

**IN THE SUPREME COURT OF FLORIDA**  
(Before a Referee)

**THE FLORIDA BAR,**  
  
**Complainant,**

**Case No. SC01-1009**  
**TFB File No. 2001-11,631**  
**(6D)(HRE)**

**v.**

**JAMES FREDERIC MANDERSCHIED,**  
  
**Respondent,**

\_\_\_\_\_ /

**RESPONDENT'S INITIAL BRIEF IN SUPPORT OF OBJECTIONS TO**  
**THE REPORT OF THE REFEREE DATED JANUARY 23, 2002**  
**(AMENDED)**

**BRIEF FILED FOR JAMES FREDERIC MANDERSCHIED**  
**RESPONDENT**

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WITH RULES FONT SIZE AND STYLE

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## **SYMBOLS AND REFERENCES**

In this Initial Brief, THE FLORIDA BAR, will be referred to as The Bar.

Respondent, JAMES FREDERIC MANDERSCHIED, will be referred to as the Respondent.

The transcript of the Hearing will be referred to as “T” followed by the page number. e.g., (T-64).

The REPORT OF REFEREE, will be referred to by “R” followed by a page number. e.g., (R-4).

RESPONDENT’S EXHIBITS will be referred to as “Resp. Ex”

## **STATEMENT OF THE FACTS AND OF THE CASE**

Pursuant to a negotiated Consent Judgment, Respondent began a two year suspension on November 8, 1998. During the proceedings, Respondent had cooperated with the Bar investigation and made restitution in full, plus, during the term of the suspension an additional \$10,000 plus \$1,659 interest on the \$10,000. After the two year period, maintaining current with the CLER and payment of all Bar dues and fees, Respondent filed a Petition for Reinstatement and then, an Amended Petition for Reinstatement after completing all of the monetary requirements. Petitioner is interviewed by the Bar on Oct 25, 2001. Circuit Judge Marva Crenshaw is appointed as the Referee. On December 3rd, the Referee is advised the Bar investigation is not completed, and sets status check for Jan 7th and hearing, if necessary, for Jan 18, 2002. Bar contacts Respondent on January 3rd, prior to status check date, that Petition has been approved, with special conditions, which

are agreed to by Respondent, and court is advised on January 3rd by Bar counsel that hearing date will not be necessary. Bar contacts Respondent on January 4th and advises the Petition is not approved--the Designated Reviewer has opposed it based on a quote from Respondent-- and the Hearing on January 18th will be required. Stipulation is entered into between Bar counsel and Respondent that only rehabilitation need be proved at January 18th hearing. Status conference takes place on January 7th and Court enters Order approving stipulation about only proving rehabilitation at the scheduled Hearing. (T-4).

Hearing proceeds on January 18th. Respondent, produces eight (8) witnesses to testify on his behalf, including two sitting judges, one Circuit and one County Judge, the elected Public Defender for the Sixth Judicial Circuit, and other lawyer and non-lawyer witnesses. Following this, the Respondent himself testifies, and introduces evidence and documentation of service work, community service, compliance with disciplinary Order and compliance with Bar requirements, and dues.. Respondent also presented evidence and testimony of mitigating factors, including but not limited to: cooperation with the bar, remorse, restitution plus \$10,000 plus \$1,659 in

interest on the \$10,000, the desire of the complainant for the Respondent to be restored, personal problems, ( a separation and divorce proceedings), and being the custodial parent of three young children. (T- 6-108). All witnesses were familiar with the Respondent's family life and the circumstances surrounding his suspension. All had access to the Bar report. All witnesses testified that they believed Respondent was rehabilitated and should be reinstated. Bar put on singular witness, their investigator, whose sole testimony was an out-of context, non-recorded, and obviously misunderstood statement made by Respondent during the Bar interview of October 25, 2001. (T 113-117).

At the conclusion of the hearing on the morning of Jan 18th, a Friday, the referee did not announce any findings or conclusions, and in fact made no oral pronouncements.(T 124). The following Monday, January 21, 2002, was a holiday--Martin Luther King day, and the Courthouse was closed. On the morning of January 22nd, Respondent filed a Memorandum of Law in support of the Petition for Reinstatement. Approximately 4:30 in the afternoon of that same day, January 22nd, the Bar counsel provided two proposed "reports of referee", findings of fact and a diskette containing same. The Bar counsel mailed the proposed findings and reports to the

respondent on the afternoon of January 22nd. The referee adopted one of the Bar's proposed Reports--the one denying the Petition, by adding a few sentences, signed same, (Resp Ex D) and mailed to the Supreme Court, the Bar and

Respondent on January 23rd. Respondent was never solicited nor invited to comment or make any additions, deletions or objections to the Report. On January 24th, Respondent received by U.S. mail copies of the Bar's proposed reports--which had been hand-delivered to the Referee **and** the signed "Report of Referee".(Resp. Exs. -B ,C, and D).

At no time in the presence of the Respondent did the referee issue findings of fact, conclusions or any ruling. (T 124).

