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SUMMARY OF ARGUMENT

It is The Florida Bar's position that the imposition of a three year disbarment, rather than a five year disbarment was clearly erroneous. The rules of statutory construction provide that procedural or remedial changes in the law must be immediately applied to pending cases. Since Mr. Greenberg's case was pending when the Rules Regulating The Florida Bar became effective and the length of a disbarment is both procedural and remedial, a five year disbarment must be imposed.

INTRODUCTION

The Florida Bar, Complainant, will be referred to as "the Bar" or "The Florida Bar". Steven M. Greenberg, Respondent, will be referred to as "Mr. Greenberg" or "the Respondent". The Code of Professional Responsibility effective prior to January 1, 1987 may be referred to as "the old rules". The Rules Regulating The Florida Bar effective January 1, 1987 may be referred to as "the new rules". All emphasis has been added.

STATEMENT OF THE CASE
AND OF THE FACTS

The Florida Bar filed its complaint on February 3, 1987. A final hearing was conducted before the Honorable David Kirwan, Referee on June 26, 1987.

The Florida Bar would adopt the Referee's summary of facts contained in the Report of Referee as its statement of the facts. Those findings have been included below for the court's convenience.

FINDING OF FACTS: Respondent admits the allegations contained in the Bar's complaint which I hereby accept and adopt as the findings of fact in this cause, to wit:

1. That Respondent was named as a principal and co-conspirator in a Federal Indictment filed in the United States District Court, Northern District of Indiana, Hammond Division in Case No. H-CR-83-36.

2. That the indictment alleged, inter alla, Respondent's complicity and involvement in committing offenses against the United States of America, to wit: conspiracy to import a controlled substance (marijuana); and conspiracy to distribute and possess with intent to distribute a controlled substance (marijuana); all in violation of Title 21, United States Code, Section 952(a), 963, 841(a)(1) and 846.

3. That on or about June 25, 1985, Respondent was adjudicated guilty after a jury verdict as to one (1) count of conspiracy to import a controlled substance (marijuana) in violation of Title 21, United States Code, Section 952 (1) and 963; and one (1) count of conspiracy to distribute a controlled substance (marijuana) in violation of Title 21, United States Code, Section 841(a)(1) and 846.

4. That Respondent was sentenced to serve two (2) years imprisonment as to each count, said sentences to run concurrently.

After finding the Respondent guilty of all violations charged by The Bar, the Referee imposed a disbarment for a period of three years. The Bar is appealing the imposition of a three year disbarment.

POINT ON APPEAL

WHETHER THE REFEREE'S IMPOSITION OF A
THREE YEAR DISBARMENT WAS ERRONEOUS?

THE REFEREE'S IMPOSITION OF A THREE YEAR
DISBARMENT WAS ERRONEOUS

Respondent was found guilty of the criminal acts charged on June 24, 1985, when the Code of Professional Responsibility was in effect. The Bar's complaint was filed on February 3, 1987. The final hearing before a referee occurred on June 26, 1987, when the Rules Regulating The Florida Bar were effective. Under the rules effective January 1, 1987, Rule 3-5.1(f) provides that a disbarred attorney may seek readmission to the Bar after five years have expired. The explanatory note which accompanies the Rules Regulating The Florida Bar provide:

All disciplinary cases pending as of 12:01 a.m. January 1, 1987, shall thereafter be processed in accordance with the procedures set forth in the Rules Regulating The Florida Bar.

It is clear from the foregoing note that the Florida Supreme Court intended that procedures contained in the new rules be applied to cases pending. Consequently, since Respondent's case was pending subsequent to January 1, 1987, the new rules apply and a five year disbarment would be mandated. In fact, The Florida Supreme Court's explanatory note is consistent with well established rules of statutory construction pertaining to procedural rules.

While statutory changes in law are normally presumed to apply prospectively, procedural or remedial changes may be immediately applied to pending cases

Heilman v. State, 310 So.2d 376
(Fla. 2nd DCA 1975)

It is the Bar's position that Rule 3-5.1(f) of the Rules

Regulating The Florida Bar which provides for the length of a disbarment before applying for readmission is procedural.

