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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellee/Cross-Appellant,

v.

PETER CHARLES CLEMENT,

Appellant/Cross-Appellee.
______________________________/

Case No. 82,097

TFB No. 92-10,252(6A)
93-10,633(6A)

THE FLORIDA BAR'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF CROSS PETITION FOR REVIEW

BONNIE L. MAHON
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, FL 33607
(813) 875-9821
Attorney No. 376183

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SYMBOLS AND REFERENCES

In this Brief, the Appellant/Cross-Appellee, Peter Charles Clement, will be referred to as the "Respondent". The Appellee/Cross-Appellant, The Florida Bar, will be referred to as "The Florida Bar", "TFB", or "The Bar". "TRI" will refer to the transcripts of the portion of the Final Hearing in this case held on December 13, 1993. "TRII" will refer to the transcripts of the portion of the Final Hearing in this case held on December 14,1993 and December 20, 1993. "TRIII" will refer to the transcripts of the Disciplinary Hearing held in this cause on January 11, 1994. "R" will refer to the record in this cause. "RR" will refer to the Report of Referee dated January 19, 1994.

STATEMENT OF THE FACTS AND OF THE CASE

CASE NO. 82,097

COUNT I - (TFB NO. 92-10,252(6A))

The Respondent failed to set forth in his initial brief, a statement of the facts of this case, thus the Bar will do so.

In 1980, Respondent met Murray Koren during a real estate transaction. Respondent and Mr. Koren developed not only an attorney/client relationship, but also a father/son type relationship (TRI, pp. 33-36). Between 1980 and 1991, Respondent was Mr. Koren's personal and family attorney. Respondent placed mortgages, prepared real estate contracts, closing documents, trust agreements, and Wills for Mr. Koren (TRI, pp. 38-39). In addition, between 1980 and 1991, Mr. Koren loaned money to Respondent and/or Respondent's father. On the loans that Mr. Koren made to Respondent's father, Respondent was either made a party to the loan or he was a guarantor of the loan (TRI, pp.40-41, 229-230). Based on the relationship between the Respondent and Mr. Koren, Respondent did not charge Mr. Koren attorney fees for legal representation. Respondent's attorney fees were usually paid by individuals who were seeking a loan or mortgage from Mr. Koren (TRI, pp. 38-39).

On November 8, 1990, Respondent filed for personal bankruptcy and sought to discharge all the outstanding loans from Mr. Koren for which Respondent was personally responsible or which he had guaranteed for his father. Respondent's father had filed for bankruptcy and had discharged the loans Koren had made to him, leaving Respondent responsible for loans he had guaranteed for his

father. Notwithstanding the foregoing, Mr. Koren continued to be Respondent's friend and to use Respondent as his attorney. Respondent informed Mr. Koren, either prior to or at the time of filing for bankruptcy, that even though he was seeking to discharge the debts owed to Koren, he intended to satisfy the debts owed to Koren based on a moral obligation. (TRI, pp. 40-43).

In December, 1990, Respondent met Edward Morelli, who advised Respondent that he had secured two dates for two concerts (Julio Iglesias and Willie Nelson) at the Dunedin Stadium. Mr. Morelli advised Respondent that if Respondent could find some investors for the concerts he would give Respondent 40% of the profits. Mr. Morelli advised Respondent that he would need $20,000.00 to promote the concerts. Respondent decided to become a partner with Morelli in the concert venture and sought to borrow $20,000.00 from various individuals so that he could finance his interest. (R, TFB Exhibit #12, pp. 12-16).

In December, 1990, Respondent represented Dr. Kadry in a foreclosure action involving the Palm Lakes Shopping Center in Palm Harbor, Florida, which Dr. Kadry owned. At said time, Respondent approached Mr. Koren and asked Koren if he would be interested in purchasing the shopping center (TRI, pp. 47-50). Mr. Koren was interested in purchasing the shopping center and, as a result thereof, on January 4, 1991, he sent Respondent a check for $5,000.00 made out to Respondent's trust account. The $5,000.00 sent to Respondent was to be an earnest money deposit if a contract to purchase the shopping center was presented and accepted by Dr. Kadry. (TRI, pp.231-232; R, TFB Exhibit #1).

On January 7, 1991, Respondent deposited into his trust

account, Mr. Koren's check for $5,000.00. On the same date, Respondent issued a trust account check to himself in the amount of $5,000.00 and indicated in his cash receipt and disbursement journal that the funds were disbursed on behalf of Mr. Koren (TRII, p. 201; R, TFB Exhibit #7 and #9).

On January 7, 1991, Respondent used Mr. Koren's trust funds to invest in the Julio Iglesias concert venture without the consent of this client, Murray Koren. (TRI, p. 236).

On or about January 28, 1991, Mr. Koren wrote and sent to Respondent, a letter which requested the Respondent to notify him of the status of the shopping center purchase. The letter also requested Respondent to return the $5,000.00 escrow deposit immediately if the property was not going to be sold to him. (R, TFB Exhibit #2).

Sometime between January 28 and February 5, 1991, Mr. Koren traveled from Miami to Palm Harbor to collect from Respondent his $5,000.00 earnest money deposit. When Koren demanded the return of the funds, Respondent pled with Koren to let him use the funds to finance the Julio Iglesias concert. Respondent did not advise Koren at said time that he had already used the $5,000.00 earnest money deposit as of January 7, 1991, to invest in the concert. Mr. Koren initially rejected Respondent's pleas for a loan; however, after Respondent kept persisting that he needed the funds for a short time and would repay the funds in a few days from the proceeds of the first ticket sales, Koren agreed to Respondent's request. The Respondent did not put the terms of the $5,000.00 loan in writing, he did not advise his client of the potential conflict of interest he had, nor did he advise his client to seek

independent legal advice in regard to the loan. Within a few days, Mr. Koren called Respondent to inquire as to the repayment of the $5,000.00. At that time, Respondent advised Koren that Morelli had stolen about $10,000.00 in cash of the ticket proceeds and that he would not be able to repay the $5,000.00 at that time. (TRI, pp. 90-92, 237-240).

On February 6, 1991, Respondent called Mr. Koren and requested a loan of $25,000.00 to save the Julio Iglesias concert from going under. Koren refused to loan the funds requested. A short time later on the same day, Koren received another call from Respondent. During the second phone call, Respondent advised Koren that a client, Anthony Montello, was going to take over the responsibility of the Julio Iglesias concert and was willing to provide Koren with a promissory note secured by a mortgage on three pieces of property that Montello owned which had substantial equity, in return for a loan of $25,000.00. Respondent also advised Koren that Montello was willing to make the promissory note for the sum of $30,000.00 so that Koren would have security for the $5,000.00 forced loan to Respondent. Koren initially refused to make the loan; however, thereafter, Montello spoke with Koren and convinced Koren to come to Palm Harbor the following day (February 7, 1991) at Montello's expense to discuss the proposition. Prior to the conclusion of the phone conversation, Koren instructed Respondent, as his attorney, to investigate the three Montello properties which were to secure the loan in order to determine the equity of the same, the tax status, mortgage status, and to make a pencil search of the properties so he could make an informed decision as to whether or not the loan would be a good business deal. (TRI, pp. 239, 241-

243).

On the morning of February 7, 1991, Respondent picked Koren up at the airport. Thereafter, Respondent took Koren to his office to meet with Mr. Montello. During the meeting with Montello, Respondent presented Koren with a $30,000.00 note and mortgage on two pieces of property, prepared by Respondent, which contained signatures in the name of Loretta and Anthony Montello. The signatures were not witnessed or notarized on the documents, but this fact did not concern Koren since Koren knew that in prior matters, Respondent had completed the execution of documents prior to concluding a transaction. The following day, Koren gave Montello a $25,000.00 cashier's check, but not until after the Respondent assured Koren that he knew of no reason why Koren should not loan the funds. Respondent did not advise Koren that his professional judgment was materially limited by his own financial interest in the concert. In addition, Respondent did not advise Koren of his suspicions that Montello and Morelli had connections with organized crime. Koren's $25,000.00 was not placed in Respondent's trust account because it was necessary to wire $25,000.00 to the Cooper Entertainment agency by noon on February 8, 1991, or the Iglesias concert would have been cancelled. Koren instructed Respondent to get the note and mortgage recorded, and Respondent agreed to do as instructed. (TRI, pp. 244-249).

On February 9, 1991, after Koren returned to Miami, he wrote Respondent a letter, (R, TFB Exhibit #4), giving Respondent specific instructions on legal matters he wanted Respondent to handle in connection with the Montello transaction. Respondent complied with most of the instructions outlined in Koren's letter

of February 9, 1991 (TRI, pp. 168, 172-175). However, Respondent never had the Montello note and mortgage witnessed or notarized, and never recorded the same (TRI, p. 157).