Respondent filed Objections to the referee's report on February 6th. The Objections were, *inter alia*, to the wording, the findings, that the referee did not pronounce any conclusions or findings and that the respondent was not given an opportunity to review the proposed Report, or contribute to same before signature; i.e., to offer mitigating circumstances.

Respondent learned from the Clerk's office on February 22nd that the Objections were treated as a Request for Review, and the time within which

to file the Initial Brief was running. Respondent filed a Petition for a 30 Day Extension before filing the Initial Brief. It was granted. Respondent received the Bar's notice they were not requesting any review on March 19, 2002, As of the date of the filing of this initial brief, April 8, 2002, Respondent's two year suspension has lasted for three years and six months.

(It should be noted that some of the delay in the readmission process was caused by Respondent's lack of monies to pay the \$10,000 and later, the \$1,659 interest on the \$10,000).

## **SUMMARY OF ARGUMENT**

- 1.** Respondent's uncontradicted and unrefuted witnesses and evidence prove that James Frederic Manderscheid is rehabilitated and fit to return to the practice of law.
- 2.** The Report of Referee contains findings and conclusions not supported by the record, and is clearly erroneous. If the Referee's Report is supported by competent substantial evidence in the record, these findings are not sufficient to justify denying Respondent's Petition for Reinstatement.

3. There were three significant Due Process violations in violation of Florida Bar Rule 3-7.10.

## **ARGUMENT**

### **1. JAMES FREDERIC MANDERSCHIED PROVED BY CLEAR AND CONVINCING EVIDENCE HIS REHABILITATION AND FITNESS TO PRACTICE LAW.**

Eight witnesses, plus Respondent, testified for the Reinstatement. The Respondent offered evidence of significant civic work and community activities (Resp. Ex. L ). Respondent had taken all courses necessary to remain current in the CLER and paid the Bar dues. This court has repeatedly outlined the elements that must be proved before a suspended attorney is allowed to return to the practice of law, and cases reiterate them as (1.) Strict compliance with the terms and conditions of the disciplinary order; (2.) Evidence of unimpeachable character; (3.) Clear evidence of a good reputation for professional ability; (4.) Lack of malice and ill feeling toward those involved in the disciplinary proceedings; (5.) Personal assurances of sense of repentance and a desire to conduct oneself in an exemplary fashion in the future, and (6.) Restitution. In re the Petition of

William B. Dawson, III, 131 So. 2d 472, (1961) and The Florida Bar re: Joe Rawls Wolfe, 767 So. 2d 1174 (2000). Florida Bar Rule 3-7.10 was amended in February of 2001 by adding a seventh element not listed in the pre-2001 cases: “positive action showing rehabilitation by such things as a person’s occupation, religion or community or civic service.”

Respondent’s first witness was the Honorable David Seth Walker, Circuit Court Judge for the Sixth Judicial Circuit. The longest sitting Circuit Judge in Florida. He testified he knew the Respondent for over thirty years (T-7), and that Respondent had always represented his clients in a competent and professional manner (T-8). He further added that he found Respondent to be repentant (T-8). As far as rehabilitation, he stated that he would be comfortable with Respondent’s reintroduction to the practice of law (T-8). He said: “ I would think that three years of suspension would be more than enough needed by you to underscore the impropriety of what happened and I would not anticipate it ever happening again.” (T-9).

Next was the elected Public Defender for the Sixth Judicial Circuit, The Honorable Robert Dillinger. He Testified he had know respondent for over twenty-five years, and was familiar with the circumstances surrounding the

suspension (T-12). He had hired the Respondent in a non-lawyer capacity during the term of the suspension and stated that he had never hired any other suspended lawyer previous to this (T-13). Mr. Dillinger said there was no malice by Respondent towards anyone who had brought or participated in the proceedings (T-15). He added--concerning the employment: “you went out of your way to make sure the Bar know about it and that you did not want to do anything that the Bar would be bothered about” (T-15). As towards repentance, he stated: “my contact has been that you are very sorry for what you did” (T-16). He added that he thought Respondent was rehabilitated enough that: “if I have a position, I would offer it to you. I’ve never done that with any other lawyer” (T-16). In fact he stated that; “I have tentatively offered you employment” (T-17). On redirect examination he said: “I don’t have any misgivings about you being rehabilitated” (T-26).

County Judge Walter Fullerton was called next. He stated he had known the Respondent for over twenty years (T-27). He testified that the Respondent had always represented his clients in a very and thorough way (T-28). Significantly, he added: “And, I’ve always gotten the impression you try to help people rather than make a lot of money and become a rich

and famous defense attorney” (T28). He, like all of the witnesses for the Respondent, was aware of the circumstances surrounding the suspension (T-28). Before he addressed the issue of rehabilitation he advised that he had sat in many hearings as a referee. He had been sitting as a judge for twelve years and stated that he did a couple of hearings as a referee a year

(T-29). His quote on Respondent being rehabilitated was:

“What has struck me is not only what you’ve learned--that you’ve realized what you’ve done has been wrong, it’s been a terrible wrong, and you’ve tried to do everything required of you, but what struck me is that I feel you’ve really learned something from this, that practicing law is a privilege, it’s a public trust and you’ve let down the community, you’ve let down the Bar and you’ve let down your family. What I’ve been struck by is how you now realize what a privilege it is and you’d like to regain the trust in the Bar and the trust in the community, and most importantly, the family. And a lot of lawyers don’t ever see that or they overlook it. And it’s been a terrible way to learn it, but I think you’ve certainly learned from this” (T-29).

