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 REPLY BRIEF

MICHAEL DAVID SOIFER, #545856
Bar Counsel
The Florida Bar
Lake Shore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, FL 33323
(954) 835-0233

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

TABLE OF CONTENTS

TABLE OF CITATIONS

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.

For the reasons fully set forth in the bar's initial brief, petitioner should be denied reinstatement. Those reasons are fully substantiated by the findings contained in the report of the referee and the competent and substantial evidence in the record. Petitioner's answer brief does not adequately address his misconduct during the suspension: i.e. engaging in the prohibited practice of law, failing to strictly comply with the terms of his suspension, his poor financial record keeping, failing to disclose on the reinstatement petition his private consulting business or the income derived therefrom, and his direct client contact and improper handling of trust funds. This conduct was specifically noted in the report of referee, but improperly excused by the referee's recommendation for petitioner's reinstatement.

The bar's evidence in the case was culled from the petitioner's own testimony and the documents that were entered into evidence. These documents were requested from the petitioner by the bar in successive letters because petitioner failed to report material information about his employment activities and income on the reinstatement

petition. On April 18, 2008, the bar sent a letter requesting a copy of all 2007 tax returns. (Pet Ex. A-62). The 2007 tax return revealed substantial income by petitioner that was not accounted for on the reinstatement petition. On May 29, 2008, the bar sent a letter requesting copies of checks, deposits and documentation to support the income reported on the tax return, as well as a sworn affidavit from petitioner to explain in detail his activities that resulted in the income. (Pet. Ex. A-64). Petitioner's response included an affidavit, which disclosed for the first time that he did private consulting work, but provided no further detail about the consulting work. (Petitioner's Appendix 13). The response failed to include the requested documentation of his earnings and the bar sent a follow up letter, dated June 10, 2008, requesting documentation to explain his activities relating to thirty-five (35) separate matters. (Pet. Ex. A-65). On July 9, the bar sent an additional letter requesting items be brought to petitioner's deposition. (Pet. Ex. A 66.) Thus, the record is clear that the bar made a diligent and substantial effort to obtain all available documentation concerning petitioner's employment activities and income that petitioner failed to report on his reinstatement petition. This was a process made difficult by petitioner's failure to disclose this necessary and material information on the petition and also, as the referee noted, by petitioner's failure to keep good financial records about his consulting business. (RR 5). The referee correctly noted in the report that it was the

bar's position that petitioner was reluctant to provide all of the requested information concerning his activities. (RR 4). Petitioner's failure to make full disclosure on the reinstatement petition of both his employment and income during the suspension, coupled with the fact that the bar had to send no less than four letters requesting petitioner to produce information about the undisclosed employment and income demonstrates petitioner's reluctance. The bar was not seeking to show that the timing of petitioner's production caused disadvantage to the bar and the bar did not need or request a continuance.

The referee accepted the bar's evidence of petitioner's prohibited practice of law during the suspension. 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). 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). The referee also noted Mr. Wolf's consulting contract with the Florida Arcade Association. (RR 5). Among the provisions of this contract (Pet Ex. A 26), paragraph 4D provided that petitioner was to "keep current on the status or result of any litigation pertaining to the industry and report same to the membership." Despite

these findings, the referee incorrectly found the law unclear as to the scope of work allowed for a suspended attorney and accepted petitioner's argument that defining advice as legal or business is difficult. (RR 5).

Petitioner references three matters, at page 34 of the answer brief, which he refers to as the M&W/the Key West case, the Dudley Hardy case in Starke, and the Global Games/Gravaman matter. Petitioner was paid directly by the client in each of these matters. His explanation that he was paid by his consulting customers to "tutor" their lawyers does not address the fact that petitioner engaged in conduct constituting the unauthorized practice of law as set forth in The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962) and The Florida Bar v. Neiman, 816 So.2d 587, 596 (Fla. 2002)

With respect to the "M&W/Key West Case," petitioner's answer brief fails to mention that he participated in the meeting with the State Attorney and made argument on the proper interpretation of gaming law as found by the referee. (RR 5-6). Petitioner testified as follows (TR II, 298-300):

Q You went to Key West, didn't you?
A I did.
Q And you met with -- who was the attorney
A Jack Spottswood.
Q You met with Mr. Spottswood?
A I did.
Q And you prepared for the meeting with the State Attorney?
A I prepared him for the meeting with the State Attorney.

