047

FILED
SID J. WHITE
MAY 6 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

5/31

IN THE SUPREME COURT
STATE OF FLORIDA

PETER CHARLES CLEMENT,

Appellant,

vs.

CASE No. 82,097
TFB No. 92-10,252(6A)
93-10,633(6A)

THE FLORIDA BAR,

Appellee.

_____/

INITIAL BRIEF

RAYMOND O. GROSS
Attorney for Appellant
GROSS & KWALL
133 North Ft. Harrison Avenue
Clearwater, Florida 34615
(813) 441-4947
(FAX) 447-3158
Florida Bar No.: 151365

TABLE OF CONTENTS

CITATIONS OF AUTHORITIES

Cases

Page

United States Statutes

Florida State Statutes

Treatises & Other Material

TABLE OF CONTENTS

PRELIMINARY STATEMENT

In this brief the parties will be referred to by their names and by the position they occupy before this Court. The following symbols will be used for references:

"R" for "Report of Referee"

"T" for "Transcript"

"E" for "Exhibit"

STATEMENT OF THE CASE AND OF THE FACTS

The Appellant, Peter C. Clement, the original respondent below, perfected this appeal in due course from a final report of the referee of the disciplinary hearing held at the Hillsborough County Courthouse in Tampa, Florida.

The Appellant has been a member in good standing of the Florida Bar since 1978. Appellant has never had another bar grievance filed against him since he became a Florida Bar member.

After a finding of probable cause the Florida Bar filed a complaint against Appellant. A hearing on this matter was held on December 13, 14, and 20, 1993. On January 11, 1994, the Appellant presented numerous lay and professional character witnesses on his behalf.

This appeal arises from a Final Report filed on January 19, 1994 by the referee, which found Appellant guilty of Count I and guilty of Count II and recommended Appellant's suspension from the Florida Bar for thirty-six (36) months, among other unreasonable penalties.

QUESTION PRESENTED

I. WHETHER THE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHEN IT RULED THAT THE UNREBUTTED EXPERT TESTIMONY OF APPELLANT'S TREATING PSYCHIATRIST WAS UNWORTHY OF BELIEF WHERE IT LATER RELIED UPON THE TREATING PSYCHIATRIST'S DIAGNOSIS THAT APPELLANT SUFFERED WITH A MENTAL DISORDER IN ITS MITIGATION AND RECOMMENDED DISCIPLINE.

II. WHETHER THE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED IN THE EXCLUSION OF THE TESTIMONY OF APPELLANT'S WIFE REGARDING HER OPINION OF APPELLANT'S SANITY AT THE TIME OF THE ALLEGED OFFENSES WHERE SHE HAD ADEQUATE OPPORTUNITY TO OBSERVE THE CONDUCT OF APPELLANT.

III. WHETHER THE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHEN COLLATERAL ESTOPPEL PRECLUDED APPELLEE FROM PRESENTING FACTS INTO EVIDENCE WHICH ARE CONTRARY TO FACTS PREVIOUSLY PRESENTED IN PRIOR LITIGATION WHERE APPELLEE'S WITNESS TESTIFIED HERE THAT HE HAD NOT AUTHORIZED THE APPELLANT TO USE DESIGNATED FUNDS FOR HIS PERSONAL USE BUT WHO HAD PREVIOUSLY PLEAD AND/OR TESTIFIED UNDER OATH IN A PREVIOUS TRIAL THAT HE HAD IN FACT AUTHORIZED APPELLANT TO UTILIZE SAID FUNDS FOR APPELLANT'S PERSONAL USE.

IV. WHETHER THE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHERE TELEPHONIC TESTIMONY OF A FOREIGN WITNESS TESTIFYING FROM A FOREIGN COUNTRY WAS ADMITTED WHERE THE OATH ADMINISTERED WAS NOT EXECUTED IN ACCORDANCE WITH THE REQUIREMENTS OF THE FLORIDA STATUTES AND SAID TESTIMONY WAS NOT COMPETENT EVIDENCE TO SUPPORT APPELLEE'S CONTENTIONS.

V. WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHERE APPELLANT PRESENTED DETAILED EVIDENCE OF HIS DIAGNOSIS AND TREATMENT OF HIS MENTAL CONDITION, HIS EARLIER COMPETENCY IN THE PRACTICE OF LAW, HIS SUDDEN, MARKED DETERIORATION IN PERSONAL AND PROFESSIONAL BEHAVIOR AROUND THE OCCURRENCE OF EVENTS UNDERLYING THE BAR COMPLAINT, AND HIS SUBSEQUENT RETURN TO HIS NORMAL HIGH STANDARD OF CONDUCT AND THE RECOMMENDED DISCIPLINE OF SUSPENSION FROM THE PRACTICE OF LAW FOR THIRTY-SIX (36) MONTHS PUNISHMENT WAS NOT WARRANTED IN LIGHT OF APPELLANT'S UNBLEMISHED RECORD.

