidence that he has met the criteria set forth in Rule 3-7.10, R. Regulating Fla. Bar, and the decisions of this Court. The Florida Bar re: McGraw, 903 So.2d 905 (Fla. 2005); In re Petition of Wolf, 257 So.2d 547 (Fla. 1972). In placing this burden of proof on the petitioner, this Court set specific reinstatement proceedings and criteria to define reinstatement as "more a matter of grace than a right …" In re Stoller, 36 So.2d 443 (Fla. 1948).

In ruling on a petition for reinstatement, this Court has stated that, "We begin with the requirement that the burden is on the petitioner to establish that he is entitled to resume the privilege of practicing law without restrictions." Petition of Dawson, 131 So.2d 472, 474 (Fla. 1961). "A petitioner seeking reinstatement bears the heavy burden of establishing rehabilitation." Florida Bar re Janssen, 643 So.2d 1065, 1066 (Fla. 1994). Because of a lawyer's interaction with the public, a wide range of factors may be considered in determining whether an individual shall be allowed to resume the profession. Petition of Rubin, 323 So.2d 257, 258 (Fla. 1975).

The party seeking review of the referee's recommendation on a reinstatement petition has the burden to demonstrate the referee's recommendation is erroneous, unlawful or unjustified. Fla. Bar re Dunagan, 775 So.2d 959, 961 (Fla. 2000) (quoting Fla. Bar re Grusmark, 662 So.2d 1235, 1236 (Fla. 1995)). With regard to the referee's legal conclusions and recommendations, this Court's scope of review is broader because it has the ultimate responsibility to enter the appropriate judgment. McGraw at 910 (quoting Grusmark at 1236). This Court has continually denied reinstatement to attorneys who have failed to demonstrate rehabilitation, and The Florida Bar submits that the record in this matter demonstrates that petitioner has not adequately demonstrated rehabilitation and has engaged in conduct that should disqualify him from reinstatement to the practice of law.

The referee erred in recommending petitioner's reinstatement because petitioner failed to meet his burden of showing rehabilitation through strict compliance with the specific conditions of applicable disciplinary, judicial, administrative, or other orders as required by Rule 3-7.10(f)(3)(A). The referee made factual findings in the report that demonstrate petitioner's lack of rehabilitation and fitness for reinstatement. But, in recommending the reinstatement, the referee disregarded the competent and substantial evidence of petitioner's disqualifying conduct pursuant to Rule 3-

7.10(f)(1), and improperly excused petitioner's failure to strictly comply with the requirements of Rule 3-5.1(g), R. Regulating Fla. Bar.

During his suspension, petitioner engaged in conduct constituting the practice of law, had direct client contact, and received, disbursed, or otherwise handled trust funds or property. The referee states in the report that Rule 3-6.1, R. Regulating Fla. Bar permits a suspended attorney to do paralegal work, but believes that the law is unclear as to the scope of work allowed. (RR 5). At RR 5-6, the referee states:

> Clearly Mr. Wolf is extremely well versed in the laws relating to "gaming" and as he argued, defining advice as legal or business is difficult. He admitted to being paid regularly and at times substantial sums for his private consulting business dealing with arcades. Under a contract with the Florida Arcade Association, Inc. Mr. Wolf was paid $1,000.00 a month for this service. Mr. Wolf gave advise [sic] on opening arcades, reported on law changes in the area, reviewed leases and researched ordinances that would apply to new arcade cites. [sic] At one point Mr. Wolf consulted with a State Attorney on the "proper interpretation" of "gaming law" for another attorney's criminal client.