The Julio Iglesias concert scheduled for March 1, 1991, was cancelled due to the Gulf War. Between February and April 1991, Respondent failed to return or respond to several phone calls and letters from Koren concerning the status of the Montello note and mortgage and satisfaction of the same. Respondent did, at some point prior to April 25, 1991, knowingly and intentionally misrepresent to Mr. Koren that the Montello note and mortgage were recorded. (TRI, pp. 175-177).

On or about April 25, 1991, the Respondent advised Mr. Koren that the note and mortgage had not been recorded and that they had been lost or stolen (TRI, pp. 179-180, 251-252; R, TFB Exhibit #5).

In approximately May 1991, Mr. Koren hired attorney John Baum to file an action against Montello to re-establish and foreclose on the Montello note and mortgage and to seek damages (TRII, pp. 87-88). On June 26, 1991, a lawsuit was filed in the Circuit Court, Pasco County, Florida styled Koren v. Montello, et al, Case No. CA91-3206. (R, Respondent's Exhibit #1).

On August 30, 1991, Respondent's deposition was taken in the case of Koren v. Montello. During the course of the deposition, Respondent testified as follows in response to questions propounded by Koren's counsel, John Baum:

> "Q. Okay. Can you tell me what happened to the note and the mortgage?
>
> A. It was asked to be--it was never, again, never witnessed nor notarized, and it was asked by Mr. Montello

to be returned to him when he realized that it was him individually and not his company that was attempting to mortgage the property. He believed his company owned the property, and when he realized it was him individually personally guaranteeing it and no one else was personally guaranteeing anything in the realm of things, he asked for it back...

Q. When did that happen?

A. I believe that was the next day.

Q. Did you comply with that request?

A. Yes, I did.

Q. Did you make copies of the entire instrument before you released it--released them to Mr. Montello?

A. The only copy that I had left there was this first page. What happened to the rest, I really cannot say.

(R, TFB Exhibit #14).

Then, over a year later, when the Respondent testified during the grievance committee hearing in this cause on November 19, 1992, he testified as follows in response to questions propounded by the committee chair:

"The witness: Okay...The mortgage and note, it was removed from my office without my consent.

Mr. Strohauer: By whom?

The witness: By either Mr. Montello or by Mr. Andriochio...

Mr. Strohauer: How do you know Mr. Montello or this other fellow removed it?

The witness: Because we were sitting there in my

conference room talking about the concert and I was referring--He said, "Well, if I'm going to lose money in this deal, everyone is going to lose money." I said, "well, Mr. Koren has a mortgage on your property." And he says, "What mortgage?" I said, "The one that's sitting on my desk," and Mr. Andriochio started laughing saying that--what mortgage? I went back to my office and I had everything sitting on my desk, and it was not there except for the first page, which is all that was left." (R, TFB Exhibit #15).

Mr. Koren was unable to establish in the civil case of Koren v. Montello, that Montello had, in fact, executed a note and mortgage in favor of Koren for $30,000.00 (R, Respondent's Exhibit #4). As of the date of the final hearing in this cause, Mr. Koren had not been repaid the $25,000.00 loaned to Montello. In November 1993, a month prior to the final hearing in this cause, Respondent repaid Mr. Koren the $5,000.00 he misappropriated on January 7, 1991; however, the repayment did not include interest. (TRI, pp. 181-182, 252).

The Referee found Respondent guilty of violating the following Rules Regulating The Florida Bar: Rule 4-1.1; Rule 4-1.3; Rule 4-1.4(a); Rule 4-1.4(b); Rule 4-1.8(a); Rule 4-1.15(a); Rule 4-8.4(a); Rule 4-8.4(b); Rule 4-8.4(c); Rule 4-8.4(d). (RR, p. 19-20).

The Referee also recommended that Respondent be found not guilty of violating Rule 4-8.1(a) and (b) since he could not determine whether Respondent lied under oath during the grievance committee hearing or during his deposition in Koren v. Montello.

(RR, p. 19).

COUNT II

The Respondent admitted all of the allegations in Count II of the Bar's Complaint EXCEPT paragraphs 75 and 80. The Respondent also admitted violating all of the Rules Regulating The Florida Bar set forth in paragraphs 89 of the Bar's Complaint EXCEPT Rule 5-1.1(a) (R, Respondent's Answer, Respondent's Amendment of Pre-Trial Statement; and TRI, p. 6, ¶ 19-22).

In addition, the Respondent admitted that he had shortages in his trust account and he stipulated that he used $10,000.00 of his client, Phillippe Tisseaux, for his own purposes without the authorization of the client (TRI, p. 212). Respondent denied knowingly or intentionally misappropriating client trust funds.

The facts relating to Respondent's misappropriation of client trust funds are as follows:

On January 7, 1991, Respondent received from his client, Murray Koren, $5,000.00 which represented an earnest money deposit for the purchase of the Palm Lakes Shopping Center. On January 7, 1991, Respondent deposited Murray Koren's funds into his trust account, and on the same date he withdrew Koren's $5,000.00 and used said funds for his own purposes without Koren's consent. (See the facts relating to Count I above).

In September 1991, Respondent represented Phillippe Tisseaux in a real estate transaction involving the sale of Mr. Tisseaux's house to Alexander Minguet. The real estate contract between the parties called for a purchase price of $105,000.00 which included a $5,000.00 earnest money deposit, which was paid by Mr. Minguet directly to Mr. Tisseaux, in Respondent's presence, at or prior to

the time of the closing. The closing on the property occurred on September 27, 1991. At the closing, Mr. Minguet provided Respondent with $100,000.00, which included a foreign check for $7,000.00. Respondent was to receive attorney fees of $500.00 and approximately $200.00 for doing the title insurance. $72,248.45 of the closing proceeds of $100,000.00 was to be paid to Household Mortgage Services to pay off an existing mortgage. (TRI, pp. 192-197; TRII, pp. 124-127). After the closing, Respondent failed to pay off the mortgage. Instead, the Respondent issued the following trust account checks to himself and identified the same as pertaining to Tisseaux:

Date of Check	Payee	Amount
10/7/91	Peter Clement	$ 600.00
10/11/91	Peter Clement	$ 750.00
10/18/91	Peter Clement	$1,500.00
10/21/91	Peter Clement	$1,000.00
11/8/91	Peter Clement	$2,500.00
11/18/91	Peter Clement	$1,100.00
11/22/91	Peter Clement	$2,500.00
11/27/91	Peter Clement	$ 750.00

(R, TFB Exhibits #8 and #11; TRI, pp. 197-198).

The check issued to Respondent on October 7, 1991 in the sum of $600.00 represented the fees Respondent was entitled to receive in regard to the Tisseaux case. The remaining checks represented Mr. Tisseaux's funds that Respondent knowingly and intentionally used for his own purposes without Mr. Tisseaux's consent. (TRI, pp. 201-202).

In late November or early December 1991, Mr. Tisseaux received several phone messages and a letter from Household Mortgage Services which indicated that his mortgage was delinquent in that it was two months past due. This was the first time Mr. Tisseaux became aware of the fact that Respondent had not paid off the

mortgage. Mr. Tisseaux called Respondent to find out why he had failed to pay the mortgage and Respondent advised him that he was waiting for Mr. Minguet's foreign check for $7,000.00 to clear the bank. Respondent advised Tisseaux that he would pay the two past due mortgage payments. Respondent did not advise Mr. Tisseaux that he had used $10,000.00 of the funds for his own purposes. (TRII, pp. 128-130; TRI, pp. 202-203).

On December 3, 1991, Respondent sent a trust account check for $1,802.92 to Household Mortgage Services to cover the two past-due mortgage payments. On December 13, 1991, Mr. Minguet's foreign check for $7,000.00 cleared the bank, yet Respondent failed to pay off the Tisseaux mortgage. (TRI, pp. 206-207; R, TFB Exhibit #8).

On or about December 15, 1991, Mr. Tisseaux contacted Respondent and demanded that Respondent pay off the mortgage before he left for France for the Christmas holidays. Respondent advised Mr. Tisseaux that he would pay off the balance of the mortgage and fax Tisseaux a copy of the check. (TRII, p. 131).

The following day, on December 16, 1991, Respondent faxed Mr. Tisseaux a copy of his trust account check #1462 dated the same date and made out to Household Mortgage Services in the sum of $71,964.67. In addition, Respondent faxed Mr. Tisseaux a copy of a Federal Express envelope containing information which indicated that Respondent mailed the trust account check to the Payoff Department of Household Mortgage Services. (TRI, pp. 213-214, 217; TRII, pp. 131-134). Respondent only had $51,000.00 in his trust account on said date (R, TFB Exhibit #10, p. 15).

Respondent did not mail the trust account check #1462 to Household Mortgage on December 16, 1991 and he did not advise Mr.

Tisseaux of this fact (TRI, p. 217; TRII, pp. 134-135).