VI. WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHERE THE RECOMMENDED DISCIPLINE OF SUSPENSION FROM THE PRACTICE OF LAW FOR THIRTY-SIX (36) MONTHS PUNISHMENT IS UNREASONABLE AND IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT WHEN REASONABLE ALTERNATIVES EXIST WHICH COULD BE UTILIZED.

SUMMARY OF THE ARGUMENT

The decision as filed in the referee's report is clearly erroneous where the bar failed to present clear and convincing evidence that Appellant was sane at the time he committed the alleged offenses. More specifically, the referee committed reversible error where it improperly discredited the unrebutted medical testimony of Dr. Butler, who was Appellant's treating psychiatrist during the time of the alleged offenses and who met with and treated Appellant over forty times during the time the alleged offenses were committed. Moreover, the referee committed reversible error when it excluded the opinion testimony of Appellant's wife as to her opinion of Appellant's sanity at the time of the alleged incidents where she had testified as to his irrational behavior in his personal and professional life and she had adequate opportunity to observe his conduct during this time. Further, the referee committed reversible error where it admitted testimony from a witness which was contrary to sworn pleadings filed in a prior suit which was adjudicated against the witnesses' interest. Furthermore, the referee committed reversible error where it solicited and admitted telephonic testimony from a witness in a foreign country whose oath was not executed in accordance with the statutory requirements for taking oaths in foreign countries thereby making said testimony not competent evidence to support the Appellee's contentions. Finally, the referee committed reversible error where the recommended discipline is unreasonable and unduly

harsh pursuant to Florida case law and the Federal laws, in particular the Americans with Disability Act.

ARGUMENT

I. WHETHER THE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHEN IT RULED THAT THE UNREBUTTED EXPERT TESTIMONY OF APPELLANT'S TREATING PSYCHIATRIST WAS UNWORTHY OF BELIEF WHERE IT LATER RELIED UPON THE TREATING PSYCHIATRIST'S DIAGNOSIS THAT APPELLANT SUFFERED WITH A MENTAL DISORDER IN ITS MITIGATION AND RECOMMENDED DISCIPLINE.

The established rule in Florida is that the trial court cannot arbitrarily ignore unrebutted expert testimony. In re Estate of Hannon, 447 So. 2d 1027 (Fla. 4th DCA 1984). In Hannon, the personal representative of testator's estate filed a petition for construction of an article of the testator's will. The Circuit Court found that the testator intended the hospital and church to be beneficiaries of 1,000 shares of stock each, plus all stock splits and dividends, and the residual beneficiaries appealed. Hannon at 1028.

The appellate court found that at the hearing the only witness was Leo Fox, the attorney who prepared the will. Fox testified that the language "1,000 shares computed on the basis of present value" was placed in the will in order to clearly indicate that the testator wished to bequeath 1,000 shares of stock to each beneficiary at the stock's value ($35.00 per share) on the date the will was executed, thus giving each charity $35,000. The trial court totally ignored this testimony although it was uncontradicted and the only testimony heard. The trial court cannot arbitrarily ignore unrebutted testimony. Based upon the trial court's arbitrarily ignoring the unrebutted testimony of the attorney, the appellate court reversed and remanded the case. Hannon at 1028.

In Ackerly Communications, Inc. v. City of West Palm Beach,

427 So. 2d 245 (Fla. 4th DCA 1983), the appellate court found that the trial court had erred utilizing the depreciation figure of the city's expert after striking his testimony. The Ackerly Communications case was an eminent domain proceeding involving the city's taking of an owner's outside advertising signs where the sign owner appealed from the judgment awarding him $1,500 as total compensation. Ackerly at 246.

The appellant argued that the trial court erred by using a 50% depreciation figure. The evidence as to the depreciation came from two witnesses. The sign owner's expert testified as to a 5% depreciation figure, and the City's expert testified to a 50% depreciation figure. On the sign owner's motion, the court struck the testimony of the City's expert on depreciation as the expert was shown to be unqualified to render an opinion. Upon striking the 50% depreciation figure, the court was left with only the unrebutted testimony of the sign owner's expert which was 5%. The trial court thus erred in employing the 50% depreciation figure to determine compensation and was reversed and remanded for further proceedings with instructions to recompute the just compensation by the use of a 5% depreciation amount. Id.