A crucial point omitted by the referee is that petitioner engaged in many, if not all of these activities, unsupervised by an authorized business entity under the rules. The private consulting business was operated under petitioner's company, Michael H. Wolf and Associates, LLC. The contract with the Florida Arcade Association, dated June 15, 2006, was signed by petitioner and Gale Fontaine, President of the Florida Arcade Association. (Pet. Ex. A-26). Petitioner sent monthly billing statements to the

association on the letterhead of Michael H. Wolf and Associates. (Pet. Ex. A-27). Rule 3-6.1 requires employment of a suspended attorney by an authorized business entity. Michael H. Wolf and Associates, LLC is not such an authorized entity. Rule 4-8.6, R. Regulating Fla. Bar defines authorized business entities and provides in pertinent part:

> (a) Authorized Business Entities. Lawyers may practice law in the form of professional service corporations, professional limited liability companies, sole proprietorships, general partnerships, or limited liability partnerships organized or qualified under applicable law. Such forms of practice are authorized business entities under these rules.
>
> (b) Practice of Law Limited to Members of The Florida Bar. No authorized business entity may engage in the practice of law in the state of Florida or render advice under or interpretations of Florida law except through officers, directors, partners, managers, agents, or employees who are qualified to render legal services in this state.
>
> (c) Qualifications of Managers, Directors and Officers. No person shall serve as a partner, manager, director or executive officer of an authorized business entity and engage in the practice of law in Florida unless such person is legally qualified to render legal services in this state. For purposes of this rule the term "executive officer" shall include the president, vice-president, or any other officer who performs a policy-making function.

* * * * * * * * * * *

Further, many of the activities that petitioner engaged in would not be permissible under Rule 3-6.1 even assuming *arguendo* petitioner performed them as an employee of an authorized business entity. Rule 3-6.1, as amended effective March

1, 2008, [In re Amendments to the Rules Regulating The Florida Bar, 978 So.2d 91 (Fla. 2007)], provides in pertinent part:

> An authorized business entity (as defined elsewhere in these rules) may employ suspended attorneys … Subject to the exceptions set forth below these individuals may perform those services that may ethically be performed by nonlawyers employed by authorized business entities.
>
> * * * * * * * * * * * *
>
> (d) Prohibited Conduct.
>
> (1) Direct Client Contact. Individuals subject to this rule shall not have direct contact with any client. Direct client contact does not include the participation of the individual as an observer in any meeting, hearing, or interaction between a supervising attorney and a client.
>
> (2) Trust Funds or Property. Individuals subject to this rule shall not receive, disburse, or otherwise handle trust funds or property.
>
> (3) Practice of Law. Individuals subject to this rule shall not engage in conduct that constitutes the practice of law and such individuals shall not hold themselves out as being eligible to do so.

The effective date of the amended rule, which added the language in subsection (d), was after petitioner's reinstatement petition was filed. But the added language contained in subsection (d), mirrored the prohibitions of what was already set forth with respect to the required quarterly reports set forth in former Rule 3-6.1, which provided in pertinent part:

> An authorized business entity (as defined elsewhere in these rules) may employ individuals subject to this rule to perform such services only as may ethically be performed by other lay persons employed by authorized business entities.

* * * * * * * * * * * *

> (f) Reports by Employee and Employer. The employee and employer shall submit sworn information reports, quarterly based on a calendar year, to The Florida Bar. Such reports shall include statements that no aspect of the employee's work has involved the unlicensed practice of law, that the employee has had no direct client contact, and that the employee did not receive, disburse, or otherwise handle trust funds or property.[1]

Clearly, the rule prohibits a suspended attorney, employed by an authorized entity to engage in the unlicensed practice of law, direct client contact, and receiving, disbursing, or otherwise handling trust funds or property. Petitioner engaged in these acts separate and apart from his employment by an authorized business entity. Engaging in any of these acts would demonstrate petitioner's failure to prove the element of rehabilitation relating to strict compliance with the specific conditions of the disciplinary order set forth in Rule 3-7.10(f)(3)(A), as well as disqualifying conduct under Rules 3-7.10(f)(1)(D) and (H), R. Regulating Fla. Bar, which pertain to misconduct in employment and neglect of professional obligations.