Mr. Tisseaux, believing that the mortgage on the property sold to Minguet had been satisfied, left for France and returned in early January, 1992. When Mr. Tisseaux returned from France, he discovered that Respondent had not paid off the mortgage on the property. Thereafter, Mr. Tisseaux hired an attorney, Alan Christner, to pursue the mortgage payoff funds from Respondent. (TRII, pp. 134-137).

On January 10, 1992, Respondent made another mortgage payment for Mr. Tisseaux. On January 22, 1992, Respondent paid Household Mortgage Services $40,000.00. It was not until February 7, 1991, that Respondent satisfied the mortgage. (R, TFB Exhibit #8). On February 7, 1991, Respondent borrowed $20,000.00 from his mother and deposited said sum into his trust account in order to have sufficient funds in his account to cover the check to Household Mortgage Services (TRI, pp. 221-222). Mr. Tisseaux had to pay Mr. Christner between $1,000.00 and $2,000.00 to recover the mortgage funds from Respondent (TRII, p. 137).

Ten months later, on December 10, 1992, Pedro Pizarro, the Florida Bar auditor, met with Respondent to obtain Respondent's trust account records so that he could audit the account. At that time, Respondent failed to advise Mr. Pizarro of the fact that he had used Mr. Tisseaux's funds without authorization in October and November 1991. (R, TFB Exhibit #6; TRII p. 158).

Mr. Pizarro used the trust account records produced by Respondent and put all the receipts and disbursements for the period from May 7, 1990 through December 7, 1992 into his computer and created a cash receipts and disbursements journal with

reconciliations, individual clients' ledger cards, lists of monthly ending balances, and a summary of monthly comparisons. The print-outs reflected large shortages and numerous negative balances and unallocated items, which were in part the result of lack of adequate identification of the deposits and disbursements. (R, TFB Exhibit #6).

On March 4, 1993, Mr. Pizarro returned to Respondent's office and discussed with Respondent, the preliminary results of the audit. At the conclusion of the meeting, Respondent agreed to review and correct his records which had been returned by Mr. Pizarro and also the client ledger cards, the cash receipts and disbursements journal, and the list of unallocated items contained in the print-outs of Mr. Pizarro. (R, TFB Exhibit #6).

On March 22, 1993, Respondent returned to The Florida Bar, his trust records and Mr. Pizarro's print-outs of the journal and client ledger cards with notations and corrections to be made. The corrections made by Respondent did not include corrections in regard to the Tisseaux funds which Respondent indicated had been disbursed on behalf of Tisseaux. (TRII, p. 178).

Mr. Pizarro, using Respondent's corrections and notations, adjusted his audit accounting and printed a new set of reports. The results of the audit again, did not reflect an accurate picture of the trust account (R, TFB Exhibit #6).

On March 24, 1993, Mr. Pizarro returned to Respondent's office to review certain client files. At that time, Mr. Pizarro asked Respondent about the $20,000.00 he deposited in his trust account on February 7, 1992. Respondent advised Mr. Pizarro that at some point in time he realized that there had been a shortage in his

trust account and that his mother gave him the $20,000.00 to cover it. Mr. Pizarro reviewed Mr. Clement's records and discovered that part of the shortage in Respondent's trust account on February 7, 1991 resulted from a negative balance in the account of Tisseaux, in the sum of $16,483.85. He also discovered that most of the negative balance in the Tisseaux account resulted from checks made to Respondent. Respondent falsely advised Mr. Pizarro that the negative balance in Tisseaux was due in part to Mr. Minguet's failure to remit a $5,000.00 earnest money deposit on the Tisseaux transaction. (TRI pp. 194-195; TRII, p. 126; R, TFB Exhibit #6, p. 3).

During the conference with Respondent on March 24, 1993, Respondent advised Mr. Pizarro that no clients were hurt by the shortages in his trust account and that no clients had complained. He also advised Mr. Pizarro that he had made Mr. Tisseaux aware of the shortage in the trust account and that the shortage did not result in a delay of the Tisseaux case (R, TFB Exhibit #6, p. 3).

In April 1993, when Mr. Pizarro returned to Respondent's office to review client files to correct the audit accounting, Respondent finally advised Mr. Pizarro that the checks issued to him in October and November 1991 and identified as pertaining to Tisseaux were actually personal disbursements to him unrelated to Tisseaux (R, TFB Exhibit #6, p. 3).

The Referee recommended that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: Rule 4-1.15(a); Rule 5-1.1(a); Rule 5-1.1(c); Rule 5-1.2(b)(5); Rule 5-1.2(b)(6); Rule 5-1.2(c)(1)(b); Rule 5-1.2(c)(2); Rule 5-1.2(c)(3); and Rule 5-1.2(c)(4).

FACTS RELATING TO COUNT I AND COUNT II

In late July, or early August 1990, Respondent began seeing Dr. Butler for depression (TRII, pp. 225, 251). Respondent was experiencing serious marital and financial problems at the time. In addition, Respondent had been using marijuana (TRII, p. 276). Respondent was diagnosed as having bipolar affective disorder symptoms with 10-20 years duration. In August, Dr. Butler prescribed prozac and Respondent began taking the same. Between August 1990 and May 1991, Respondent consulted with Dr. Butler, and on most occasions, Respondent expressed concern about his financial problems. (TRII, p. 254).

In approximately late November 1990, Dr. Butler became concerned that Respondent was becoming manic. Dr. Butler recommended that Respondent begin taking lithium; however, Respondent rejected the recommendation. It was not until March 1991, that Respondent began taking lithium along with the prozac he had been taking. (TRII, pp. 251, 252).

In May 1991, Respondent's mood stabilized (R, TFB Exhibit #19; TRII, pp. 237, 267). From mid-May 1991 to September 12, 1991, Respondent did not see Dr. Butler (TRII, pp. 302-303).

Respondent saw Dr. Butler on September 17, 1991, October 29, November 1, and November 25, 1991. On September 17, 1991, Dr. Butler's office notes indicated that Respondent showed no signs or symptoms of mania or depression (TRII, p. 269). On October 29, 1991, Dr. Butler's office notes indicated that Respondent was doing O.K., that he was doing well at work, and that Respondent's business was good (TRII, p. 309). Dr. Butler's office notes for November 11, 1991 indicated that Respondent's mood was less

depressed, that his affect was bright, that he was focusing well on work, and that his energy level was O.K. (TRII, p. 314). Dr. Butler's office notes for November 25, 1991 indicated that Respondent's mood was O.K. and that there were no signs or symptoms of mania or depression (TRII, p. 270).

From July 1990 through the time of the final hearing in this cause, Respondent continually practiced law (TRIII, p.88).

On December 13, 14, and 20, a final hearing was held in this cause. On January 11, 1994, a disciplinary hearing was held in this cause. On January 19,1994, the Referee, Peter J. T. Taylor, issued his Report of Referee wherein he recommended that Respondent be disciplined as follows: that the Respondent be suspended from the practice of law for thirty-six (36) months and thereafter until he proves rehabilitation; that he be held responsible for all costs incurred by The Florida Bar in this proceeding; that Respondent make restitution to his clients, Mr. Tisseaux and Mr. Koren, for any and all losses they incurred as a result of Respondent's misconduct (the losses are not to include the debts Respondent discharged in bankruptcy in 1990/91); during the term of Respondent's three-year suspension, Respondent shall take two (2) Florida Bar or out-of-state seminar courses a year with a minimum of three (3) credit hours each on ethics, and file with his local Bar association and The Florida Bar, a ten (10) page report on each seminar; that during the term of Respondent's three-year suspension, Respondent shall be required to perform pro bono work on behalf of The Florida Bar by travelling throughout the State of Florida and making five (5) speeches a year to any Bar association on the following topic: "I'm Proud to be a Member of The Florida

Bar and There is a Higher Social Calling for Attorneys Than Making Money as Fast as Possible"; and, upon reinstatement to The Florida Bar, Respondent shall be on probation for as long as he actively practices law with a condition of probation being that Respondent shall continue to see, at his own expense, a Board certified physician with a specialty in psychiatry (other than Dr. Francis Kevin Butler or an affiliate of Dr. Butler), he shall take all medications recommended and/or prescribed by his psychiatrist, and every four months, Respondent's psychiatrist (other than Dr. Butler or an affiliate or associate of Dr. Butler) shall issue a report to The Florida Bar in regard to Respondent's condition.

Respondent filed a Petition for Review challenging the Referee's findings of fact and recommended discipline. The Florida Bar filed a Petition for Review challenging the Referee's recommended discipline of a three-year suspension, and seeking disbarment.

SUMMARY OF ARGUMENT

The Respondent's Initial Brief presents several arguments alleging that the Referee's findings of fact and recommendations of guilt are erroneous, unlawful, and unjustified based on the Referee's rejection of certain expert and lay opinion testimony and his consideration of the telephonic testimony of Phillippe Tisseaux.

