IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Supreme Court Case
No. 83,892

IN RE: PETITION FOR REINSTATEMENT
OF DENNIS I. HOLOBER

The Florida Bar File
No. 94-71,567(MRE-11C)

_____/

On Petition for Review

ANSWER BRIEF OF COMPLAINANT

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STATEMENT OF THE CASE AND FACTS

The Florida Bar submits this, its Answer Brief on the Petitioner's appeal of the Order of Referee dismissing the Petition for Reinstatement and requiring Petitioner to comply with Rule 3-7.10(a), Rules Regulating The Florida Bar.

The Florida Bar does not object to Petitioner's statement of the case and facts but would add the following.

At the hearing on the Motion to Dismiss, the Referee would not allow Petitioner to testify, because the hearing was not an evidentiary hearing, but instead a hearing on the Bar's Motion to Dismiss where the only inquiry was to the sufficiency of the pleading in question.

The Referee held that the Petitioner had not complied with Rule 3-7.10(a), Rules Regulating The Florida Bar and that the Petition should be dismissed.

SUMMARY OF ARGUMENT

Petitioner submitted a Petition to Resign from The Florida Bar pending discipline. The petition to resign was granted on November 28, 1979. In, In Re Kay, 576 So.2d 705 (Fla. 1991), the Supreme Court in a footnote clearly expressed that future applications for readmission should be made to the Bar pursuant to Rule 3-7.9(a). [(now renumbered as 3-7.10(a)] when it stated:

> "Because Kay resigned prior to the adoption of Rule 3-7.9(a) of the Rules Regulating The Florida Bar, we permitted him to file for readmission with this court and appointed a Referee to make recommendations. Henceforth, all applications for readmission shall be filed pursuant to Rule 3-7.9(a)." Kay, at 705.

This Court did not limit the language of the footnote to the facts of Kay nor did it limit the use of the word "all", therefore the language should be interpreted to mean all applications including petitioner's application.

Petitioner argues that the case of The Florida Bar v. Kimball, 425 So.2d 531 (Fla. 1982), allows Petitioner to apply for readmission to the Bar pursuant to the rules in effect at the time of his resignation.

The court in Kimball, supra, upheld the general rule cited in State v. Evans, 109 So.2d 881 (Fla. 1959) and modified the rule to state:

> "Reinstatement proceedings are governed by the rules in effect at the time of application for reinstatement unless the original discipline opinion otherwise provides or unless the rules at the time of disbarment otherwise provide." Kimball, at 533.

However, this exception to the rule does not apply to Petitioner as the final order of discipline is silent as to the rules applicable to reinstatement. Furthermore, the rules in effect at the time of Petitioner's resignation are unclear as to what procedure for reinstatement applied. Therefore, the rules now in effect should govern Petitioner's reinstatement. The Court should uphold the order of the Referee dismissing the Petition for Reinstatement and require Petitioner to seek readmission pursuant to Rule 3-7.10(a) Rules Regulating The Florida Bar.

ARGUMENT

THE REFEREE PROPERLY DISMISSED THE PETITION FOR REINSTATEMENT FOR PETITIONER'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF RULE 3-7.10(a), RULES REGULATING THE FLORIDA BAR.

The Supreme Court in, In Re Kay, 576 So.2d 705 (Fla. 1991) has clearly established that all applications for readmission to the Bar submitted subsequent to the opinion would be governed by Rule 3-7.10(a), of the Rules Regulating The Florida Bar.

Kay, supra, involved an attorney who had resigned prior to the adoption of the Rules Regulating The Florida Bar in 1987, and had attempted to reapply for reinstatement after the rules had been adopted. Although Petitioner Kay was denied reinstatement on other grounds, the court in a footnote to the opinion stated in part,

> "Hence forth all applications for readmission shall be filed pursuant to Rule 3-7.9(a)." 1. [Rule 3-7.9(a) has been renumbered as 3-7.10(a)] (Emphasis supplied) Kay, at 705.

This court precisely stated that all reinstatement proceedings, after Kay, regardless of when a lawyer had resigned must be pursuant to Rule 3-7.9(a), which is now renumbered as 3-7.10(a).

There is no evidence in the opinion or in the footnote which limit the language to the specific facts in Kay or to limit the application of the language to only selected reinstatement cases. The use of the word "all" without any limiting language should be construed so as to apply to every reinstatement case after Kay, whether or not the lawyer had resigned prior to the adoption of Rule 3-7.10(a).