The disbarment itself would be of a substantive nature. The length of time to apply for readmission, however, would be procedural. The new rules have not changed the definition of a disbarment, only the length of time to reapply. The rule simply changes the form of the remedy without impairing substantial rights. Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978). It has been held that, "No one has a vested right in any given mode of procedure". Walker and LaBerge Inc. v. Halligan, 344 So.2d 239 (Fla. 1977).

Black's Law Dictionary provides the following definition for the term procedure.

The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product.

Black's Law Dictionary,
4th Edition, at 1367-8 (1968)

The act of making application to the Board of Bar Examiners once a disbarment is imposed is clearly the "machinery" which activates the "product" of disbarment. The length of time for that application is part of that machinery.

In Tel Service Co., v. General Capital Corp., 227 So.2d 667 (Fla. 1969), the court held that the measure of damages for vindication of a substantive act was inherently procedural. It was further held that alteration of such measure of damages did

not work any modification of fundamental substantive rights, see also Walker and LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977). The same analysis should be applied to the length of time of a disbarment. First, Bar proceedings have been held not to be penal and therefore fall within the sphere of civil law, rather than criminal law. DeBock v. State, 512 So.2d 164 (Fla. 1987); The Florida Bar v. Massfeller, 170 So.2d 834 (Fla. 1964).¹ Second, disciplinary proceedings are governed by The Rules of Civil Procedure, rather than The Rules of Criminal Procedure which lends support to the previous statement, Rule 3-7.5(e)(1) of the Rules Regulating The Florida Bar. Third, the substantive act before this court is disbarment, which is vindicated by the length of time it is imposed.

In DeBock, supra, this Court upheld its earlier finding that Bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts. Therefore, "[B]ar discipline exists to protect the public and not to punish the lawyer." DeBock, at 167. Since disciplinary proceedings in general are remedial, the rule of statutory construction which provides that where there are statutory changes in the law, remedial changes are to be immediately applied to pending cases is also applicable. Heilman, supra.

¹ - Since Bar proceedings are not criminal, they do not fall within the prohibition against ex post facto laws. Dobbert v. Florida, 432 U.S. 282, reh'g denied, 434 U.S. 882 (1977); Seaboard System R.R. Inc., v. Clemente, 467 So.2d 348 (Fla. 3rd DCA 1985).

Additionally, both the old rule and new rule provide that a disbarment may be for "[S]uch longer period as the Court might determine in the disbarment order". There have been disbarments exceeding three years under the old Integration Rule 11.10(5). In The Florida Bar v. Anderson, 482 So.2d 1 (Fla. 1986) a five year disbarment was imposed. Therefore, an argument may be made that even procedural rights have not been modified since it was always possible to be disbarred for a period in excess of three years under the old rules.


This Honorable Court has addressed the application of the new rules and whether a five year or three year disbarment is applicable in two recent cases. In The Florida Bar v. Bryan, 506 So.2d 395 (Fla. 1987), the Bar's complaint, Final Hearing and Report of Referee occurred in 1986. This Court disbarred the Respondent on April 30, 1987, for five years and cited Rule 3-7.9 of the Rules Regulating The Florida Bar as applicable precedent. In The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987), the Bar's Complaint, Final Hearing and Report of Referee occurred in 1986. This Court disbarred Newman on September 10, 1987, for three years, making reference to the former Bar rules. It is therefore unclear what position this Court has taken on the issue sub judice.

The act of applying for readmission after a particular time

period once a disbarment is imposed is procedural. Furthermore, bar discipline has been held to be remedial. In either event, the Rules Regulating The Florida Bar are applicable to the Respondent whose case was pending subsequent to January 1, 1987, and mandates the imposition of a five year disbarment.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed a three disbarment, and would urge this court to amend the Report of Referee and impose a five year disbarment.

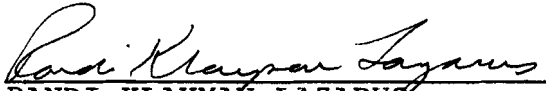

RANDI KLAYMAN LAZARUS
Bar Counsel
The Florida Bar
Suite 211, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, Florida 32301-8226
(904) 222-5286

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Initial Brief of Complainant on Petition to Review was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to John A. Weiss, Attorney for Respondent, 101 North Gadsden Street, Tallahassee, Florida 32301, this 30th day of December, 1987.


RANDI KLAYMAN LAZARUS
Bar Counsel