He said he had occasion to see the respondent almost every day during the term of the suspension because “our children attend the same school” (T-28). As to the direct question of if Respondent has been rehabilitated he stated: “I think that you have” (T-30). He added that he was familiar with the circumstances surrounding the suspension (T-31). As for remorse, during cross examination by Bar counsel he said of Respondent, “...he’s very sorry about it” (T-33), and “he’s very ashamed of it” (T-34). On the malice element: “...I don’t ever see him saying anything bad about the Bar or the

suspension or anything” (T-35). He added later, (as to whether or not there were adverse feelings by Respondent: “No. You, in fact, just the opposite, you’ve been repentant in what you’ve said to me, what you’ve done wrong, and you’ve tried to do everything that the agreed-upon penalty entailed and recognize where you’ve been and where you’d like to go from here” (T-38).

Assistant Public Defender Lorraine Kelly testified next. She first addressed Respondent maintaining competence by analyzing the Florida Law Weekly cases with each issue and publishing and distributing highlights to the Assistant Public Defenders. Respondent did this during his 18 month employment at the Public Defender’s office (T-39). (Samples attached, Resp. Ex. E). This--along with the CLER-- maintained Respondent’s competency during the term of suspension, a requirement for readmission. See, Florida Bar v. Ragano, 403 So. 2d 401, 406, (Fla. 1981). She described the weekly “Highlites” by saying:

“...they were always directly on point and certainly showed that you were keeping up with what was going on in the practice” (T-40). She testified about courthouse reputation and ability: “... the scuttlebutt...was that Mr. Manderscheid was a very good and reputable practitioner” (T-41). She was

familiar with the circumstances surrounding the suspension, (T-41), and

expressed her feelings about the Respondent being repentant:

“...I’ve seen a person who I think is pretty broken by the bad choices that you’ve made and quite ashamed of what that kind of practice casts on the entire profession. And I see someone who is very humble and contrite about that and who is most anxious to get back to the practice and reprove yourself as a very good practitioner. Sometimes, when a person makes a bad choice, it helps them to make better and stronger ones in the future, and I think Mr. Manderscheid is certainly a person who has learned from these past mistakes” (T-43-44).

When asked directly about Respondent’s fitness to be reinstated she was

just as emphatic:

“I have a very strong opinion. I think in the past you have been a credit to our profession. And I believe that this very powerful and embarrassing lesson will just further your ability to practice well, and that your clients at the Public Defender’s Office, should you be offered and decide to take that position, would be well served. ...I certainly would benefit from having you, an experienced and tenured person, in our office” (T-46).

She responded to the questions as to malice against those bringing the proceedings and rehabilitation she stated as follows;

“No. Quite the contrary. What I think and what I perceived was really kind of an aching grief on your part that you created that and betrayed the trust that you owed those people”, and as to rehabilitation, “Absolutely. I guess I could just speak to the specifics that I’ve seen in terms of rehabilitation and that is community service, staying up with the current law in the profession; following as near as I know, to the letter what the Bar has prescribed for you to do in order to get your license back; and certainly a contrite attitude about what has happened in the past and your intent to not do that again....all those things point to rehabilitation” (T-47-48).

The next witness to testify for respondent was Attorney Joseph H.

Chambers. An AV rated, board certified civil trial lawyer (T-55). He stated

he had known Respondent for thirty years--"early seventies" (T-56). His

opinion as to reputation and ability was:

"I thought you were a very competent lawyer. I referred probably most of our criminal cases, clients who would call for representation in criminal cases to you". He advised that his practice was limited to personal injury litigation and "I was always very comfortable in referring clients to you. I thought that not only were you a very competent attorney, but what always impressed me about you is that you seemed to genuinely care for the clients and the people I sent there. So I knew that if I sent them to you, they would not only be effectively represented, but it would be in a caring manner. So people that I liked that I wanted to send to somebody, I wanted them to get someone who was going to really take care of them" (T-56-57).

He told of referring cases from the late seventies until Respondent was suspended (1998). (T-57). When asked if he ever had occasion to regret sending a case to Respondent for handling, or any problems with the way it was handled: "Absolutely no regrets. And I still have no problems. I never got any negative feedback from any of the clients I sent you" (T-57). This type of statement speaks volumes as to ability and reputation. Chambers went on to say that he never had any misgivings at all as to Respondent's character or reputation in the community (T-57). He had directed a letter to the Florida Bar on Respondent's behalf in which he stated he was "shocked" to learn of the suspension. (Resp. Ex. F ). Also, he displayed a unique knowledge as to the facts surrounding the suspension, i.e., he knew the

name of the lawyer that had secured the complainant the personal injury award; knew that this was not a trust account violation, and that the monies had been restored (T-59). When asked if Respondent was repentant for his misdeeds, he replied: "Absolutely". (T-60). He said that "...you have certainly acknowledged and admitted what you have done. You take responsibility for what you have done. You are remorseful and that you have learned from this and you've learned your lesson from this (T-60).