There is authority under relevant established case law that defines what constitutes the practice of law and these decisions demonstrate that petitioner engaged in unlicensed practice of law during his suspension. In The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), [opinion modified at 159 So.2d 229 (Fla. 1963)], the Court

[1] The language of former Rule 3-6.1(f) is similar to current Rule 3-6.1(e).

applied the following definition in determining whether acts constituted the unlicensed practice of law (Id. at 591):

> We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

In Sperry, the court held that a lawyer not licensed in Florida who held himself out to the public as qualified to advise the public on the patentability of products and who gave such advise was engaged in the unlicensed practice of law. The court recognized that rendering an opinion as to the patentability of products under the law

requires a knowledge of the patent statutes and of the decisions interpreting them.[2]

Similar to Sperry, the referee found that petitioner is extremely well versed in Florida Arcade and Gaming law, which he used as the basis for his private consulting business. The referee specifically found that petitioner gave advice on opening arcades, reported on law changes in the area, reviewed leases and researched ordinances that would apply to new arcades. (RR 5).

In The Florida Bar v. Neiman, 816 So.2d 587, 596 (Fla. 2002), the Court applied the Sperry definition of the practice of law and found that Neiman, who was a paralegal, engaged in the unauthorized practice of law in attempting to argue and advocate merits of cases, the applicability of the law, and attempting to analyze statutory and case law, and discuss it with clients and opposing counsel.

Similar to Neiman, the referee found that petitioner consulted with a State Attorney on the proper interpretation of gaming law for another attorney's criminal client in addition to the giving of advice on opening arcades, reporting on law changes in the area, reviewing leases, and researching ordinances that would apply to new arcade cites. (RR 5-6).

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[2] The Sperry opinion was later modified to conform with the opinion of the U.S. Supreme Court reported at 373 U.S. 379 (1963), to allow Sperry to perform acts in patent cases before the Patent Office as performed by registered agents in conformity with the Rules of Practice of the United States Patent Office. The modification does not affect petitioner's conduct relating to the area of Florida Arcade and Gaming Law.

Petitioner, at page 15 of his reinstatement petition, inaccurately states that he has not been practicing law, has not had direct client contact, and has not dealt with trust funds or property. Contrary thereto, the evidence was competent and substantial to show that, in several instances, petitioner engaged in the practice of law, had direct client contact, and improperly handled trust money. These instances are discussed at length hereinafter.

In the following matters, petitioner's conduct constituted the unlicensed practice of law pursuant to the definition in Sperry and the conduct was both a violation of Rule 3-6.1 and disqualifying conduct under Rules 3-7.10(f)(1)(D) and (H).

1. Global Games Seized Arcade Machines Matter

During his suspension, petitioner was contacted directly by Global Games, a client of petitioner's prior to his suspension. Petitioner was advised that the owner of a facility in Jackson County, where Global Games had arcade machines, had been arrested and the machines had been seized by law enforcement. The owner of the facility (Gravaman) was facing criminal charges. Global requested petitioner to put together a legal defense team for Gravaman and to act as a consultant to those lawyers because Global was concerned their machine would be forfeited if Gravaman was convicted. (TR II, 286-288). Petitioner prepared an invoice on his letterhead dated June 14, 2007, billing Global Games $10,000 as "Consultant Retainer Re: Jackson

County/Gravaman matter." Petitioner was paid the amount in 2 checks from Global Games, check number 6844, dated June 14, 2007, for $5,000 and check number 7029, dated August 23, 2007, for $5,000 (TFB Ex. 6). Petitioner also received a third check from Global Games, number 6935, dated July 24, 2007, for $668.81. All three checks bore the description "Jackson Co. FL. seized machines." (TR II 286-288; TFB Ex. 6).

Petitioner was to advise the lawyers he assembled on legal strategy and assist them with the defense of Gravaman. He was not acting as a business consultant; rather, he was acting as a legal consultant. He was not being supervised by a lawyer, in fact he was to supervise this legal team, and in his own words:

> … to educate those lawyers in strategy, the elements, the defense strategy for defending these type of cases which is markedly different from a typical criminal case … (TR II 287-288).