The Referee's rejection of Dr. Butler's expert testimony as being unworthy of belief was appropriate based on the doctor's conflicting opinions and testimony, and based on documentary evidence which conflicted with the doctor's ultimate trial testimony. The Referee's rejection of Janet Clement's lay opinion as to Respondent's legal incompetency at the time of his misconduct was justified in light of her failure to acknowledge that she knew or understood the legal test for insanity, and also based on testimony and evidence he had heard or considered prior to her testimony that indicated that Respondent was sane or competent at the time of his misconduct. The Referee's consideration of Tisseaux's testimony was appropriate in that there was no reason to believe that the telephonic testimony came from anyone other than Mr. Tisseaux. The Referee's findings of fact are presumed to be correct and should be upheld.

Respondent argues in his Brief that collateral estoppel applies in this case to the issue of whether or not Koren agreed to loan Respondent the $5,000.00 earnest money deposit on or prior to January 7, 1991, based on the case of Koren v. Montello. Said issue was not considered or ruled on in Koren v. Montello, thus collateral estoppel does not apply.

Respondent argues that a three-year suspension and the additional discipline that the Referee recommended is unduly harsh for Respondent's misconduct based on Respondent's bi-polar disorder. The Bar argues that disbarment is appropriate for Respondent's misconduct based on the nature of Respondent's misconduct and the aggravating factors found by the Referee. Respondent cited several cases in support of his position; however, the cases involved misconduct by attorneys that is considerably less serious than Respondent's misconduct. On the other hand, the Bar, in support of its position that Respondent should be disbarred, cited several cases that are substantially similar to the facts of the instant case. Disbarment is appropriate for Respondent's misconduct in light of the case law presented by the Bar and based on the Florida Standards for Imposing Lawyer Sanctions.

Respondent argues that he is being discriminated against as a result of his bi-polar disorder by being disciplined for his misconduct and that the same violates the Americans With Disabilities Act (ADA). Discipline is being sought against Respondent because he engaged in criminal, fraudulent, and dishonest acts with respect to clients and their trust funds, not because of his bi-polar disorder. The evidence established that Respondent has engaged in dishonest acts subsequent to any time frame that he claims he was mentally incompetent or insane. The Americans With Disabilities Act does not apply in this case.

The Referee's findings of fact and recommendations of guilt should be upheld by this Court. However, this Court should reject the Referee's recommended discipline and disbar Respondent.

ARGUMENT

ISSUE I

WHETHER THE REFEREE'S FINDING THAT THE EXPERT TESTIMONY OF RESPONDENT'S TREATING PSYCHIATRIST AS TO RESPONDENT'S ABILITY TO DISTINGUISH BETWEEN RIGHT AND WRONG AT THE TIME OF HIS MISCONDUCT, AND THE REFEREE'S REJECTION OF SAID TESTIMONY AS UNWORTHY OF BELIEF, WAS ERRONEOUS, UNLAWFUL, AND UNJUSTIFIED.

The Respondent challenges the Referee's finding that the expert testimony of Dr. Butler, Respondent's psychiatrist, was highly suspect and unworthy of belief. Respondent also challenges the Referee's rejection of Dr. Butler's testimony, on the grounds that the doctor's expert testimony was unrebutted and later relied on by the Referee in recommending discipline in this case. A Referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). In this case, there is abundant evidentiary support for the Referee's finding regarding Dr. Butler's lack of credibility and for the Referee's rejection of the doctor's testimony relating to Respondent's state of mind at the time of his misconduct.

The evidence in this case which caused the Referee to reject Dr. Butler's ultimate expert opinion testimony that from December 1990 through December 1991, Respondent was so mentally impaired or psychotic that he did not know the difference between right and wrong at the time of his misconduct, is as follows:

On or about August 29, 1993, Respondent wrote Dr. Butler a letter (R, TFB Exhibit #21) which stated in part as follows:

"I need a report that shows that my actions during the period from early fall 1990 thru the spring of 1991 occurred while my medication was in the process of being stabilized and that a correlation of my alleged bar complaint and the period of medical stabilization is consistent with my "disability" in a manic depressive episode. ie: concert, poor judgment, spending large sums of money, etc. ...

Please mention that I have been without any problems since the spring of 1991, that I no longer take the prozac, but continue on the lithium. ..." (sic.) (Emphasis added) (R, TFB Exhibit #21).

On August 30, 1991, Dr. Butler faxed Respondent a letter (R, TFB Exhibit #18), which stated, in part, as follows:

"...Mr. Clement was diagnosed as having a manic depression. From the early fall of 1990 through the spring of 1991, Mr. Clement was treated with various medications to stabilize his mood condition. Unfortunately, his mood did not stabilize until early summer, 1991. Since this time, Mr. Clement's mood has been stable, without any recurrence of depressive symptoms or mania. ...

It must be noted that during the period of early fall, 1990 to spring, 1991, Mr. Clement's judgment was impaired and major decisions in his life may have been adversely affected by this manic depressive episode. ..." (Emphasis added) (R, TFB Exhibit #18).

Thereafter, Respondent sent a fax to Dr. Butler (R, TFB Exhibit #22) which stated as follows:

"Dr. Butler, I gave wrong dates. Sorry. Please redo and fax to me. Mail original to Attorney." (R, TFB Exhibit #22).

Based on Respondent's request, on or after August 30, 1993, Dr. Butler issued a second opinion letter, this one addressed to Mr. Kwall (TFB Exhibit #18), which stated the following:

"...Mr. Clement was diagnosed as having a manic depression. From December of 1990 through 1991, Mr. Clement was treated with various medications including Prozac and Lithium to stabilize his mood condition. Unfortunately, his mood did not stabilize until late December 1991. Since this time, Mr. Clement's mood has been stable, without any recurrence of depressive symptoms or mania. ...

It must be noted that during the period from December, 1990 through 1991, Mr. Clement's judgment was

impaired and major decisions in his life may have been adversely affected by this manic depressive episode. ..." (Emphasis added) (R, TFB Exhibit #19).

On November 15, 1993, Dr. Butler's deposition was taken in this cause and during the deposition, Dr. Butler testified as follows in response to a question propounded by Bar counsel:

> "Q. No, that's not what I meant. I'm talking about as far as, for instance, like committing a crime. Would he know the difference between right and wrong with respect to committing a crime?
>
> A. I don't know if I can answer that. I know that his judgment is impaired when he's manic and when he's depressed a little bit, too, when he's severely depressed. And in that sense he may not know the difference between right and wrong and that his thought process may be grandiose, that they kind of gloss over that."
> (Emphasis added) (TRII, pp. 296-297).

Dr. Butler agreed during his deposition to provide Bar counsel with a copy of his notes and records relating to Respondent. Dr. Butler provided the Bar with his notes and records relating to Respondent prior to the final hearing in this cause. The records produced by the doctor included a copy of the first letter Dr. Butler wrote on August 30, 1991 (R, TFB Exhibit #18; TRII, p. 304). The records produced also included Dr. Butler's own office notes which indicated that Respondent's mood first stabilized in May, 1991; that Respondent did not see Dr. Butler from May through September 12, 1991; and that on September 17, 1991, November 11 and 25, 1991, Respondent was showing no signs or symptoms of mania or depression (TRII, pp. 268-270, 314).

The records produced to the Bar did not include a copy of Respondent's letter to Dr. Butler dated August 29, 1993 (R, TFB Exhibit #21), a copy of Respondent's fax to Dr. Butler on August

30, 1993 (R, TFB Exhibit #22), or a copy of Dr. Butler's letter to Mr. Kwall dated August 30, 1993 (R, TFB Exhibit #19; TRII, p. 304). Bar counsel discovered the documents that Dr. Butler failed to produce to the Bar while reviewing the doctor's original file during the portion of the final hearing in this case held on December 14, 1993 (TRII, p. 255).

During the portion of the final hearing held in this cause on December 14, 1993, Dr. Butler testified as follows in response to questions propounded by Respondent's counsel:

> Q. ...In preparation for testifying here today, and I know your deposition was taken by the Bar, have you had a chance to review Peter's file and --
>
> A. Yes.
>
> Q. --familiarize yourself with the time tables of his treatment?
>
> A. Yes.
>
> Q. Okay. If you were drawing a time line of most severely afflicted, would that time line essentially begin in late 1990, November, December, and particularly January, February, March and throughout most of 1991?
>
> A. I think that Peter manifested initially symptoms of depression. He then skyrocketed into a manic episode in late November, December.
>
> THE REFEREE: Of what year?
>
> THE WITNESS: Of 1990 that went into 1991. I don't think he reached a state of stability until probably April, May, June, of the following year, 1991.

BY MR. GROSS:

> Q. During this time period do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Clement, Peter, was legally competent at that time?

