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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:

DENNIS I. HOLOBER

CASE NO.: 83,892

_____/

PETITIONER'S REPLY BRIEF

WEISS & ETKIN
John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, FL 32302-1167
(904) 681-9010
COUNSEL FOR PETITIONER

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POINT ON APPEAL

THE REFEREE IGNORED THIS COURT'S HOLDING IN THE FLORIDA BAR. IN RE KIMBALL, 425 So.2d 531, 533 (Fla. 1982) THAT REINSTATEMENT PROCEEDINGS ARE GOVERNED BY THE RULES IN EFFECT AT THE TIME OF APPLICATION UNLESS THE ORIGINAL DISCIPLINARY ORDER OR THE RULES IN EFFECT AT THE TIME OF THAT ORDER OTHERWISE PROVIDE AND, THEREFORE, IMPROPERLY DISMISSED PETITIONER'S PETITION FOR REINSTATEMENT.

ARGUMENT

The Bar's argument is, in essence, that expediency overrides fairness. Were The Florida Bar a lawyer, it could not possibly be said that its word was its bond. Bar Counsel (whose integrity is beyond reproach, she is properly advocating the Bar's position) argues that a very material change in the requirements for reinstatement, not contemplated by the parties at the time of the agreement, i.e., the resignation, is permissible. In essence, the Bar argues that the terms of any consent judgment entered into by any lawyer with the Bar can be unilaterally altered unless every conceivable future modification is addressed in the document itself.

There was no controversy in 1979 about the manner in which resigned lawyers resumed the practice of law. Nothing the Bar points to shows that lawyers who resigned in lieu of discipline had to come back in through the Board of Bar Examiners. Nothing. Disbarred lawyers came in through the Board of Bar Examiners, resigned lawyers petitioned for reinstatement to the Board of Governors.

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The rule that resigned lawyers did not have to seek reinstatement through the Board of Bar Examiners was so fundamental, was so clearly set out in the rules, that specific clauses to that effect were not required in consent judgments or resignations.

On the one hand the Bar argues that the record is devoid of a specific agreement between the Bar and Petitioner regarding his manner of reinstatement. On the other hand the Bar argues that he was properly not allowed to testify about any such agreement and that he should not be allowed to reveal the terms of the agreement. Catch-22. Is this fairness on the Bar's part?

This Court has long followed the philosophy that

> The court exercises a jurisdiction over attorneys which is to be exercised according to law and conscience, and not by any technical rules. (emphasis in original).

Gould v State, 127 So. 309, 311 (Fla. 1930). To this end the Court has given the Bar and referee wide latitude. Technical rules of evidence do not apply, the Bar is allowed to freely amend its charges, the exclusionary rule does not apply and referees can make guilty findings based on the evidence before the Court despite it not being specifically pled. This refusal to follow technicalities in disciplinary proceedings should not be applied exclusively for the benefit of the Bar.

In the instant case, the Bar argues that the Petitioner, the only individual left in the system with first-hand knowledge of the plea agreement, should be muzzled. It then argues that there is no record testimony supporting the Petitioner's position. How can

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there be any such evidence if the Petitioner is not allowed to testify. Gould implies that he should be so allowed.

Petitioner submits that The Florida Bar. In Re Kimball, 425 So.2d 531 (Fla. 1983) mandates the processing of his petition for reinstatement. As pointed out on page three of Petitioners Initial Brief Kimball holds that

> 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.

At the time Petitioner's resignation was submitted, Rule 11.08(5) specifically stated that the resigned lawyer

> May be again admitted to the Bar upon application to and approval by the Board of Governors....

To now require Petitioner to apply to the Board of Bar Examiners directly contradicts Rule 11.08(5).

Rule 11.10(4), later renumbered 11.10(5) required that disbarred lawyers, and only disbarred lawyers, had to comply "with the rules and regulations governing admission to the Bar."

As further support for Petitioner's argument that all contemplated his seeking reinstatement without going through the Board of Bar Examiners, Petitioner points to the language of Rule 11.11, captioned Reinstatement, in effect at the time of the Court's November 28, 1979 order granting Petitioner's resignation. The new rule, codifying past practices specifically stated that

> An attorney who has been suspended or who has resigned for cause may be reinstated to The Florida Bar pursuant to this rule.

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As argued on pages six and seven of Petitioner's brief, nobody in 1979 could have reasonably expected that any resigned lawyer would have to go through the Board of Bar Examiners before resuming the practice of law.

In essence, Kimball contradicts the Bar's position. The rule in effect in 1979 specifically contradicts the rules in effect today. Petitioner resigned pursuant to those rules and, accordingly, he cannot be required to apply to the Board of Bar Examiners.

The Florida Bar completely misses the point of Chiles v United Faculty of Florida, 615 So.2d 671 (Fla. 1993). Chiles recognized that contracts between individuals and the government cannot be unilaterally altered subsequent to the arrangement being reached. In the case at Bar, a fair reading of the rules in effect at the time of the agreement, and the language of the resignation and order accepting it, can leave no doubt in anybody's mind that the specific agreement was that Petitioner could seek reinstatement as opposed to applying to the Florida Board of Bar Examiners. Rule 3-7.9, adopted eight years after the agreement, cannot alter that agreement.

The Bar should be estopped from arguing that the adoption of Rule 3-7.9 was a procedural change that negated the terms of Petitioner's resignation and required application to the Board of Bar Examiners. No such argument was raised The Florida Bar Re Kay, 576 So.2d 705 (Fla. 1991). At that time, the Bar allowed Mr. Kay to seek reinstatement without objection. The point on appeal

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before the Supreme Court was whether he had met the requirement of proving rehabilitation, not whether the procedures were properly entered into. They did not believe in Mr. Kay's case that the rule change had retroactive application.

The Florida Bar's reliance on The Florida Bar v Greenberg, 534 So.2d 1142 (Fla. 1988) is misplaced. Mr. Greenberg's case was pending at the time of the adoption of the new rules permitting a five year disbarment. Accordingly, there was no retroactivity involved.

The Bar's reliance on the unreported decision of The Florida Bar v Rubinowitz, Case Number 80,130 (Fla. 1993) is also inappropriate. There is no showing that Mr. Rubinowitz appealed his case and, therefore, the issue of the propriety of his dismissal was never brought before the Court.

In 1979 Petitioner, relying on the language of the rules and the good faith of The Florida Bar, entered into an agreement. A cornerstone of that agreement was that resumption of the practice of law could be achieved without applying to the Board of Bar Examiners. The Integration Rule as interpreted at that time, and as specifically and emphatically amended prior to the acceptance of the order of discipline, specifically so provided. Petitioner seeks nothing more at this time than enforcement of the agreement that he made with The Florida Bar.

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CONCLUSION

The referee's recommendation that these proceedings be dismissed should be overturned and this case should be remanded to the referee for a hearing on Petitioner's fitness to practice law.

Respectfully submitted,

WEISS & ETKIN

John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, FL 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Reply Brief were mailed to Elena Evans, Esquire, The Florida Bar, Suite M-100 Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 and to John A. Boggs, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 26th day of October, 1994.

JOHN A. WEISS