After Gravaman retained his own attorney and the legal team he assembled was no longer involved, petitioner, without supervision, continued to have further involvement with the case. He had discussions with Gravaman's new attorney about the case and what was needed to be done in the defense of the case, and offered to accompany the lawyer to the trial. (TR II 291-292). In addition, petitioner, on behalf of Global Games, called the lawyer for the sheriff to ascertain the status of a related forfeiture action filed against Global Games, and was informed the action had been dismissed. (TR II 292).

2. M&W Enterprises Cease And Desist Matter

The referee found that petitioner "consulted with a State Attorney on the 'proper interpretation' of 'gaming law' for another attorney's criminal client." (RR 5-6). The evidence showed that during his suspension, petitioner was contacted directly by Steve DaGrave (phonetic) of M&W Enterprises concerning a legal problem in Key West, FL, involving a cease and desist letter issued by the Key West State Attorney's Office. M&W Enterprises was not petitioner's client prior to the suspension. (TR II 297-298). Petitioner testified that Ms. DeYoung participated in the initial meeting with Mr. DaGrave, and advised him to retain counsel in Key West and also suggested he retain petitioner to assist the Key West attorney because of petitioner's expertise. (TR II 298). Ms. DeYoung was not paid for her time. (TR II, 310). Petitioner prepared an invoice to M&W Enterprises d/b/a Stick and Stein, dated July 29, 2007, billing $2,500 for "Travel to Key West meeting with Stick and Stein's Lawyer Attorney Spotswood to prepare him for meeting with State Attorney" and $309.80 for "Airline Tickets." Petitioner was paid directly by M&W Enterprises by check number 20907, dated July 29, 2007, the amount of $2,809.80. (TFB Ex. 8; Pet. Ex. A-37; also part of Pet. Ex. A-30; TR II, 296-297). Also contained in TFB Ex. 8 and Pet. Ex. A-37, is a copy of another check payable directly to petitioner from M&W Enterprises, number 20855, dated July 19, 2007, in the amount of $1,000.

Petitioner was retained and paid by M&W Enterprises to assist the lawyer in Key West. Petitioner traveled to Key West and met with the attorney, Jack Spotswood. Petitioner testified as to the purpose of the meeting at TR II, 298:

> Bring him up to speed on the arcade issues, about the law pertaining to amusement machines, application of skill, all of the things that he would need to be aware of in order to go and have an intelligent meeting with the State Attorney's Office down there.

Petitioner attended the meeting at the State Attorney's office with Spotswood. Petitioner participated in the presentation of the case, answering questions, and informing the lawyer for the State Attorney of applicable case law and Attorney General Opinions and petitioner's interpretations of those decisions. Petitioner presented legal argument to the lawyer for the State Attorney's office that the interpretation by the State Attorney of case law and Attorney General Opinions was incorrect. (TR II 298-304).

3. Letter to Attorney Dudley Hardy

In another matter, petitioner was contacted directly by Mr. Githens of a company called Las Vegas Games. Petitioner testified he was requested to assist the lawyer for Las Vegas Games and petitioner told Githens that he could assist the lawyer. (TR II 293). Petitioner prepared a billing statement on his letterhead, addressed to Las Vegas Games for $1,000. The statement describes petitioner's

services as "Consultant retainer to assist Attorney Dudley Hardy in Stark [sic], Florida in dealing with City Council on Arcade issues. (TFB Ex. 7). Petitioner was paid $1,000 directly from Las Vegas Games, by check number 1072, dated July 8, 2007. (TFB Ex. 7). Petitioner wrote a letter to Mr. Hardy, dated July 13, 2007, wherein he gives legal analysis to a proposed ordinance. The letter refers to case law, Attorney General Opinions and an Appellate Brief in addressing legal issues raised in the ordinance. A copy of the letter is contained in TFB Ex. 7, and the letter states in part:

> First, I have some observations about the proposed ordinance. As worded, the ordinance would preclude kids arcades, like a Chuck E Cheese, because the definition of adult arcade amusement center defines a kid's arcade as well as our "adult arcades". Therefore, according to the ordinance, a "Chuck E Cheese" would not be allowed to admit minors! Also, I was curious if Don's method of operations, insofar as it would be inconsistent with the ordinance, could be "grandfathered" in. …
>
> As far as the legal issues regarding the arcades are concerned, let me first address the "merchandise" issue. I am attaching the following:
>
> a. State v. Delorme
> b. Appellate Brief from Delorme (portion)
> c. Attorney General opinion (formal)
> d. Attorney General opinion (informal) addressed to me on behalf of the Florida Arcade Association.
>
> These are the only "authorities" to have spoken on this issue. Delorme was a case that I handled at the Trial Court level. …

The letter was written on Ms. DeYoung's letterhead and signed by petitioner in the capacity of Director, Arcade Compliance Division for Ms. DeYoung's firm. Yet, the matter did not involve a client of Ms. DeYoung and the letter was written without

Ms. DeYoung's supervision or signature. (TR II 293-296). A copy of the letter is also part of TFB Ex. 7. The letter also failed to disclose petitioner's non-attorney status. *See* The Florida Bar v. Pascual, 424 So.2d 757 (Fla. 1982).

4. Petitioner's Other Private Consulting Business Activities

The referee found that, in connection with his private consulting business, petitioner gave advice on opening arcades, reported on law changes in the area, reviewed leases, and researched ordinances that would apply to new arcade sites, for which he was paid regularly and at times substantial sums. (RR 5). In his private consulting business, petitioner met with clients, prepared invoices, and billed those clients. (TR II, 253-254). Petitioner did his "consulting" at the offices of both attorneys he was employed by, Cohen and DeYoung, but the consulting was separate and apart from the respective attorney's law practice and he maintained his own letterhead with the name Michael H. Wolf And Associates, LLC. (TR II 267; TFB Ex. 6). Petitioner testified that he consulted with people who were considering opening or buying an arcade. (TR II 270). Petitioner testified that he advised these clients about zoning restrictions, ordinances concerning parking restrictions, and the correct number of machines to a space, as well as reporting requirements to the Florida Department of Revenue and business promotions regulated by Chapter 849, Florida Statutes. Petitioner also would look up ordinances on his computer for his clients and advise

them if a particular jurisdiction had ordinances pertaining to amusement arcades. (TR II 270-275). Petitioner also provided copies of legal forms to his private consulting clients to use as samples including a 52-page lease for an arcade, which he believed was a good form from the aspect of over-protecting the landlord and under-protecting the tenant. (TR II 277). Petitioner kept no records for his consulting clients, except for a billing invoice, and sometimes he did not even prepare an invoice. (TR II, 281). In the report of referee, the referee noted 2 checks paid directly to petitioner by clients of his consulting business contained a description indicating it was payment for "legal consult" and "for legal services." (RR 5; Pet. Ex. A-37).

In each of the aforementioned situations, petitioner engaged in the practice of law as defined in Sperry. Petitioner's services were requested because of his legal skill and knowledge in the area of Florida arcade and gaming laws, and in each case, his legal skills and knowledge were utilized in matters affecting important rights of those individuals and entities who directly engaged him.

In the following matters, petitioner also failed to strictly comply with the requirements of the disciplinary suspension, demonstrated his failure to rehabilitate himself in the area of bad financial management and bookkeeping practices, and further engaged in disqualifying conduct pursuant to Rule 3-7.10(f)(1), R. Regulating Fla. Bar.

5. Handling Trust Funds

The referee found that petitioner "allowed a check to be used for a direct retainer for another attorney to be written to him." (RR 4-5). Petitioner testified that in two instances, David Schneider of D&E Stables gave him a check to pay for a lawyer to handle a legal issue. One check was for $20,000 and the other was for $2,000. (TFB Ex. 12). Both checks were made payable to petitioner and were deposited into his business account. A garnishment lien on the $20,000 deposit was asserted by Biloxi Casino Corporation, which had an outstanding personal judgment against petitioner. Ms. DeYoung had to file an Emergency Motion To Dissolve Writ of Garnishment on petitioner's behalf. (TR II, 312-315, 319; TFB Ex. 13). In paragraph 8 of the emergency motion, Ms. DeYoung asserts on petitioner's behalf:

> Additionally, of the amount garnished, $20,000 was monies belonging to a friend of Michael H. Wolf, for which a check in the amount of $20,000 had been issued to Attorney Michael Gelety as his retainer in a Federal criminal matter. **In any event, such funds were not belonging either to Michael Wolf, individually, or to Michael H. Wolf & Associates, LLC**. A check for $20,000 was issued concurrently with the deposit of $20,000 received from Mr. Wolf's friend. (Emphasis added).