Q You went to the meeting with Mr. Spottswood with the State Attorney?

A Yes, sir.

Q What did you do at that meeting, Mr. Wolf?

A It was Mr. Spottswood's meeting, and he introduced me as the compliance director for the Arcade Association and that was -- that was pretty much it, what I did. Probably answered some questions. I'm sure I did.

Q Isn't it true that you made the presentation to the State Attorney?

A I was involved in the presentation from the standpoint of answering questions.

Q Well, didn't those questions consist of discussing case law and interpretation of case law and applicable statutes and Attorney General's opinions?

A It was informing the State Attorney that those cases existed and that he might want to avail himself of reading them.

Q Wasn't there a disagreement as to the meaning of some of those opinions?

A The -- we convinced the State Attorney to change his mind.

Q Didn't you present to the State Attorney you believed was the proper interpretation for the State Attorney?

A I presented to the State Attorney's Office the cases that I suggested he read or she, he or she, and the AGO opinions that he availed himself of.

Q Didn't you tell the State Attorney that his interpretation of those opinions were wrong?

A Yeah, probably did.

With respect to the "Dudley Hardy case in Starke," petitioner prepared and signed a letter to Mr. Hardy, on the letterhead of Ms. DeYoung, without her supervision and without disclosing petitioner's non-attorney status. The letter gives legal analysis to a proposed ordinance, and refers to case law, Attorney General

Opinions and an appellate brief in addressing legal issues petitioner found in the proposed ordinance. Relevant portions of the letter are set forth in the Bar's initial brief at page at page 28. A copy of the complete letter is in evidence as TFB Ex. 7.

Pertinent testimony by the petitioner concerning the letter was as follows at TR II, 294:

> Q My question is, did Mr. Githens, not Mr. Hardy, did Mr. Githens ask you to assist Mr. Hardy?
> A I would say yes.
> Q And he asked you to provide Mr. Hardy all of the necessary information on the redemption issue?
> MR. GELETY: Objection.
> THE REFEREE: Overruled.
> THE WITNESS: Mr. Hardy asked me to provide him with the things that he specifically wanted.
>
> * * * * * * * *

At TR II 296:

> Q This was not a client -- Mr. Githens was not a client of Bernace DeYoung, was he?
> A Not to my knowledge.
> Q But you wrote the letter on Miss DeYoung's letterhead?
> A The letter is on Miss DeYoung's letterhead.
> Q Miss DeYoung did not supervise you on this letter, did she?
> A No. She didn't sign it either.

With respect to the "Global Games/Gravaman matter," the evidence showed petitioner, pursuant to his "consulting business," was paid $10,000 directly by Global Games, 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).

Petitioner also testified as follows at TR II, 290-291:

> Q What happened to the defense team that you assembled?
> A They never had to do anything.
> Q Who were the lawyers?
> A I wish I could remember the names, but I don't remember the names. I probably if I saw the name, I would recognize it.
> Q Mr. Gravaman got his own attorney?
> A Yes.
> Q Who was Mr. Gravaman's attorney?
> A A female. I think the first name was Elizabeth. I don't recall her last name.
> Q After your defense team was dissolved, you continued to be involved in the matter, didn't you?
> A I was involved -- not really. I did communicate with Elizabeth. I don't recall her last name.
> Q Ths is Mr. Gravaman's attorney?
> A Yes. I did communicate with her.
> Q What did you communicate to her about?
> A I communicated to her that I was with Global Games, that I was their consultant, that I would be more than willing to help her at trial by coming there, sitting with her, strategizing with her, and I would be more than happy to be of assistance to her.

* * * * * * *

At TR II, 292:

> Q How did you find out the status -- did you make inquiry into the status of forfeiture action that had been instituted against Global?
>
> A I think I did. I called the lawyer for the sheriff or the county, whoever instituted the civil forfeiture complaint, to find out the status.
>
> Q What did you find out?
>
> A That they had dismissed the forfeiture.
>
> Q Global didn't have any other attorney handling the forfeiture action, did they?
>
> A Forfeiture action had been filed and dismissed right away so there was no need.