Petitioner argues that to give the footnote in Kay such a

meaning would abrogate specific agreements between attorneys and the Bar regarding reinstatement procedures and proceedings. Petitioner argues that these agreements for resignation were entered into by lawyers who were given specific advice and encouragement by the Bar that they would not have to reapply through the Board of Bar Examiners if they entered a resignation.

Petitioner, however, has failed to produce any record evidence of these alleged agreements, and more specifically of any agreement between Petitioner and the Bar promising he would not have to reapply through the Board of Bar Examiners memorialized in an order as required by Rule 3-7.10(a). Both the Petition for Resignation and the Order on Petitioner's Resignation are silent as to any alleged agreement between the Bar and Petitioner regarding his reinstatement.

The Petitioner argues that the Referee in the lower court erred when he did not allow Petitioner to testify as to the substance of the agreement allegedly reached between Petitioner and the Bar. The hearing on the Motion to Dismiss was not an evidentiary hearing, but rather was held to argue whether as a matter of law Petitioner had complied with the requirements of the prevailing rule.

Motions to Dismiss are not by their very nature, evidentiary hearings. In Motion to Dismiss hearings, the facts and allegations are taken as true and the judge must make a determination of law as to the sufficiency of the pleading. The Court is limited to inquiry within the four corners of the pleadings. Barker v. First

National Bank, 325 So.2d 467 (Fla 2d D.C.A. 1976); Whitfield v. Whitfield, 161 So.2d 256 (Fla. 3d D.C.A. 1964). It has been held that an insufficient complaint cannot be saved from a Motion to Dismiss by testimony at the hearing. City of Coral Springs v. Florida National Properties, 340 So.2d 1271 (Fla. 4th D.C.A. 1976).

Similarly, in this matter, the Referee is limited to an inquiry on the sufficiency of the Petition for reinstatement. The inquiry is also limited to the facts and allegations of the petition and as stated in City of Coral Springs, supra, the petition cannot be saved from the motion by testimony at the hearing. Therefore, the judge did not err by disallowing testimony of petition at the hearing on the Motion to Dismiss.

Furthermore, it is well settled that rule changes which effect a procedural change, such as the rule in this case may be applied retroactively without any infringement of rights. The Florida Courts have consistently held that changes in law which effect procedure or remedial changes may be immediately applied to pending cases. Fogg v. Southeast Bank, 473 So.2d 1352 (Fla 4th D.C.A., 1985); Heilman v. State, 310 So.2d 376 (Fla 2nd D.C.A., 1975).

The rule changes regarding reinstatement are clearly a procedural change. Rule 3-7.10(a) establishes the steps and procedures necessary in order for a petitioner to be eligible for reinstatement. The rule does not define or give any particular right, but solely establishes the process by which an attorney must proceed to attain reinstatement.

Also, retroactive application of the rule on reinstatement

does not infringe upon any constitutional rights of the Petitioner. A statute may be applied retroactively as long as it does not deprive an individual of a substantive or vested right. In re Will of Martell, 457 So.2d 1064 (Fla. 2d D.C.A. 1984). The change in the rules does not deprive Petitioner of any vested or substantive right. The practice of law is not a vested right which is protected under the constitution. Ippolito v. State of Florida, 824 F. Supp 1562 (MD Fla. 1993). The practice of law is a conditional privilege that is revocable for cause. Rule 3-1.1 of the Rules Regulating The Florida Bar.

Because no vested right is affected and the change is a procedural one, the change in rules may be applied retroactively and does not infringe on rights of Petitioner or any other lawyer who resigned prior to the rule change and the promulgation of the Kay opinion. The rules Petitioner resigned under were superseded by the amendments to the rules and the adoption of the Rules Regulating The Florida Bar. The Florida Bar v. Hosner, 513 So.2d 1057 (Fla. 1987).

An illustrative case on the retro-active application of the rules Regulating The Florida Bar can be found in The Florida Bar v. Greenberg, 534 So.2d 1142 (Fla. 1989). Greenberg involved an attorney who had been found guilty of criminal acts, was suspended in 1985 and faced disbarment proceedings. In 1987, the Bar filed a complaint seeking disbarment under the newly adopted Rules which changed the time for readmission to the Bar after disbarment from three (3) years to five (5) years. Greenberg argued that his case

was pending long before the effective date of the new rules and that the Bar's position should be rejected and the old rules should apply. The Supreme Court held that despite the fact that the matter was pending prior to the adoption of the Rules Regulating The Florida Bar, these new rules could be applied retroactively without violation or infringement of Greenberg's substantive rights. Therefore application of the new rules to the Petitioner's application for reinstatement does not violate any rules of fairness or any vested or constitutional right.