A. I think that Peter was competent when he manifested symptoms of depression.

I think Peter lost his touch with reality when he became manic and manifested marked symptoms of grandiosity and totally unencumbered by insight about the consequences of his behavior.

Q. And by having reviewed your notes and otherwise, what period of time would have been covered by this manic phase? What would have been the primary period of time?

A. Late November, December, January, February, then trailing off.

THE REFEREE: Of what year?

THE WITNESS: Late November, December of 1990, and trailing off through the Spring of 1991. ...

... THE REFEREE: So the question is whether he knows the difference between right or wrong?

MR. GROSS: That's the bottom line, yes, sir.

THE WITNESS: I believe that during Peter's manic phase that he had lost touch with reality and did not have a firm grounding in right and wrong and what was the appropriate thing to do (TRII, pp. 236-239).

On December 20, 1993, which was subsequent to the Bar's discovery of the records that Dr. Butler failed to provide to the Bar, Dr. Butler, during cross examination by Bar counsel, changed his trial testimony of December 14, 1993 by stating that, in his opinion, the Respondent did not know right from wrong for the period covering from December 1990 through December 1991 (TRII, p. 324). Dr. Butler testified during the final hearing in this cause that his trial testimony differed from his deposition testimony because subsequent to his deposition, he had time to contemplate the question asked by Bar counsel regarding Respondent's ability to

distinguish between right and wrong at the time of his misconduct and formulate a better response (TRII, pp. 297-298). Dr. Butler also testified that his trial testimony changed from December 14, 1993 to December 20, 1993 as to the time period that the Respondent did not know the difference between right and wrong, after he reviewed his notes and records and reflected on the issues (TRII, pp. 326-327).

Dr. Butler testified during the final hearing that he never suggested to Respondent that he stop practicing law. Dr. Butler did testify however, that at some point he suggested Respondent be hospitalized, but Respondent rejected the suggestion. Dr. Butler further testified that he did not believe Respondent's emotional state was severe enough to justify having Respondent involuntarily hospitalized and that he did not believe Respondent met the criteria for being hospitalized under the Florida Baker Act (TRII, pp. 252-253).

Between August 30, 1993 and December 20, 1993, Dr. Butler's expressed opinion regarding Respondent's mental state for the time period involved in this case changed at least four times. The Referee observed Dr. Butler's demeanor when Bar counsel impeached the doctor with records he failed to provide to the Bar, and with his office notes that contradicted his ultimate trial testimony. The Referee assessed the doctor's credibility and found he was unworthy of belief.

Respondent contends it was error for the Referee to reject Dr. Butler's testimony on the grounds that the same was unrebutted. The Respondent sets forth, in his initial brief, case law which he claims supports his contention. The case law cited by Respondent

sets forth the proposition that a trial court cannot arbitrarily reject unrebutted expert testimony. The Referee had good cause to reject Dr. Butler's testimony based on the impeachment of his veracity as set forth above. The Bar concedes that no other expert physician rebutted Dr. Butler's testimony; however, documentary evidence (ie. Dr. Butler's own office notes, records, and his initial opinion letter addressed To Whom It May Concern and dated November 30, 1993) and Dr. Butler's deposition testimony and initial trial testimony clearly rebutted the doctor's ultimate trial testimony.

Respondent contends that it was error for the Referee to find that Dr. Butler's testimony was unworthy of belief and then rely on the testimony as a mitigating factor that Respondent was diagnosed as having a bi-polar, manic-depressive disorder. The Bar did not dispute, and in fact conceded that Respondent suffered from a bi-polar, manic-depressive disorder with ten to twenty years duration. The Bar did dispute, however, the Respondent's defense of insanity or incompetency at the time of his misconduct. The Court should uphold the Referee's findings and rulings regarding Dr. Butler's lack of credibility and The Referee's rejection of the doctor's opinion regarding Respondent's culpability for his misconduct.

ISSUE II

WHETHER THE REFEREE ERRED IN EXCLUDING THE TESTIMONY OF RESPONDENT'S WIFE AS TO HER LAY OPINION REGARDING RESPONDENT'S COMPETENCY FROM DECEMBER 1990 THROUGH DECEMBER 1991.

Respondent argues that the Referee erred when he refused to permit Respondent's wife, Janet Clement, to provide her lay opinion as to Respondent's sanity from December 1990 though December 1991. Although the Referee excluded said testimony, Respondent's counsel proffered the wife's testimony to be that in her opinion the Respondent was not mentally competent from November 1990 to January 1, 1992 (TRII, p. 382).

When asked to render her lay opinion, Janet Clement had not provided any testimony to establish that she knew or understood the legal test for insanity or incompetency.

Prior to excluding Janet Clement's lay opinion, the Referee heard testimony that Respondent's emotional state was not severe enough to qualify Respondent for involuntary hospitalization under the Florida Baker Act and that Respondent had practiced law continuously from December 1990 through December 1991. In addition, the Referee had admitted into evidence and considered, Dr. Butler's notes and records which indicated that Respondent's mood stabilized in May 1991, and remained stable thereafter.

The evidence presented by the Bar in this case clearly established that Respondent knew and understood that he was stealing client funds from Murray Koren and from Phillipe Tisseaux at the time he engaged in said acts notwithstanding the proffered testimony of Respondent's wife. The Referee's exclusion of Janet Clement's lay opinion was harmless.

ISSUE III

WHETHER COLLATERAL ESTOPPEL APPLIES TO THE INSTANT CASE BASED ON THE LITIGATION STYLED KOREN V. MONTELLO IN THE CIRCUIT COURT OF PASCO COUNTY, FLORIDA, CASE NO. CA 91-3206, DIVISION H.

Respondent argues that the doctrine of collateral estoppel by judgment applies in the instant case in regard to the five-thousand dollar loan from Koren to the Respondent based on his contention that the matter was fully litigated and adjudicated against Koren in the case styled Koren v. Montello in the Circuit Court of Pasco County, Florida, Case No. CA 91-3206, Division H.

The issues and the parties in the instant case are not the same as the issues and parties in the case of Koren v. Montello.

Respondent was not a party to the litigation styled Koren v. Montello. The case of Koren v. Montello was an action by Koren against Montello to re-establish a lost note and mortgage or mortgages and to foreclose the same or in the alternative, an action for damages in excess of $10,000.00 (R, Respondent's Exhibit #1) . The issues in Koren v. Montello were: (1) Whether Montello agreed to repay Koren the sum of $30,000.00? (2) Whether Montello agreed to secure the repayment of any such indebtedness with a mortgage or any real property owned by him? (3) Whether a note and/or mortgage was executed by Montello and subsequently lost, misplaced or stolen?; and the amount of indebtedness owed Koren, if any (R, Respondent's Exhibit #2).

In the instant case, it was undisputed that on January 4, 1991, Koren issued to the order of Respondent's attorney trust account, a check in the amount of $5,000.00. It was undisputed that Koren's $5,000.00 check represented a refundable earnest money

deposit if a contract to purchase a shopping center owned by Dr. Kadry was unsuccessfully negotiated (RR, p. 8).

Respondent testified during the final hearing in this cause that prior to January 7, 1991, he made an oral offer to purchase the shopping center owned by Dr. Kadry and that the offer was rejected. Respondent also testified that prior to his receipt of Koren's $5,000.00 check dated January 4, 1991, he orally advised Koren that an offer to purchase the shopping center had been presented and rejected. Respondent further testified that prior to January 7, 1994, he asked Koren if he could borrow the $5,000.00 and that Koren agreed to the loan. (TRI, pp. 82-84). Koren, on the other hand, testified that Respondent did not advise him on or prior to January 7, 1991 that an offer to purchase the shopping center had been made and rejected. Koren also testified that he did not agree to loan the $5,000.00 earnest money to Respondent on or before January 7, 1991 (TRI, pp. 233-236).

On January 28, 1991, Koren wrote a letter to Respondent which stated, in part, "notify of shopping center purchase. If not being sold to us, return the $5,000.00 escrow deposit immediately" (R, TFB Exhibit #2). Koren testified that between January 28, and February 5, 1991, he travelled from Miami to Palm Harbor to collect the $5,000.00 earnest money deposit from Respondent. Koren testified that when he demanded the return of the funds, Respondent pled to let him use the funds to finance the Julio Iglesias concert. Koren testified that he initially refused to make the loan, but acquiesced after the Respondent persisted that he needed the funds for a short time and would repay the funds in a few days from the proceeds of the first ticket sales (TRI, pp. 236-237).

Koren testified that on February 8, 1991, he agreed to loan Montello an additional $25,000.00 to finance the Julio Iglesias concert based on Montello's agreement to issue a promissory note for $30,000.00 secured by a mortgage so that Koren would have security for the $5,000.00 loan to Respondent (TRI, pp. 242, 247, 250).