The two checks given to petitioner were clearly in the nature of trust funds because the funds did not belong to petitioner, but were being held for the benefit of a

third party as another attorney's fee retainer in connection with a legal representation. Rule 5-1.1(a)(1), R. Regulating Fla. Bar, provides in pertinent part:

> Trust Account Required; Commingling Prohibited. A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation …

Petitioner also received funds from Ms. DeYoung that were intended for payment of petitioner's employee, Deborah Carter. Petitioner deposited those funds into his bank account. Those funds were not held intact by petitioner and as a result, checks that petitioner wrote to Ms. Carter resulted in overdrafts to his account. (TT II, 335-337).

By taking these third party funds and depositing them into his bank account, petitioner exposed other people's funds to his own financial problems, thereby placing those funds in jeopardy of loss. This conduct by the petitioner is a continuation of the misconduct that resulted in the imposition of the instant rehabilitative suspension. In the underlying disciplinary matter, petitioner placed funds to be held in trust into his operating account and was found guilty of commingling trust funds with his own. The Florida Bar v. Wolf, 930 So.2d 574 (Fla. 2006). Thus, it is clear that petitioner has not rehabilitated himself.

Petitioner also directly handled client funds while employed with Attorney Cohen. The referee found that he cashed a check made out to him which was payment for legal services of another attorney. (RR 5). Andrew Soowal testified that his company, Top Branch Environmental Services (Top Branch) was petitioner's client and that he went to Cohen for legal services after petitioner became employed there. (TR I 70-71). On September 26, 2006, Cohen billed Top Branch for legal work performed between July 11, 2006 and September 4, 2006, for which Top Branch paid petitioner directly. (TR I 76; TFB Ex. 1). Petitioner also received $1,900 directly by another former client who became Cohen's client, Inter Ocean Industries. (Pet. Ex. A-67; TR I 126). Cohen also paid petitioner directly from client settlement proceeds in three personal injury cases: Petakas, Smith, and Twitty. (Pet. Ex. A-47; TFB Ex. 3 and 4). In the Smith file, which was opened after petitioner's effective suspension date, Cohen testified he paid petitioner $3,725.88 of the total fee of $4,162.50, for back pay owed, despite indicating on the check paid to petitioner that it was payment for prior fees earned. (TR I 133-135).

6. Continued Financial Irresponsibility As Disqualifying Conduct Pursuant To Rule 3-7.10(f)(1)(G), R. Regulating Fla. Bar

In the underlying disciplinary case, the Court's opinion noted the referee's finding that petitioner engaged in "sloppy bookkeeping" in connection with the misappropriation of client funds. The referee, in the report recommending reinstatement, did not change her opinion of petitioner's financial irresponsibility. The referee found that petitioner is "horrible at financial management." (RR 6). The referee also found that petitioner is behind in filing and paying income taxes, failed to keep good financial records about his private consulting business, and that his bank accounts continue to be often overdrawn. (RR 4-5). Petitioner admits he failed to repay any of the judgments or tax liens listed in his reinstatement petition. (TT II 334). Exhibit 18 to the petition sets forth ten tax liens filed from 1996 through August 2007, and seven judgments filed from 2001 through October 2006. The tax liens listed show a total of $301,995 and the judgments listed total $33,703.

Rule 3-7.10(f)(1)(G) provides that financial irresponsibility constitutes disqualifying conduct to reinstatement. Petitioner's financial irresponsibility is not solely limited to these unsatisfied tax liens and judgments against him. He also continues to keep poor business records and continues overdrawing his bank accounts. This conduct, which resulted in his suspension, continues unabated, with no evidence

of rehabilitation. The referee noted that although petitioner signed up for LOMAS (The Florida Bar's Law Office Management Assistance Service), he did not take the course. (RR 5).