On the issue of being rehabilitated:

"I think that you certainly have. I think your remorse and your repentance has gone a long way toward your rehabilitation. I think that first and foremost--not every lawyer is like this. ...perhaps people in your situation have been angry with the Florida Bar or mad at the profession; I see none of that in Mr. Manderscheid. On the contrary, this is a gentleman that really loves being a lawyer, loved and continues to love the legal profession and wants very badly to be a lawyer and to have the ability and right to practice again....I don't think it would ever happen again because he's realized exactly what he's lost" (T-60-62).

When asked if Respondent were readmitted would he have any problem referring cases to him, he said he would have no hesitation (T-62).

He also responded to the question of "the quote" by saying:

"This thing, this statement. I would trust Mr. Manderscheid with my money in his trust account. I don't think that this would ever happen again. I don't think there's any temptation on his part. Here's a man that realizes what he's lost, and I can assure your Honor that he's not going to lose that again"(T-63)

THE REFEREE: Mr. Manderscheid, any further questions?

MR. MANDERSCHIED: I have no more questions for this witness.

THE REFEREE: Counsel for the Bar?

MR. THOMPSON: I have no questions, your Honor. (T-63).

Simply put, this is as unrefuted and un rebutted as any testimony has ever been. Clearly, the elements as outlined in Dawson and Wolfe have been fulfilled by Respondent; and they are unrefuted and uncontradicted.

The next witness was Roger Wright, a fellow parishioner who testified he knew Respondent for fifteen months, since he had joined the worship band, and had occasion to see him at least once a week and more, socially included (T-65). He testified there was no malice for those bringing the proceedings (T-68), and Respondent had “ A willingness to do everything that you needed to do” (T68). When asked how he thought Respondent would perform his functions if admitted to go back and practicing law, he stated, “I think integrity is an extremely important quality to you, Jim, and I think that would be at the foremost of any endeavor you did” (T-69).

Next Cecil Keene was called by Respondent. He gave his background as retired principal of Gibbs High School, currently on the Board of Trustees of St. Petersburg College, and vice-chairman of the Florida A & M University

Foundation School. Additionally he advised he had previously served as a member of the Sixth Judicial Circuit Bar Grievance Committee (T-72). He spoke of how he had attended a weekly prayer breakfast with Respondent for over three years (T-75). He spoke of how Respondent had helped counsel one of his sons (T-76). Mr. Keene addressed a letter to the Bar on Respondent's behalf in which he detailed that counseling for his son had turned his son's life around (Re. Ex. G). When asked by Respondent if he believed that Respondent had changed his lifestyle, he responded yes (T-78). He believed that Respondent was repentant (T-78). Saw no bitterness or malice, and believed that Respondent was rehabilitated (T-79). He finished his direct testimony by saying he would have no misgivings if Respondent were to be readmitted to the Florida Bar (T-79).

The eighth witness was the Respondent's Pastor, Richard Cowley. He testified he and known the Respondent for about twelve years (T-84). He spoke of how he counseled the Respondent numerous times in regards the suspension (T-84). He spoke of how the Respondent had provided a service to him and the church, prior to his suspension, by advising the pastoral staff concerning legal issues arising from the church family. This

service was done without charge and was not used a source of referrals (T-84-85). He spoke of Respondent having no malice (T-87), and said: “In every conversation we have had you have indicated that you take full ownership for the wrong action you have taken” (T-87). As to repentance and change of lifestyle, he stated: “My opinion, based on twenty-eight years of counseling and my involvement with you in your life, that you have been extremely repentant, that you are not the same person you were when we first met and when all this occurred...I view you with the highest integrity” and when asked if Respondent has been rehabilitated, he said “I do completely (T-89-90). He added as to his belief as to whether or not I would engage again in similar conduct, “I think you would avoid it at all costs” (T-91). He stated he did not believe that Respondent would yield to future temptations. “I think you have seen enough of the consequences, paid enough of the price, that **you would not do that under any conditions**” (T-92). This statement was unrefuted and unrebutted. When cross-examined by Bar counsel, he stated that the alcoholic analogy was an unfortunate choice of words, “...and I didn’t mean that kind of an implication. I don’t believe that Jim has any of those tendencies, I really don’t....I believe that his statement was made with reference to the fact that I will avoid any

opportunity for inappropriate behavior” (T-93). When asked in the cross-examination if the statement changed his opinion as to whether or not Mr. Manderscheid is tempted to steal from his clients, he replied: “It does not change my opinion”(T-96).