During the final hearing in this cause, Respondent's counsel sought to impeach Koren's testimony regarding the timing of the $5,000.00 loan to Respondent through pleadings filed by Koren in the case of Koren v. Montello. Specifically, in the Complaint filed by Koren in Koren v. Montello, it was alleged that between January 4, 1991 and February 8, 1991, Koren loaned to the Montellos, or advanced for their use and benefit, the sum of $30,000.00 (R, Respondent's Exhibit #1). Then, in an affidavit of Koren attached to the Complaint and in Koren's Motion to Compel Discovery and his Pre-trial Statement, it was alleged that on or about January 4, 1991, Clement requested permission to apply the sum of $5,000.00 then held in trust by him for the benefit of Koren, for the payment of expenses incidental to the promotion of the Julio Iglesias concert (R, Respondent's Exhibit #'s 1, 2, 3).

John Baum, Koren's attorney, in the Koren v. Montello case, testified during the final hearing in this cause that he drafted the pleadings and the affidavit of Koren which Respondent's counsel sought to impeach Koren with. Mr. Baum testified that he did not know the specific date that the authorization to use the funds for something other than the original purpose had been given to Mr. Clement, so he put the date of the check as the date that permission for the loan had been requested (TRII, pp. 96-100).

Mr. Baum also testified that Koren never gave him a date as to when he authorized Clement to use the $5,000.00 earnest money for his own purposes. He did testify, however, that Koren showed him the letter of January 28, 1991 (R, TFB Exhibit #2) and indicated that there had been a passage of time between the time he gave Respondent the earnest money deposit and the time he authorized the loan. (TRII, p. 105).

An issue in the instant case was whether Respondent misappropriated Koren's $5,000.00 earmarked for an earnest money deposit on a shopping center owned by Dr. Kadry; or whether Koren agreed to loan Respondent the $5,000.00 on or before January 7, 1991. This issue was not litigated in Koren v. Montello.

The Koren v. Montello action was tried before the Court, which rendered a judgment that Koren intended to make a loan to Montello, the repayment of which would be secured by a mortgage; that funds were released to Montello as a result of Koren's understanding that a loan had been agreed upon; that the evidence failed to establish that Montello had such an understanding or that the note and mortgage Koren sought to re-establish had, in fact, been executed by Montello and thus, could not be enforced (R, Respondent's Exhibit #4). The Court was not asked to make or render a ruling that Koren loaned the $5,000.00 earnest money deposit to Respondent on or before January 7, 1991.

Based on the foregoing, the doctrine of collateral estoppel by judgment does not apply to the instant case.

ISSUE IV

WHETHER THE REFEREE'S FINDINGS OF FACT BASED ON THE TELEPHONIC TESTIMONY OF PHILLIPPE TISSEAUX FROM COSTA RICA WERE ERRONEOUS, UNLAWFUL, OR UNJUSTIFIED SINCE THE OATH WAS ADMINISTERED BY THE REFEREE RATHER THAN IN ACCORDANCE WITH SECTION 92.50, FLORIDA STATUTES.

Phillippe Tisseaux, a former client of Respondent's, testified in this cause by telephone from Costa Rica after being sworn in by the Referee. Respondent contends that the testimony of Mr. Tisseaux from Costa Rica must be excluded since the established Rules of Civil Procedure in Florida and Florida Statutes, Section 92.50 provide that the oath must be administered in the foreign country before a notary or other public official authorized to administer the same in said country.

In Bar disciplinary proceedings, a Referee is not bound by the technical rules of evidence since the proceedings are neither civil or criminal in nature, but are in the nature of a quasi-judicial administrative hearing. The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986).

Respondent was familiar with Tisseaux's voice and never claimed during the course of Mr. Tisseaux's telephonic testimony that he questioned the identity of the individual providing testimony from Costa Rica. The majority, if not all, of Tisseaux's testimony was supported by documentary evidence and/or the Respondent's own testimony.

Tisseaux's testimony was properly considered by the Referee based on The Florida Bar v. Vannier. The Referee's findings, which may have been based in whole or in part on the testimony of Mr. Tisseaux were not erroneous, unlawful, or unjustified and should be upheld.

ISSUE V

WHETHER A THREE-YEAR SUSPENSION WITH CONDITIONS FOR REINSTATEMENT AND INDEFINITE PROBATION IS A SUFFICIENT DISCIPLINE FOR RESPONDENT'S MISCONDUCT IN THIS CASE.

It is the Respondent's position that a three-year suspension is unduly harsh and unwarranted in this case based on the mitigating factors found by the Referee, with a special emphasis on the testimony from his witnesses in regard to his character and competency as an attorney before and after his misconduct in this case. It is the Bar's position that disbarment is appropriate for Respondent's misconduct in light of the aggravating factors and notwithstanding the mitigating factors found by the Referee.

Respondent argues three cases which he claims involve facts and misconduct similar to the instant case, yet warranted a discipline ranging from a one-year suspension to a 90-day suspension. The cases argued by Respondent can be distinguished from the instant case.

Respondent argues that The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992) contains facts remarkably similar to the instant case. The Bar disagrees. Neu was the court-appointed guardian for Selser McKinney. Between May 1984 and October 1985, Neu withdrew $52,604.29 from his clients' trust accounts. $40,000.00 of the $52,604.29 came from four unauthorized withdrawals of the McKinney guardianship funds. Neu deposited the funds in his own trust account. Neu invested, on behalf of the guardianship, $31,000.00 in a music venture which eventually went sour. The facts in Neu do not indicate, as set forth by Respondent in his brief, that Neu was promoting the concert in South Florida. Regardless of the foregoing, Neu realized that he had not made a prudent investment

on behalf of the guardianship and promptly replaced the invested funds with interest. Neu did not report the unauthorized withdrawals on the guardianship accountings because he replaced the funds before the accountings were due. In addition, in January 1987, Neu used the guardianship funds for approximately a month and a half to pay his personal taxes to the Internal Revenue Service in the amount of $5,648.28.

In Neu, the Referee with this Court's concurrence, specifically found that there was insufficient evidence to support a finding that Neu intended to deprive, defraud, or misappropriate a client's funds or that he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. The evidence established that Neu negligently commingled his personal funds with trust account funds and that such conduct resulted in the trust violations.

In the instant case, an audit of Respondent's trust account records revealed shortages from May 9, 1990 through March 31, 1993, ranging from $120.00 to $31,290.28 (R, Complaint, ¶74, and Answer and Affirmative Defenses, ¶1). Contrary to Neu, the Referee in this case found that Respondent knowingly and intentionally misappropriated $5,000.00 from his friend, mentor, and client, Murray Koren, on January 7, 1991, and $10,100.00 from his client, Phillippe Tisseaux, between October 11, 1991, and November 27, 1991 (RR, pp. 10, 18); he had a conflict of interest in representing Koren on the Montello loan transaction based on the fact that his professional judgment was materially limited by his own financial interest in the venture (RR, p. 12); he failed to competently represent Koren in the Montello loan transaction since he failed to

get the Montello note and mortgage properly executed and never recorded the same (RR, p. 14); he admittedly lied to Koren by stating that the Montello note and mortgage was recorded (RR, p. 14); he lied under oath during his deposition in Koren v. Montello or during the grievance committee hearing in this cause, based on his conflicting explanations as to why the Montello note and mortgage were not recorded (RR, pp. 12-13); he made an intentional misrepresentation to Mr. Tisseaux when he indicated that the outstanding mortgage in the sum of $71,964.67, on the property sold to Minguet, was being satisfied on December 16, 1991 by trust account check #1462 (RR, p. 19); he only had $51,000.00 in his trust account on said date (R, TFB Exhibit #10, p. 15).

Respondent did not make restitution for the funds he misappropriated from his client, Mr. Tisseaux, until Mr. Tisseaux hired an attorney for $1,000.00 to collect the funds from Respondent. Respondent never reimbursed Tisseaux for the $1,000.00 in fees paid to attorney Alan Christner. Further, Respondent did not make restitution to Koren in the sum of $5,000.00 until shortly prior to the final hearing in this cause. The restitution made by Respondent did not include interest.

The Respondent's misconduct was not based on a negligent commingling of client funds with personal funds, nor was it based on gross negligence in the handling of clients' trust accounts. Respondent's misconduct was not caused by his bi-polar disorder, but instead, was the result of greed, financial problems, and dishonesty. Respondent lied to the Florida Bar and the Florida Bar auditor subsequent to any time frame that Respondent and his doctor claimed Respondent was legally incompetent or insane. On March 24,

1993, Respondent falsely advised Pedro Pizarro, the Bar auditor, that Mr. Minguet failed to remit the $5,000.00 earnest money deposit on the Tisseaux transaction; that there was no delay in the Tisseaux case as a result of the shortage in his trust account; and that no client complained about or was injured by the shortages in his trust account (RR, p. 6). In addition, Respondent intentionally made a false certification to the Florida Bar in his 1990-93 Bar dues statements that his trust account records and procedures were in substantial compliance with the Rules Regulating The Florida Bar. (TRIII, p. 93). The Respondent's misconduct is substantially more serious than Neu's misconduct and warrants disbarment.