The Courts have followed the reasoning in Kay and dismissed petitions for reinstatement which have not properly proceeded through the Board of Bar Examiners. In The Florida Bar In Re Jerome Rubinowitz, Supreme Court Case No. 80,130 (Fla. March 31, 1993), the Court approved the Corrective Order of the Referee who dismissed the Petitioner's application for reinstatement. The Referee held that he did not have jurisdiction pursuant to Rule 3-7.10(m) and that readmission must be brought through the Board of Bar Examiners. The Supreme Court approved the order and dismissed the case. (A copy of the Referee's Order and the Supreme Court's Order is included in the Appendix to this brief as Exhibit A).

As in the case at issue, Rubinowitz had resigned prior to the rule changes. Despite this fact, the Court held Rubinowitz to be governed by Ruled 3-7.10(a) and required him to apply to the Board of Bar Examiners. This holding demonstrates that Rule 3-7.10(a) and Kay are now the prevailing rule for all reinstatement proceedings.

Petitioner attempts to analogize the situation in the instant case to that of a unilateral change in a criminal plea agreement. Petitioner states that a plea agreement cannot be modified upwards without the defendant's consent. Freeman v. State, 376 So.2d 294 (Fla. 2d D.C.A. 1979). Petitioner argues the change in the rules and their retroactive application is tantamount to changing the sentence of a criminal who has agreed to a plea bargain without his consent.

This argument, however, does not consider that the two situations are fundamentally different and deal with entirely separate rights. To change a plea agreement, changes substantive vested constitutional rights of that defendant and is an obvious violation of those rights. Agreements which affect constitutional rights should be held to a higher standard.

However, in the case at issue the changes, as argued above, deal with procedural changes and rights which are not vested or protected under the constitution. Therefore a change in reinstatement proceedings and a change in a plea bargain are worlds apart and may not be considered analogous.

Petitioner attempts a second analogy by citing Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993). In Chiles, supra, the Court upheld the trial court's decision that the Florida Legislatures unilateral modification and abrogation of an agreement between the union representing public employees and the state, violated employees right to collectively bargain and constituted an impairment of contract. The legislature had, after resolving a

conflict between unions and the state and authorizing a pay raise, later postponed and eliminated the pay raise. The Court held the legislatures' conduct was improper.

Petitioner argues that the court in Chiles said a deal is a deal and that the court should similarly find that Petitioner made a deal with the Bar and should not be able to have it abrogated. As stated above, Petitioner has produced no record evidence to illustrate any deal between the Petitioner and the Bar except what is written in the final order on Petitioners's resignation. The final order is silent as to any alleged encouragement of the Bar convincing Petitioner to resign in lieu of disciplinary proceedings or any statements that Petitioner would not have to seek readmission through the Board of Bar Examiners. Petitioner argues that but for this alleged agreement Petitioner would have resigned and that the resignation benefitted the Bar. This argument is self serving and ignores the seriousness of the charges against Petitioner and the fact that resigning rather than litigating was beneficial to Petitioner by avoiding the cost and record of a trial and the possible stigma of disbarment.

Furthermore, Chiles deals with a State Constitutional rights violation involving the right to collective bargaining and the right to contract. In the case at issue, Petitioner has no constitutional right either under the Federal or State Constitutions to practice law and application of the rules does not trigger any violation of the Federal or State Constitutions. Therefore, Chiles is clearly distinguishable from the instant

matter.

Prior to the Kay opinion, the Court set the groundwork for the current rule on reinstatement in The Florida Bar In Re Kimball, 425 So.2d 531 (Fla. 1983). In Kimball, supra, an attorney who had been disbarred sought reinstatement under the rules in effect at the time of his disbarment. The Court clarifying reinstatement proceedings, upheld the general rule stated in State v. Evans, 109 So.2d 881 (Fla. 1959), which stated, "Proceedings for reinstatement are governed by rules in effect at the time application for reinstatement is made". The Kimball court also modified the general rule adding an exception to the rule which state, "The rules in effect at the time the petition for reinstatement is filed govern the reinstatement, unless the original discipline opinion or the rules in effect at the time of disbarment otherwise provide." Kimball, supra, at 533.

The Referee in the instant matter properly considered the Kimball case in coming to his decision. The final order on Petitioner's resignation is silent as to any particular rules which would apply to his reinstatement. Similarly, Fla. Bar Integr. Rules Article XI, Rule 11.08 and 11.11, which were in effect when Petitioner resigned, are silent as to what rules would govern a petition for reinstatement. Therefore, under the Kimball opinion, the rule in effect at the time Petitioner filed his petition for reinstatement controls the reinstatement process.