Respondent took the stand and testified as to his service and community activities, and admitted being very wrong and expressed to the court that “I’m not that person anymore” (T-102). He stated: I can assure the Court that with the changes I’ve gone through...which I submit I have, that I will not yield again” (T-106). He said: “I’ve discovered there’s only two things I really love here on earth, one of them is practicing law, the other is being a Godly father. I’m hoping that we have demonstrated to this court that I have learned from this, that I’ve been rehabilitated” (T-107) In closing Respondent quoted *The Secrets of the Vine*, by Bruce Wilkinson ”...rehabilitation isn’t being sorry for something you’ve said or done, it’s a repentance and change of lifestyle.” I can assure this court that has happened in this case (T-107).

Besides the overwhelming testimony satisfying all of the elements in the case law, Respondent had submitted to the Bar supporting letters from Judge Frank

Quesada, (Resp. Ex. H ); Pinellas County Sheriff Everett Rice (Resp. Ex. I), and Attorney Jerry Theophilopolous, who described Respondent as a mentor to him in practicing law (Resp. Ex. J). The Bar report itself was unable to come up with anything derogatory or find anyone who objected to reinstatement of the Respondent, as mentioned previously, this included the complainant.

The cross-examination of the Respondent produced the testimony that the complainant had been restored before the suspension began, had received an additional \$10,00 plus interest from the Respondent (T-110). Putting it in perspective, the events leading to the suspension took place in 1995 and the money was fully repaid within eighteen months of that.(T-111).

The Bar called only its investigator, Ernest Kirstein, who offered an out-of context, misperceived quote from Respondent he heard during the Bar interview on October 25, 2001. No other witnesses were called by the Bar. When asked if anyone interviewed opposed the reinstatement of Respondent, he advised that on the contrary, everyone was in favor of the restoration to the practice of law. “All of them wanted you to be reinstated”

(T-117). This included the complainant herein, Laura M Fields.

Her Bar interview stated:

“...she recalls having filed a complaint with The Florida Bar about Mr. Manderscheid **who had borrowed money** from a settlement she had received.... Ms. Fields... remembered that during her association with the attorney he was experiencing many personal problems including a breakup of his marriage and a child with a serious illness. His financial situation deteriorated resulting in his obtaining **the loans** from his client (Ms. Fields). Ms. Fields comment was that **Manderscheid has made full restitution to her since his suspension**, and due to his desperate financial circumstances which motivated him to **borrow money from her**, she believes he should have “another chance” to practice law. Thus, she recommended his reinstatement to The Florida Bar with a provision that he serve a two (2) year period of probation.” (Resp. Ex .K )

Despite the presence of Ms. Fields’ statement in the Bar report, Bar counsel’s entire presentation consisted of cross examining all (eight) of the Respondent’s witnesses with a question of did they know how much money the Respondent **stole**, and inquiring of them if they were familiar with the “temptation” quote. All of the witnesses testified they were familiar with the facts surrounding the suspension, the (out of context) quote, and to a person, still supported the reinstatement. The only witness called by the Bar, their investigator, only testified that he had heard the quote made by Respondent at the Interview. The witnesses called by the Respondent were unrefuted, uncontradicted, and un rebutted.

At the conclusion of the Bar interview, which produced “the quote”

Respondent promised to never again conduct himself as he had done in the past, and the Bar need not fear any future improprieties. Ironically, neither this quote or any of Respondent's other statements made it into the Bar report, only the out of context and misunderstood quote about being glad he would be only a lawyer and not have to be a businessman again. Witness Kelly showed great perception when she said in response to "the quote": "...I found it to be pretty remarkable because there's no transcript of the proceeding...only that one quote. I'm assuming he said some good stuff in there". (T-52).

There are various reasons that suspended lawyers do not get reinstated. A careful review of the decisions involving denial of reinstatement all have some act, commission or omission, on the part of the petitioning suspended lawyer, i.e., a reason for the Referee and /or this Court to deny them. The Respondent herein has attempted to review all of the Florida Bar cases which have resulted in a decision and published opinion since 1995. (The UPL cases have been ignored inasmuch as they do not involve attorneys). A total of over 180 cases were reviewed and they constitute the body of law in this regard, I believe to the best of my ability that I have reviewed them all. The

majority deal with Guilt and/or Discipline. Very few of them deal solely with reinstatement proceedings, they may loosely be called the “rehabilitation cases”.

They are, along with the reasons, as follows:

Florida Bar v. Wolfe, No.94573. (2000). Referee ruled against him for not doing community service, which was not a requirement at that time. Court reversed referee, reinstated Wolfe, even though the victims were not fully compensated and some suffered greatly, i.e., one of the heirs of the trust lost his house.

The Florida Bar v. Macatee , Nos. 83174 83449. Denied Macatee’s reinstatement based on him practicing law while serving a prior suspension.

The Florida Bar v. Winderman, No. 84,609, ,(1995). After denial, served additional year and was opposed by Bar because of large debt. Supreme Court reversed because of Florida Bar v. Whitlock, 511 so. 2d 524, (Fla. 1987), which stated to deny reinstatement for monetary reasons is to deny reinstatement forever.