Respondent cites The Florida Bar v. Parsons, 238 So. 2d 644 (Fla. 1970), another case involving facts similar to the instant case. Parsons' misconduct is not even remotely similar to Respondent's misconduct. The Bar, in its Complaint against Parsons, alleged that Parsons issued 19 worthless checks which led to criminal charges and that he neglected a client's case which resulted in an adverse judgment against the client. The Referee found Parsons guilty of the charges filed by the Bar, notwithstanding the fact that he was found not guilty by reason of insanity on the criminal charges of uttering worthless checks. This Court found that the appropriate discipline for Parsons' misconduct was a one-year suspension from the practice of law and thereafter, pending proof of professional and psychological rehabilitation, restitution to those injured, and payment of the Bar's costs.

The Respondent did not simply neglect a client's case, nor did

he issue worthless checks. In addition, the Respondent was not insane at the time of his misconduct. The Respondent knowingly and intentionally misappropriated the funds of at least two clients; he had shortages in his trust account for almost three years; he knowingly and intentionally made misrepresentations to his client, Tisseaux, and to the Florida Bar in an effort to conceal his defalcations; he knowingly and intentionally misrepresented to his client, Koren, that the Montello note and mortgage had been recorded in an effort to conceal the fact that the documents had been either returned to Montello or stolen; he had a conflict of interest and failed to competently represent Koren; and he caused injury to his clients, Koren and Tisseaux.

Respondent did suffer from a bi-polar, manic-depressive disorder at the time of his misconduct; however, said disorder did not diminish his capacity to understand the unethical nature of his acts. Respondent had suffered from the manic-depressive disorder for ten to twenty years in duration. Further, Respondent practiced law continuously and attended hearings during the time frame involved in the instant case (TRIII, pp. 88-89). The only client that complained about Respondent's representation during said time frame was Murray Koren. A one-year suspension as that imposed against Parsons is insufficient for Respondent's misconduct. The Respondent should be disbarred.

The last case cited by Respondent as similar to the instant case is The Florida Bar v. Musleh, 453 So. 2d 794 (Fla. 1984). Musleh was indicted by a federal grand jury for conspiring to receive, to transport in interstate commerce, and to sell stolen securities. In February 1982, Musleh went to trail in the criminal

case and was found not guilty by reason of insanity.

In April 1982, the Bar filed a Complaint against Musleh for the same conduct he was indicted and tried for in February 1982. Musleh did not deny the nature or occurrence of the events underlying the criminal charges and the Bar Complaint. He did, however, claim that his acts were not intentional or willful, but occurred when he was mentally incompetent (bi-polar affective disorder). The Referee found Musleh could appreciate the nature of his acts at the time of the misconduct and found him guilty on all counts. This Court found a 90-day suspension to be appropriate for Musleh's misconduct based on its consideration, in mitigation, of his severely limited ability to control his activity, his lack of a prior disciplinary record, and the testimony of character witnesses who testified to Musleh's earlier competency in the practice of law, his sudden, marked deterioration in personal and professional behavior around the time of the criminal conspiracy and his subsequent return to his normal high standard of conduct.

Like Musleh, Respondent committed a crime. However, unlike Musleh, Respondent's criminal misconduct involved clients. Respondent knowingly and intentionally misappropriated clients' funds. In addition, Respondent, unlike Musleh, engaged in numerous other unethical acts as previously outlined, including lying under oath either during a deposition or during a grievance committee hearing, and lying to the Florida Bar.

Unlike Musleh, Respondent was not ever found to be legally incompetent. However, like Musleh, Respondent claims he did not knowingly or intentionally engage in unethical conduct due to his mental state.

Respondent has been diagnosed as suffering from bi-polar affective disorder. Respondent did not experience a sudden, marked deterioration in personal and professional behavior at the time of his misconduct as did Musleh. Respondent had a prior history of ten to twenty years in duration of erratic manic behavior. In a testimonial letter to Dr. Butler, Respondent's wife outlined numerous spending sprees and grandiose ideas and acts of Respondent over a ten-to-twenty year period (TRII, pp. 256-257).

Unlike Musleh, the Respondent did not return to a high standard of conduct subsequent to the times he engaged in misconduct, or even the times that Dr. Butler testified he was unable to distinguish between right and wrong. On August 30, 1991, when Respondent was not seeing Dr. Butler due to his mood stability, or on November 19, 1992, Respondent lied under oath as to how the Montello note and mortgage became missing. In addition, on March 24, 1993, the Respondent lied to The Florida Bar auditor as previously described. Further, Respondent, on his 1990-1993 Florida Bar dues statements, knowingly and intentionally falsely certified that his trust account records and procedures for each year were in substantial compliance with the Rules Regulating The Florida Bar and the Rules Regulating Trust Accounting, and that there were no shortages (TRIII, p. 93).

Respondent's misconduct is clearly more serious than Musleh's misconduct. Respondent is dishonest and he should be disbarred.

It is The Florida Bar's position that disbarment, rather than a three-year suspension, is the appropriate discipline for the Respondent's misconduct in this case. The Bar's position is supported by recent case law and by the Florida Standards for

Imposing Lawyer Sanctions.

The facts of the instant case are similar to the facts in The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991). In Shanzer, The Florida Bar filed a seven-count complaint. Count I alleged violations of the trust accounting record keeping requirements. Count II alleged that Shanzer retained the interest in his trust accounts for his personal use. Count III, IV, V, VI, and VII alleged misappropriation of funds and shortages in Shanzer's trust account. Shanzer admitted the allegations in the Bar's complaint in an unconditional guilty plea, reserving only as to the question of discipline before the Referee. The Referee recommended disbarment after finding three aggravating circumstances: (1) dishonest or selfish motive; (2) a pattern of misconduct; and (3) multiple offenses.

Shanzer filed a Petition for Review with The Supreme Court of Florida wherein he argued that his emotional problems during the nine months which spanned his defalcations, as well as his full cooperation with the Bar, his remorse, rehabilitation, and the payment of restitution, mitigated his conduct and called for discipline less than disbarment.

Upon review, this Court noted that "misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment". Shanzer, at page 1383. The Court also noted that in some cases they have found the presumption of disbarment rebutted by mitigating evidence and imposed a slightly lesser discipline of suspension. The Supreme Court held that the mitigating factors in Shanzer did not warrant a discipline less than disbarment. In holding as such, the

Court noted that depression, primarily over marital and economic problems, are visited upon a great number of lawyers. The Court further stated as follows:

> "clearly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems. We recognize that mental problems as well as alcohol and drug problems may impair judgment so as to diminish culpability. However, we do not find that the Referee abused his discretion in not finding this to be one of those cases." Shanzer at 1384.

Shanzer was disbarred.

The facts of the instant case are also similar to the facts in The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986). In Knowles, the Referee found that between August 1979 and May 1983, Knowles converted to his own personal use a total of $197,900.00 from the trust fund accounts of several of his clients. During the disciplinary proceedings, Knowles admitted that he was an alcoholic and advised that he went into an alcohol rehabilitation center where he resided until treatment was terminated. Knowles also advised that he continued his rehabilitation through Alcoholics Anonymous and private therapy. Further, Knowles was found to have refrained from consuming alcoholic beverages since August 1983. The Referee recommended that Knowles be disbarred. Knowles filed a Petition for Review, arguing that disbarment was unduly harsh in light of the role that alcoholism played in causing his misconduct and his subsequent successful efforts towards rehabilitation.

The Supreme Court held in Knowles that the seriousness of Knowles offense warranted disbarment. In upholding the Referee's recommendation of disbarment, the Court stated as follows:

> "although we recognize that alcoholism was the underlying cause of Respondent's misconduct, it cannot constitute a mitigating factor sufficient to reverse the

> Referee's recommendation to disbar under the facts in this case. The misappropriations occurred continuously over a period of approximately four years. During this time, Respondent continued to work regularly. His income did not diminish discernably as a result of his alcoholism. We note further that the clients from whom he stole were elderly individuals who trusted him and for whom he had powers of attorney. Under these circumstances, we believe Respondent should be disbarred regardless of his defense of alcoholism." Knowles at 142.

Another case similar to the case on review is The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990). In Shuminer, the Referee found that Shuminer misappropriated trust funds from several clients; that he settled a client's case without the prior knowledge and consent of the client; and that he made misrepresentations to a client in order to conceal his defalcations. The Referee, in his report, noted that Shuminer called several witnesses in mitigation:

1. Dr. John Eustace, M.D., the Director of the Mount Siani Medical Center's Chemical Dependency Treatment Unit, and a Board Certified Addictionologist who diagnosed Shuminer to be chemically dependent on alcohol and cocaine at the time of his misconduct. The doctor testified that Shuminer had been a drug abuser since he was ten years old. The doctor further testified that he had been supervising Shuminer's medical care, which consisted of detoxification, voluntary long-term treatment including in-hospital extended treatment. The doctor also testified that the addiction was the cause of Shuminer's disciplinary violations and that Shuminer's prognosis for recovery was excellent.