It should be noted, however, that while the Kimball opinion is instructive as to the promulgation of the general rule and

reinstatement proceedings, the language and rule in Kay are controlling. This Court went out of its way to state what rule would govern reinstatement proceedings after Kay.

Petitioner cites three cases which are cited and discussed in Kimball, The Florida Bar In Re Turk, 307 So.2d 162 (Fla. 1975); The Florida Bar In Re Rassner, 301 So.2d 451 (Fla. 1974); The Florida Bar In Re Bond, (Fla. 1974).

Petitioner argues that Turk, supra, establishes the fact that when the rule in effect at the time of resignation specifically states which rule will apply for reinstatement, the general rule on reinstatement will not apply. In Turk, an attorney who had been temporarily disbarred for three years, petitioned for reinstatement arguing that the rule in effect at the time of his disbarment should govern. The Court held that the rule in effect would apply and not the general rule, because of language in the rule which made the old rule applicable. The rule stated, "An attorney...may be reinstated to membership in The Florida Bar pursuant to this rule." The Court stated that the inclusion of the language "pursuant to this rule" made the rule applicable to Petitioner's reinstatement.

Petitioner in the instant matter argues the rules in effect at the time he resigned provide for and are applicable today as in Turk and clearly and unequivocally preclude reinstatement through the Board of Bar Examiners. However, the rules Petitioner resigned under, Rules 11.08 and 11.11 are unclear as to exactly what rule will govern reinstatement and are unclear as to the proper

procedure. These rules certainly do not clearly and unequivocally preclude any type of reinstatement process and do not clearly prescribe a reinstatement process either. Therefore, the rules in effect at the time of filing of the petition govern the reinstatement process.

Petitioner also cites The Florida Bar In Re Rassner, 301 So.2d 451 (Fla. 1974) to argue against the use of the existing rules on reinstatement. In Rassner, supra, an attorney who had been disbarred in 1965 petitioned for readmittance in 1972. While the petition was pending in 1974, the rules changed regarding reinstatement creating a more onerous readmission process. The Court held that because the application was pending at the time, the rules changed, the Court would not allow the 1974 rules to govern. The Court, however, did hold that Petitioner would have to adhere to the rules in effect at the time his petition for reinstatement was filed and not the rules existing when he was disbarred.

The case actually illustrates the Bar's argument that the rules in effect at the time Petitioner filed his petition should govern. The Bar is not asking to institute a change which took place while the petition was pending, but only to implement the rules in effect at the time the application was submitted. The rules had changed long before Petitioner submitted this application for readmission. The Rassner case would only apply if Petitioner had filed a reinstatement petition and while it was pending the rules on reinstatement changed.

Petitioner also cites and argues The Florida Bar In Re Bond, 301 So.2d 476 (Fla. 1974). In Bond, supra, an attorney who had been permitted to resign for three years sought reinstatement. The issue before the court was whether the lawyer had to seek readmission under the existing rules or pursuant to the rules under which he resigned. The Court held the lawyer would be allowed to reapply in accordance with the rules in effect at the time of resignation. The Court's reasoning was not that an attorney can come back under the old rules, but that the existing rules did not apply to the attorney. The new rules specifically mentioned that they would apply, "if resignation was accepted under this rule". The Court found that Petitioner did not resign under that rule so was ineligible to apply for reinstatement under the rule.

The Petitioner argues that a similar situation exists in the case at issue. The existing Rule on Reinstatement, 3-7.10(a) has language which also states that it provides reinstatement to those attorneys who resign pursuant to Rule 3-7.12. Petitioner argues since he did not resign under 3-7.12, the Bond holding allows him to apply for reinstatement under the old rules.

However, the Bond holding does not apply as rule 3-7.10(a) has been interpreted by this Court to apply to all petitions for reinstatement under the language in Kay. The Kay opinion has expanded rule 3-7.10(a), formerly 3-7.9(a) to include lawyers who resigned pursuant to rules different from those mentioned in 3-7.10(a). Therefore, the Bond opinion is distinguished from the instant matter as no interpretive decision such as Kay existed to

interpret the rule in Bond and expand its use.

Finally, Petitioner argues that the acceptance of the Kay opinion as prevailing law would cause confusion in reinstatement proceedings. The Kay opinion, however, would have just the opposite effect by streamlining reinstatement cases by having one prevailing rule for each case regardless or when the attorney resigned. There would no longer be a need, as in this case, for determinations as to what rule applies and when it applies.