The evidence also demonstrated that petitioner otherwise engaged in the prohibited practice of law in his private consulting business. Although petitioner's answer brief paints this as "innuendo," petitioner again fails to address the referee's findings that Mr. Wolf gave advice on opening arcades, reported on law changes in this area, reviewed leases and researched ordinances that would apply to new arcade sites. (RR5).

Petitioner parlayed his knowledge of the law in the area of arcades and gaming into a private consulting business to render his legal expertise for which he was paid substantial sums by his clients. The referee acknowledged that petitioner is extremely well versed in the laws related to gaming. (RR 5) The subject of his consulting was respondent's knowledge of those laws and regulations related to arcades and gaming.

Although Petitioner argued that defining advice as legal or business is difficult (RR 5), petitioner also acknowledged in his testimony that he was not much into the business end of the arcade industry prior to his suspension. (TR II, 269).

With respect to his consulting business, Petitioner testified as follows in pertinent part at TR II, 271-273:

> Q Isn't zoning important?
> A Well, you can't have an arcade where zoning doesn't allow it.
> Q Isn't it true that you advised them that zoning was a factor; that zoning restrictions had to be taken into account?
> A Yes.
> Q Didn't you advise them that they had to check out the zoning restrictions?
> A Yes, I would advise them that it is definitely a critical distinction and they need to avail themselves of the zoning information.
> Q Didn't you also discuss restrictions like on parking and hours with those clients?
> A I discussed with them that there are ordinances that I was aware of that limit the number of hours or require number of parking spaces per machine, and they need before they do anything to go to the city licensing department, business permit, occupational license and find out if the location that they are interested in qualifies under that jurisdiction and zoning ordinances.
> Q Aren't there -- did you also discuss with them about the amount of parking spaces that are required by an arcade depending on how large an arcade it is or how many machines an arcade has?
> A I would advise them that there are jurisdictions that have ordinances about that, that have regulations about that, and that's why they need to go. There is no state law about that. But local jurisdictions have their own little nuances so, yes, clearly if you are going to start a business and not just an arcade but any kind of business, you better make

sure that you are going to get a business permit for the location you want.

* * * * * * * *

At TR II, 273-275:

Q For instance, the correct number of machines you have to have in a space, the hours of operation, the parking?

A Those are all issues that they need to find out from the jurisdiction that they are planning on going to. It won't do them any good to spend a hundred fifty thousand dollars to buy machines, to spend hours entering into lease negotiations, to pay deposits, only to find out that they can't get an occupational license for that premises because it's not zoned correctly.

Q On occasion, didn't you look at the ordinances for the clients?

A No. Let me correct that. I might sit down at a computer and say they wanted to go to Palm Beach County, and they want to know is there an ordinance, I have muni codes on my computer, sit down next to me, and I would bring up muni codes and we would look. And I would say there is an ordinance regarding amusement arcades. I can't tell you how to comply with it. You need to go to the jurisdiction and talk to them.

Q If an ordinance said you can't have an arcade in a place, isn't it true that you told them that here is an ordinance that says you can't have an amusement arcade?

A I don't know if there are any ordinances that say you can't have an amusement arcade. There are jurisdictions that zone them out of existence. I didn't analyze those ordinances for them. I specifically told them I can't analyze it. The only way to find out if you are going to get a business permit or occupational license for that location is go to the jurisdiction, to the city, and apply for it. They will tell you what you have to do and what you don't have to do.

Q I asked you at your deposition and you testified that --

MR. GELETY: Judge, we object.

THE REFEREE: Overruled.

BY MR. SOIFER:

Q Page forty-two, line three, why don't you read that paragraph?

A If they said, we want to be in Green Acres, I might go to the muni code on my computer and look and see if there was any ordinance pertaining to amusement arcades in Green Acres. And if there was, I would say, well, it looks like there is an ordinance. And if an ordinance said you can't have an amusement arcade in Green Acres, I would tell them here is an ordinance that says you can't have an amusement arcade in Green Acres.

Q Mr. Wolf, you also discussed the reporting requirements with the Florida Department of Revenue with these clients; correct?

A Yes. I discussed the necessity of it.

Q You are not an accountant; correct?

A That is correct.