2. William Kilby, Esq., the Staff Attorney for Florida Lawyers Assistance, Inc., testified that Shuminer was under contract with FLA, Inc. and that he had been in full compliance with the program

requirements.

3. The Honorable Catherine Pooler, Dade County Court Judge and The Honorable Roy T. Gelber, Circuit Judge of the Eleventh Circuit both testified that Shuminer was an excellent and competent attorney and of good moral character.

The Referee in Shuminer found the following factors in mitigation: 1. absence of a prior disciplinary offense; 2. great personal and emotional problems, including his disease of addiction, his impairment, and his family and marital problems; 3. a timely and good faith effort at restitution made to all clients; 4. cooperation with the Bar in that a probable cause hearing was waived and an unconditional guilty plea was entered in the proceedings; 5. his inexperience in the practice of law, that being a total of one year; 6. his character and reputation were good as testified to by two judges; 7. he was clearly mentally impaired due to his addiction; 8. he had been seriously, productively and successfully involved in rehabilitation for over one year; 9. he had expressed and shown remorse which the Referee felt was genuine.

Based on the mitigating factors, the Referee recommended that Shuminer be suspended from the practice of law for eighteen months; that thereafter he be placed on probation for thirty months and that a condition of the same be that he not have use of any trust accounts and that he be under the supervision of FLA, Inc.; that he perform 100 hours of community service; and that he pay the cost of the Bar's proceedings. The Bar filed a Petition for Review with The Supreme Court of Florida seeking disbarment rather than an eighteen-month suspension. On review, The Supreme Court held that

disbarment was the appropriate discipline for the Respondent's misconduct. In holding as such, the Court stated as follows:

> "Shuminer has failed to establish that his addiction rose to a sufficient level of impairment to outweigh the seriousness of his offenses. He continued to work effectively during the period in issue, and he used a significant portion of the stolen funds not to support or conceal his addictions but rather to purchase a luxury automobile. In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list." Shuminer at 432 and 433.

The Respondent's misconduct in the instant case is strikingly similar to all three of the above-referenced cases. Like Shanzer, Knowles, and Shuminer, the Respondent misappropriated client trust funds and he had trust account record keeping violations. Like Shuminer, the Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation to clients, in an effort to conceal his theft of client funds and his incompetent representation of a client. Unlike Shanzer, Knowles, and Shuminer, the Respondent failed to competently represent a client; he engaged in a conflict of interest with a client; he lied under oath either during a deposition in the case of Koren v. Montello or during the grievance committee hearing held in the instant case; he lied to the Florida Bar auditor during the audit of his trust account records and procedures.

Like Shanzer, Knowles, and Shuminer, there are mitigating factors in the instant case, which include the following: 1. absence of a prior disciplinary record; 2. Respondent was diagnosed as having bi-polar, manic-depressive disorder, for which he has been undergoing treatment since the summer of 1990; 3. Respondent tried to rectify the consequences of his misconduct, but

not until after the disciplinary process commended; 4. good character and reputation; and 5. interim rehabilitation in that Respondent made forty-two or more visits to a psychiatrist or psychologist since the summer of 1990. Further, there are aggravating factors in the instant case which include the following: 1. dishonest or selfish motive; 2. a pattern of misconduct; 3. multiple offenses; 4. bad faith obstruction of the disciplinary proceeding by making false statements or not being candid, especially about his trust accounts, or by engaging in other deceptive practices during the disciplinary process; and 5. substantial experience in the practice of law.

As in Shanzer, Knowles, and Shuminer, Respondent in the instant case failed to establish that his mental state or disability rose to a sufficient level of impairment to outweigh the seriousness of his offenses. The Respondent continued to work during the period in issue and he used the stolen funds to finance his investment in a concert promotion he was involved in and to pay his personal bills.

The Florida Standards for Imposing Lawyer Sanctions also support the Bar's position that disbarment is appropriate for the Respondent's misconduct. The following sections of the Standards apply in the instant case:

Standard 4.1 (failure to preserve the client's property)

Absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer knowingly or intentionally converts client property regardless of injury or potential injury.

Standard 4.3 (failure to avoid conflicts of interest)

Absent aggravating or mitigating circumstances, disbarment is

appropriate when a lawyer, without the informed consent of the client, engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client.

STANDARD 4.6: Lack of Candor

Absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another, regardless of injury or potential injury.

STANDARD 5.1: Failure To Maintain Personal Integrity

Absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer engages in serious criminal conduct, a necessary element of which is includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.

STANDARD 9.2: Aggravation;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceeding;

(f) submission of false statements or other deceptive practices during the disciplinary process; and

(i) substantial experience in the practice of law.

STANDARD 9.3: Mitigation;

(a) absence of a prior disciplinary record;

(c) personal or emotional problems;

(d) Timely good faith effort to make restitution or to rectify

consequences of misconduct;

(g) character or reputation;

(h) physical or mental disability or impairment; and

(j) interim rehabilitation.

There was injury to Respondent's client in the instant case. Respondent's client, Murray Koren, was injured by the Respondent's misconduct as outlined in the facts relating to Count I of the Bar's Complaint. In addition, Respondent's client, Mr. Tisseaux, was injured by Respondent's theft of Tisseaux's funds in that Tisseaux had to hire an attorney and pay said attorney approximately $1,000.00 to recover the funds stolen by Respondent.

Clearly, the aggravating factors in the instant case outweigh the mitigating factors outlined in Florida Standards for Imposing Lawyer Sanctions and, as such, the presumption that disbarment is appropriate for the Respondent's misconduct in this case has not been rebutted.

ISSUE VI

WHETHER THE AMERICANS WITH DISABILITIES ACT APPLIES TO THE INSTANT CASE.

Respondent argues that he is being discriminated against by The Florida Bar, the Referee, and potentially by this Court, for having bi-polar, manic-depressive disorder, and that the Americans With Disabilities Act (ADA) is being violated.

The ADA does not apply to the instant case. As set forth by the Respondent in his brief, 42 U.S.C. Section 12132 of the Americans With Disabilities Act prohibits discrimination against persons with disabilities and states as follows:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall by reason of such disability, be excluded from participation in or be deemed denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." (emphasis added)

The Respondent is not a qualified individual to practice law or be a member of The Florida Bar. Respondent has committed four of the most serious offenses a lawyer can commit: (1) he misappropriated clients' funds; (2) he lied under oath either during his deposition in the case of Koren v. Montello or during the grievance committee hearing on this cause; (3) he made misrepresentations to The Florida Bar during the course of its investigation of this case, which was subsequent to any time period that Respondent claims he was unable to distinguish between right and wrong; and (4) he made misrepresentations to his clients.

Respondent claims that but for his bi-polar disorder, he would not have engaged in the misconduct and would not be being disciplined. Unfortunately, the Referee, after hearing all the evidence in this case, disagreed with Respondent's position for the

reasons set forth in his report.

The preamble to Chapter 3 of the Rules Regulating The Florida Bar provides:

> "A license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause" Rule 3-1.1, Rules Regulating The Florida Bar.
>
> The Supreme Court of Florida has the inherent power and duty ... to revoke the license of every lawyer whose unfitness to practice law has been duly established" Rule 3-1.2, Rules Regulating The Florida Bar.

There is cause to revoke Respondent's privilege to practice law in that his unfitness to practice law has been duly established. Respondent engaged in numerous acts of dishonesty. Respondent's acts of dishonesty have occurred even subsequent to any time period that Respondent claims he was incompetent as a result of his bi-polar disorder. The public needs to be protected from dishonest lawyers. The only appropriate discipline for Respondent's misconduct is disbarment in light of the aggravating factors, and notwithstanding the mitigating factors found by the Referee.

CONCLUSION

Disbarment is the only appropriate discipline for the Respondent's misconduct in this case.

WHEREFORE, The Florida Bar respectfully requests this Court to uphold the Referee's findings of fact and recommendations of guilt; and reject the Referee's recommended discipline and disbar the Respondent, Peter Charles Clement, from the practice of law.

Respectfully submitted,

BONNIE L. MAHON
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Attorney No. 376183

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Initial Brief in Support of Cross Petition for Review has been furnished by regular U.S. mail to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; and copies were furnished by regular U.S. mail to Raymond O. Gross, Esq., Gross & Kwall, P.A., Counsel for Respondent, 133 North Fort Harrison Avenue, Clearwater, Florida 34615; and to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 27th day of May, 1994.

BONNIE L. MAHON