7. Omissions and False Statements On the Petition for Reinstatement As Disqualifying Conduct Pursuant To Rule 3-7.10(f)(1)(C), R. Regulating Fla. Bar

There were also false statements and material omissions in the petition for reinstatement, which is disqualifying conduct pursuant to Rule 3-7.10(f)(1)(C), R. Regulating Fla. Bar. This rule includes "making or procuring any false or misleading statement or omission of relevant information, including any false or misleading statement or omission on any application requiring a showing of good moral character."

Petitioner falsely states at page 15 of his reinstatement petition that he has not been practicing law, has not had direct client contact, and has not dealt with trust funds or property. The petitioner failed to disclose the existence of his private consulting business and failed to disclose his income from this business on the reinstatement petition. (TR II 254). Petitioner kept no records for his consulting clients, except for a billing invoice, and sometimes he did not even prepare an invoice. (TR II, 281).

The referee found petitioner made a regular income and at times substantial money from the consulting business. (RR 5). His business tax return for the year 2006 disclosed $142,322 in income for his business, Michael H. Wolf & Associates, LLC. Petitioner's 2007 business tax return disclosed $95,315 in gross receipts or sales and $91,459 in total income for his business, Michael H. Wolf & Associates, LLC. (Pet. Exs. A-20; 25; 25a).

His false statements and omissions are material, given the nature and extent of petitioner's financial problems and the extent to which his financial mismanagement factored into his misconduct resulting in the disciplinary suspension.

8. Petitioner's Failure to Demonstrate Rehabilitation by Strict Compliance With Rule 3-5.1(g)

The referee also found that petitioner failed to notify two clients and one judge of the suspension as required by Rule 3-5.1(g), R. Regulating Fla. Bar, but did not consider that to be significant. (RR 6). Rule 3-7.10(f)(3) requires petitioner to prove strict compliance with the conditions of the disciplinary order. Rule 3-5.1(g), R. Regulating Fla. Bar provides in pertinent part:

> Upon service on the respondent of an order of disbarment, disbarment on consent, suspension, emergency suspension, emergency probation, or placement on the inactive list for incapacity not related to misconduct, the respondent shall, unless this requirement is waived or modified in the court's order, forthwith furnish a copy of the order to:

(1) all of the respondent's clients with matters pending in the respondent's practice;

(2) all opposing counsel or co-counsel in the matters listed in (1), above; and

(3) all courts, tribunals, or adjudicative agencies before which the respondent is counsel of record.

The referee committed error in excusing petitioner’s failure to strictly comply with the requirement of this rule, especially in view of the evidence and other findings made by the referee of petitioner’s disqualifying conduct and lack of rehabilitation as set forth throughout the within brief.

CONCLUSION

The bar submits that petitioner did not sustain his burden of proof and that his petition for reinstatement should be denied. The findings made by the referee and the competent substantial evidence demonstrate that petitioner has not proved he is rehabilitated and fit to resume the practice of law. Petitioner continues to exhibit the same conduct during his suspension that resulted in his suspension and also engaged in prohibited conduct that disqualifies him from reinstatement. The Florida Bar respectfully requests this Court to protect the public by denying reinstatement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief regarding Supreme Court Case No. SC08-250, The Florida Bar File No. 2008-51,119(17G) FRE has been mailed by regular U.S. Mail to Michael D. Gelety, Esq, Attorney for Petitioner – Appellee, 1209 Southeast Third Avenue, Fort Lauderdale, FL 33316 on this _____ day of January, 2009.

_____
Michael David Soifer, Bar Counsel
The Florida Bar
Fort Lauderdale Branch Office
5900 N. Andrews Avenue, Suite 900
Fort Lauderdale, FL 33309
(954) 772-2245
Florida Bar No. 545856

Copy provided to:
Kenneth Lawrence Marvin, Staff Counsel

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Michael David Soifer, Bar Counsel