The Florida Bar v. Dunagan, No. 95720, (2000). Referee’s recommendation that attorney not be reinstated rejected where he had improper contact with client, remained attorney of record in five cases, failed to notify employer where he lectured he was suspended, and more, but court considered he had been suspended for more than the original term.

The Florida Bar v. Roberts, No.90,022. (1998). Suspended for purchase of crack cocaine. During suspension wrote 180 bad checks, not all made good. Denied for two more years, plus must undergo drug program.

The Florida Bar v. David Webster, No. 82042. This 1994 case is included because petition denied for omission in telling of suspended status when applying to practice in foreign jurisdiction.

The Florida Bar v. Rue, No. 84,978. (1995) Misstated the status of his wind-down to close practice, engaged in advertising holding himself to be attorney, remained a director in the law firm P.A., and more, but referee reinstated and court

upheld reinstatement. Rue had been suspended for 91 days and it had become a one year suspension.

The Florida Bar. v. Hernandez-Yanks, SC 86337 (1997) Misused office checking account causing insufficient checks to be issued

In the case herein, none of the above-stated reasons apply. Simply put, there was no act on the part of the Respondent that resulted in the denial by the referee, merely the out of context, non-recorded, misinterpreted quote made during the Bar interview. During that interview, the Bar already had in their file the written statement of Respondent, which was on the Petition for Reinstatement, it said: “I ask the Florida Bar for a chance to prove that I am a different person. I understand what I did was wrong and can assure the Bar that I will do nothing in the future to besmirch myself or the Bar. If reinstated, I will be on a probationary period, and look forward to that being an uneventful time in which I work diligently and reduce my obligations, which I agree to do as a condition of my probation”. As in Dunagan, cited above, the misunderstood quote is clearly not enough to show the Respondent is not rehabilitated. The Respondent has proved by clear and convincing evidence his rehabilitation and fitness to practice law. Also, as in Dunagan, the Respondent has been suspended for more than a year past the original

term of suspension. This, following the precepts in Dunagan, merits consideration as to the reinstatement of Respondent. This Court held in Florida Bar v. Pahules, 233 So. 2d 130, (Fla. 1970), that the three purposes of disciplinary judgments was (1) the judgment must be fair to society, (2) it must be fair to the attorney, and (3) must be severe enough to deter future conduct. It is submitted that the denial of this petition would not accomplish the objectives set forth in Pahules, as it would be unfair to Respondent, and, equally important, it would deprive our society of a competent and qualified attorney, and it would not serve to deter others from future conduct..

**2. The referee's Report (and Recommendation) is based on facts not supported by the record, and is clearly erroneous.**

On January 23, 2002, the referee signed a Report of Referee. The Report is simply one of the Bar's Proposed Orders with a few sentences added. The Report correctly pointed out the requirements for reinstatement as previously stated in Wolfe and Dawson. All of the factors were proved by respondent and his witnesses during the hearing. By stipulation and court order only rehabilitation needed to be proved for reinstatement to occur. As already discussed, Respondent called eight witness to attest to their knowledge of him his rehabilitation. To a person they all testified that

Respondent had been rehabilitated during the term of the suspension.

The referee states in the “Report” that Respondent’s statement, “the Quote” raises concerns about Respondent’s fitness to practice law. Maybe so, but strangely not enough for her to address a question to Respondent or any of his eight witnesses. This Court has stated that “The referee is in a unique position to assess the credibility of witnesses, and the referee’s judgment regarding credibility should not be overturned absent clear and convincing evidence that the referee’s judgment is incorrect.” Florida Bar v. Fredericks 731 So. 2d 1249, 1251 (Fla. 1999). The referee in the instant case had a puzzling absence of inquiry as she asked no questions of Respondent or any of his eight witnesses. If in fact there was a conflict, which it is submitted there is not, she had the obligation to resolve it. (See Florida Bar v. Niles, 644 So. 2d 504, (Fla. 1994) which held it is the responsibility of the referee for finding facts and resolving conflicts in evidence.) This was not done. Also puzzling, is the absence of findings of fact or a recommendation. At the conclusion of the hearing, and at any time, the referee failed to orally pronounce or make any findings of fact or any recommendation. It is settled law in Florida that “In a reinstatement proceeding, the party seeking

review of the referee's recommendation has the burden to demonstrate that the report is erroneous, unlawful or unjustified," Florida Bar v. Grusmark, 662 So. 2d 1235, 1236 (Fla. 1995). As to the referee's findings of fact, they should be upheld unless clearly erroneous or without support in the record. Florida Bar v. Janssen, 643 So 2d 1065, 1067 (Fla. 1994). The report of the referee is clearly erroneous considering the overwhelming evidence, which is both clear and convincing and proves Respondent is rehabilitated; for all of the evidence and testimony presented by Respondent and his witnesses was uncontradicted, unrefuted and unrebutted. The report states that it does require that Petitioner (Respondent herein) "has remedied that particular behavior which led to the suspension--*his propensity to steal from clients*. (R- 4). (Emphasis added). Nowhere during the hearing did anyone complain about the Respondent stealing from a client. No evidence was presented that this had ever occurred with any client or anyone he was in litigation with. Nowhere during this hearing was any propensity shown or even alleged. In fact, the investigator, the only witness the Bar called testified on cross exam that nothing appeared in their investigation which would sully the client, nothing bad was said about him, all had expressed a desire for his reinstatement,--including the complainant.