Petitioner also presents a rather confusing argument concerning the Kay opinion which allegedly would allow the Bar to argue that an attorney suspended for ninety (90) days would have to go through the Board of Bar Examiners to attain reinstatement. The Kay opinion only prescribes the use of 3-7.10(a) for reinstatement proceedings not for situations involving suspension with automatic reinstatement.

CONCLUSION

The Referee properly dismissed Petitioner's Petition for Reinstatement. The Kay opinion is controlling and clearly states that all applications for reinstatement shall be filed pursuant to the existing rules, Rules Regulating The Florida Bar, 3-7.10(a). Rule 3-7.10(c) requires Petitioner to seek readmission through the Board of Bar Examiners. The Kay opinion is far reaching by creating a settled rule for all reinstatement proceedings. The decision of the Referee should be affirmed and the Petition for Reinstatement dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer Brief of Complainant was sent via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927, and a true copy was mailed via Certified Mail RRR 862 424 741 to John A. Weiss, Attorney for Petitioner, P.O. Box 1167, Tallahassee, Florida 32302-1167 on this 11th day of October, 1994.

Elena Evans, Bar Counsel

A P P E N D I X

Supreme Court of Florida

WEDNESDAY, MARCH 31, 1993

THE FLORIDA BAR

RE: JEROME RUBINOWITZ Case No. 80,130

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

Upon consideration of the referee's Corrective Order in the above styled case, the Corrective Order is approved and

It Is Ordered that the above styled case is dismissed.

A TRUE COPY

TEST:

Sid J. White
Clerk Supreme Court

bdm

c: Hon. Martin Greenbaum
Ms. Alisa M. Smith
Mr. John Boggs
Mr. Norman I. Segal

EXHIBIT

A

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JEROME L. RUBINOWITZ,

Respondent.
_____/

Case No. 80,130

TFB File No. 93-00232-02-NRE

CORRECTIVE ORDER

This cause came to be heard upon Respondent's Petition for Reinstatement and The Florida Bar's Motion to Dismiss. Both parties having been present, (The Florida Bar telephonically) at a hearing held January 20, 1993 and having had the opportunity to present argument, this Court finds the following:

1. That the Respondent filed on or about July 10, 1992 a Petition for Reinstatement Alternative Petition for Readmission.

2. That on or about January 7, 1993, The Florida Bar filed a Motion to Dismiss Respondent's Petition for Readmission.

3. That the Respondent on June 7, 1984 resigned from The Florida Bar in lieu of discipline without leave to reapply for five years.

4. That pursuant to Rule 3-7.10(m) of the Rules Regulating The Florida Bar, this Court does not have jurisdiction and the Respondent must apply for readmission with The Florida Board of Bar Examiners.

Based on the foregoing findings, it is hereby

ORDERED AND ADJUDGED:

1. The Florida Bar's Motion to Dismiss Respondent's Petition for Reinstatement/Readmission is hereby granted.

2. The Respondent's Petition for Reinstatement/Readmission is hereby dismissed.

DONE AND ORDERED in the Chambers of the Honorable Martin Greenbaum, 626 Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130, this FEB 24 1993 day of February 1993.

MARTIN GREENBAUM

Honorable Martin Greenbaum, Referee
626 Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130

Copies Provided To:

Alisa M. Smith, Bar Counsel
John T. Berry, Staff Counsel, c/o John A. Boggs, Director of Lawyer Regulation
Norman I. Segal, Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JEROME L. RUBINOWITZ,

Respondent.
_____/

Case No. 80,130

TFB File No. 93-00232-02-NRE

ORDER

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4. That pursuant to Rule 3-7.10(m) of the Rules Regulating The Florida Bar, this Court does not have jurisdiction and the Respondent must apply for readmission with The Florida Board of Bar Examiners.

Based on the foregoing findings, it is hereby

ORDERED AND ADJUDGED:

1. The Florida Bar's Motion to Dismiss Respondent's Petition for Reinstatement/Readmission is hereby granted.

2. The Respondent's Petition for Reinstatement/Readmission is hereby denied.

DONE AND ORDERED in the Chambers of the Honorable Martin Greenbaum, 626 Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130, this 10 day of February 1993.

FEB 10 1993

MARTIN GREENBAUM
Circuit Judge

Honorable Martin Greenbaum, Referee
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Miami, Florida 33130

Copies Provided To:

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