Q You are aware of these reporting requirements from your previous legal experience; correct?

A I'm aware of the reporting requirements because of my experience in the arcade industry, yes, legal and business.

At TR II, 276 – 277:

Q Mr. Wolf, you also at times provided copies of legal forms to your clients, didn't you?

A I did not prepare legal forms for the clients. If, for example, somebody said, I want to enter into a lease for an arcade, do you have a sample copy of one that has been used in the past, I would give them one from an old file and say, here is a sample one. So I didn't consider that supplying them with forms. I didn't prepare forms.

Q You gave somebody a fifty-two page lease for an arcade?

A That was one of the copies that I gave to somebody, not one that I prepared.

Q But you thought it was a good form from the landlord's perspective?

A That one was, yes.

Q In what sense?

A It overprotected the landlord and underprotected the tenant, but that's not why I gave it to the client because the client wanted to be

> the tenant so I certainly wouldn't have given that to him as a sample of one he wanted to enter into.

As argued in the bar's initial brief, petitioner's activities fall within the acts that constitute the practice of law as set forth in Sperry and Neiman cases, *Id*. In the Neiman case, this Court determined that Neiman's acts constituted the unauthorized practice of law. Those acts included:

> … discussing case law and legal strategy with clients; speaking on behalf of clients; and arguing the legal merits of cases as well as other activity usually reserved only to the judgment of a person educated, trained, and licensed in the practice of law. 816 So.2d 587 at 595.

Furthermore, as argued in the bar's initial brief, petitioner engaged in prohibited direct client contact and handled trust funds during the suspension. The referee found the petitioner "allowed a check to be used for a direct retainer for another attorney to be written to him. (RR 4-5). The referee further found that petitioner cashed a check made out to him which was payment for legal services of another attorney. (RR 5). 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).

The cases cited by petitioner to support his reinstatement are distinguishable and involve conduct less egregious than the instant case. In The Florida Bar re Grusmark, 662 So.2d 1235 (Fla. 1995), this Court permitted reinstatement despite

Grusmark's financial difficulty, noting that he had taken steps to lessen his financial burden. In The Florida Bar re Hernandez-Yanks, 690 So.2d 1270 (Fla. 1997), the attorney's poor handling of her personal checking account was insufficient to prevent reinstatement.

In contrast, the referee in the instant matter did not find any progress demonstrated by petitioner to address his financial problems. He signed up for the Law Office Management Assistance Program but did not take the course (RR 5). The referee noted that he is still horrible at financial management. (RR 6); he is behind in filing and paying income taxes (RR 5); his private bank accounts continue to be overdrawn (RR 4); and he failed to keep good financial records about his consultation business. (RR 5).

In The Florida Bar re Rue, 663 So.2d 1320 (Fla. 1995), cited by petitioner, this court excused the "troubling" actions of Rue and permitted reinstatement from a 91-day suspension, because the delay in the proceedings effectively turned a 91-day suspension into a year suspension. The instant petitioner's claim of delay is unwarranted. Petitioner was suspended for two years, effective May 1, 2006. There were no continuances in the case, and the final hearing was held on July 21, 2008. The referee's timing in filing the report of referee in the instant matter should not be considered as a sufficient reason to reinstate petitioner. It was already considered by

this Court when it denied petitioner's petition to engage in the limited practice of law.

Mr. Wolf's numerous and egregious prohibited activities during a two-year suspension were more severe than Rue's troubling activities and should not be excused so as to permit his reinstatement.

CONCLUSION

This Court should disapprove the referee's recommended reinstatement and, instead, deny petitioner's petition for reinstatement. The petitioner did not sustain his burden of proof and 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 and award the bar's costs in the matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Bar's Reply Brief regarding Supreme Court Case No. SC08-250, The Florida Bar File No. 2008-51,119(17G)FRE has been furnished by regular U.S. mail to Michael D. Gelety, Esq., Attorney for Appellee, 1209 SE 3rd Avenue, Fort Lauderdale, FL 33316, on this _____ day of February, 2009.

_____

Michael D. Soifer, Bar Counsel
The Florida Bar
Fort Lauderdale Branch Office
Lake Shore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, FL 33323
(954) 835-0233
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 Florida Bar's Reply 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 D. Soifer, Bar Counsel