(T-117-118). Investigator Kirstein also agreed that the quote was preceded

by respondent's desire to work for a firm or specifically the public defender:

Q: "Where I could just go and practice law and not even get back into the whole thing of running a business?"

A: Yes, you did.

Q: And that I was frustrated with all the things that the business caused?

A: Yes, that's true. (T-117).

If in fact there had been a propensity to steal from clients, where in the record is it? There is absolutely nothing about this conduct being repeated or any prior such acts. The referee went so far as to refer to them as "unwitting clients and their money" (R-4). There is nothing from the hearing of the 23rd that mentions or addresses any improprieties with any client and their money. The testimony adduced eight witness recommending reinstatement, citing multitudinous service and community work, un rebutted testimony about the Respondent changing his life and lifestyle and diligently raising up three children. The Bar responded with only one quote from an hour or two interview. A response centered on glad to be out of the arena where finances will be an issue, happiness for the employment opportunity and not have to set up an office, put in phones, hire a secretary and support staff, turn on the utilities, and all the emoluments of business. Respondent told the Referee emphatically that all he wanted was the chance to be

restored, (T-103), be an honorable lawyer (T-106) and return to the practice of law which he loved (T-107).

It should be noted that the “quote” the Bar and the Referee refer to are mere words, not any act on the part of the Respondent. To allow the continued suspension for mere words, sets up a capricious and arbitrary standard which makes the path to restoration both difficult and perhaps impossible if the Referee dislikes the Respondent, as it appears herein.

At some point common sense and a sense of fair play must enter the picture. The Bar should realize the Respondent is not going to walk into the interview and announce a future impropriety and accordingly, they should resolve this with a sense of fairness, and accept there was a misunderstanding **and** that Respondent will be on probation for two years, and safeguards are built into Respondent’s return to the practice of law.

In researching all of the Supreme Court cases since 1995 dealing with lawyer discipline --which has been done in preparing this brief, as stated the case law is devoid of any denials of reinstatement for mere words. In all of the researched cases, there was some act or misdeed on

the part of the suspended lawyer which raised doubt about and/or prohibited the reinstatement. It is submitted that the bare statement, (which the referee never inquired about), is not sufficient, in and of itself, to disqualify the respondent or cause the referee to ignore the testimony and evidence which was presented by the respondent and his witnesses.

Undisputed evidence must be accepted as true, and finders of fact are not free to disbelieve such evidence and return findings contrary to it. For example, see:

Roach v. CSX Transportation, Inc., 598 So. 2d 246 (Fla. App. 1st DCA 1992). The trial court cannot arbitrarily ignore unrebutted testimony. In re Estate of Hannon, 447 So. 2d 1027, 1028 (Fla. App. 4th DCA 1984).

The report makes an issue of only the out of context quote, **something which in and of itself, should not have been disqualifying**, as was held in Florida Bar v. Dunagan, SC95720, (Fla. 2000). Interestingly, in Dunagan the Court noted that the referee's recommendation was based on his findings that among other things, while suspended, Dunagan had improper direct contact with one client, remained attorney of record in five cases, failed to understand that once he appeared as attorney of record in a case, he remained attorney of record until released by court order or by stipulation for substitution of counsel, failed to inform a company for whom he lectured

that he was suspended, and failing to correct deficiencies in his trust accounting procedures. The Bar called no witnesses and used Dunagan's testimony-as was done in the case herein-- as support for their position and the referee's findings. Although not on all fours, Dunagan is instructive because as in Respondent's case, the Bar called only one witness and he quoted only the Respondent. **No other testimony or evidence was offered by the Bar**, in both Dunagan and the case herein.. This court even stated in Dunagan: "we do not condone the careless attitude and conduct engaged in by Dunagan during his suspension". But noted,: "more importantly, we take into consideration the fact that Dunagan now has been suspended for more than...the originally imposed period of suspension." (Dunagan was suspended for 91 days and the period of suspension extended to eighteen months, an extra year and three months. At the time of submission of this brief, the Respondent herein has been suspended for exactly one and a half years in excess of the agreed-upon two year suspension). Despite the "careless attitude and conduct engaged in" by Mr. Dunagan during his suspension, **he was reinstated by this court**. It is noted here that none of the "careless attitude" and conduct that occurred in Dunagan has occurred in the case herein. Merely "the quote" which is

susceptible to interpretation and not representative of Respondent's statements to the Bar or to the Court. Clearly, the Report is erroneous and should not be upheld, as it is not supported by facts in the record. In fact, the record clearly contradicts the referee's conclusions. See Florida Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999).

### **3. Due Process and Rule violations. Rule 3-7.10(h).**

(a.) Rule 3-7.10 (h) states: "The referee to whom a petition for reinstatement has been referred by the chief justice shall proceed to a prompt hearing, **at the conclusion of which** the referee shall make and file with the Supreme Court of Florida a report **that shall include findings of fact and a recommendation** as to whether the petitioner is qualified to resume the practice of law."

Here, at the conclusion of the hearing, or at any other time, the referee failed to make findings of fact or a recommendation. At the conclusion of the hearing, the referee stated: "All right. Folks, that concludes it" (T-124). And the hearing was promptly concluded. Apparently she directed or authorized the Bar counsel to make findings of fact or a recommendation, as he appeared at her office at 4:30 p.m. on January 22nd, 2002, and supplied her with two proposed Reports. (Resp. Ex. A and B). She added a few sentences to the one denying the reinstatement (B) and signed and mailed same to Respondent (Resp. Ex. D, ). Respondent received in the U.S. mail

both the Proposed reports along with a copy of the Bar's correspondence to the Court (Resp Ex. C), and the signed Report on January 24, 2002.

**b.) Rule 3-7.10(h) states: "... the referee shall make and file with the Supreme Court of Florida a report..."**

The Report in this case is a copy of one of the two Bar proposed Orders-with a few

added sentences. It is well settled that due process rights are fundamental; they are not discretionary. The Florida Bar v. Weed, 559 So. 2d 1094 (Fla. 1990). Since the referee did not make a report, the due process violation is obvious.

This argument was raised in Florida Bar v. Cramer, No. 84,716 (1996). In

Cramer the Respondent complained that there was a violation when the referee authorized and directed the Bar counsel to prepare proposed findings and did not prepare his own report. What distinguishes Cramer

from the case herein, is that **in Cramer the record reflects that the**

**proposed findings submitted by the Bar were based on the oral**

**findings made by the referee at the conclusion of the disciplinary**

**hearing.** The referee, after listening to the evidence presented, announced

on the record his findings. **Only after announcing these findings** did the

Referee ask the Bar counsel to prepare proposed findings and submit a

copy to opposing counsel. **In the case at hand, the Referee never made any findings;** either at the conclusion of the case or at any time. If she did, she did so out of the presence of the Respondent. No findings were ever communicated by the referee to the Respondent. Recall the quote by the referee at the conclusion of the hearing:

THE REFEREE: All right. Folks, that concludes it. (T-124).

**(c.) The Referee failed to allow Petitioner an opportunity to see or have input, i.e., mitigating factors, in the proposed report and/or to object to it prior to signing.**

The Respondent received-in the U.S. mail- both the Bar's Proposed Orders and the

signed Report of Referee on January 24, 2002.

Once again, this constitutes a Due Process violation. In Florida Bar v.

Baker, No 96980 (2002), the Respondent claimed he had a due process

violation when he did not prepare or have any input in the preparation,

approval or offering of mitigation in the findings and recommendation of the

referee. However, in Baker, his counsel did not avail of the opportunity to do

so. He was offered the opportunity to do so but declined. Unlike Baker, in

the case at bar, Respondent was never afforded an opportunity for input,

approval or anything to do with the report and the findings of fact. As stated

earlier, the proposed reports from the Bar counsel and the signed report of the referee both were received on the same day, the 24th of January, 2002. This was a total due process violation. To allow the Bar counsel to be a part of the process of the report and not the Respondent is inexcusable, and the report should be stricken, overturned or rejected.

## **CONCLUSION**

Respondent has proved by clear and convincing evidence that he is rehabilitated. The evidence is overwhelming, clear and convincing, and uncontradicted, uncontroverted and unrefuted.

The Referee's findings of fact are erroneous and unjustified and do not support the record herein.

Respondent was deprived of his right to due process of law when the Referee failed to make findings of fact and a conclusion, at the end of the hearing and at any time; failed to make a report as required by the rules; and failed to give respondent an opportunity to object, contribute to,

approve, or add to the report which was the product of the Bar counsel.

Accordingly, her Report should be rejected or stricken, and this Honorable Court should reinstate to the practice of law, the Respondent, James F. Manderscheid.

Respectfully submitted,

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## **APPENDIX**

<b>Respondent's exhibit</b>	<b>Page</b>
A. Bar's Proposed Order allowing Reinstatement	9
B. Bar's Proposed Order denying reinstatement	9
C. Letter and Envelope from Bar counsel, dated Jan. 22, 2002	9
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that an original and seven (7) copies of the Respondent's Initial Brief and a diskette have been furnished to Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; and a copy of the foregoing has been furnished to William L. Thompson, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida, 33607, and a copy to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by regular U.S. Mail, this \_\_\_\_ day of April, 2002.

---

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**CERTIFICATION OF COMPLIANCE ,  
WITH APPELLATE RULE 9.210 (a)(2), FONT SIZE AND STYLE**

I HEREBY CERTIFY that this Initial Brief complies with Florida Rule of Appellate Procedure 9.210 (a)(2), and has been written in font size and style: Times New Roman, 14 pt, and a diskette with this Initial Brief is enclosed.

---

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