In the instant case, while the referee may not haven stricken the testimony Appellant's treating physician before erroneously relying upon it in its findings, however, he did state that the physicians testimony was "unworthy of belief" (R.6), and then later relied upon his diagnosis of Appellants "bi-polar, manic-depressive disorder" (R.23) in mitigation. Dr. Butler provided a very

reasonable and convincing explanation as to any possible discrepancies in his medical reports. (T.271). At the hearing, Dr. Butler stated, "I believe in my opinion that [the two letters with different dates] reflect, if we look at one [date] as making a statement about [Appellant's] mania and one making a statement about his mania and depression, THEY ARE BOTH LEGITIMATE LETTERS. (Emphasis added)(T.271). Clearly in light of the extensive expert testimony presented at the hearing on Appellant's mental disorder as well as Dr. Butler's reasonable explanation of discrepancies in dates of medical records, following the rationale as set forth in Ackerly, this Court should reverse the opinion which rejected the unrebutted expert testimony of Dr. Butler that Appellant did not know right from wrong at the time of the alleged offenses and that Dr. Butler's testimony in its entirety should be given full consideration.

In Republic National Bank of Miami v. Roco, 534 So. 2d 736 (Fla. 3rd DCA 1988), the appellate court held that a bank's unrebutted expert testimony should not have been arbitrarily rejected. The Roco case involved a director/trustee of a dissolved corporation which entered into a contract to purchase jewelry from a merchandiser in Spain brought an action against the bank for breach of deposit agreement. In reversing, the appellate court held that the bank's unrebutted expert testimony that letters of guaranty are customarily substituted for drafts and shipping documents in international sales transactions and served to protect the bank against claims that might arise from its authorizing goods

to be released prior to obtaining acceptance of accompanying draft should not have been arbitrarily rejected. Therefore, it held that judgment should have been entered in favor of the bank and reversed. Id. at 738.

In Roco, the trial court's order was reversed and remanded with directions for the trial court to receive the expert testimony which was intended to explain the meaning of the ambiguous phrase concerning responsibility. Upon the first remand, the trial court heard unrebutted expert testimony establishing that such guaranties customarily substituted for drafts and shipping documents and serve to protect the bank against potential claims which could arise from its authorizing goods to be released prior to obtaining acceptance of the accompanying draft. The appellate court stated that "for reasons not apparent to this court, the trial court rejected the uncontroverted evidence and again entered judgment for Roco." Id.

In the courts discussion, it acknowledged the general rule in Florida that a trial court cannot arbitrarily reject unrebutted testimony. Citing In re Estate of Hannon supra; and Ackerly Comm., Inc. supra. Also, where the testimony adduced in not "essentially illegal, contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, or inconsistent with other circumstances in evidence, it should not be disregarded but accepted as proof of the issue. Citing Laragione 195 So. 2d 246 (Fla. 2d DCA 1967); and Florida East Coast Ry. v. Michini, 139 So. 2d 452 (Fla. 2d DCA 1962), cert. discharged, 152 So. 2d 171 (Fla. 1963).

At the instant hearing, the referee heard testimony from Appellant's treating physician, Dr. Butler, that Appellant did not know right from wrong at the time of the alleged offenses. (T.295). Dr. Butler's testimony was unrebutted. Dr. Butler was and is a qualified expert in psychiatric medicine. (T.277). Appellee apparently did not think that it was prudent or necessary to order a second medical evaluation be performed; from the costs of this hearing, money was not a consideration to the Florida Bar. Pursuant to the above case law, the referee cannot arbitrarily reject unrebutted expert testimony and his decision that Dr. Butler's testimony was not worthy of belief must be reversed.

Likewise, our own Second District Court of Appeal has held that a witness' friendship for a party should not constitute an impeachment of his veracity and his uncontradicted factual testimony should not be arbitrarily disregarded. Laragione v. Hagan, 195 So. 2d 246 (Fla. 2d DCA 1967). In Laragione, the plaintiffs brought suit against a wife's estate and her second husband to enforce rights under an alleged oral contract between the wife and her first husband to execute mutual wills in favor of plaintiffs. Laragione at 247.

The trial court entered judgment against plaintiffs. In reversing and remanding, the appellate court stated that the appellee unsuccessfully challenged the competency of appellants' witness, Frank Rinaldi, however, the chancellor did remark in his decree that Rinaldi "frankly admitted on the witness stand that he would like to help the plaintiffs." Rinaldi's testimony was not

contradicted by any other witness, and it was not contradictory within itself. Id. at 249. Neither was it essentially illegal, contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge or inconsistent with other circumstances in evidence. It was material, properly admitted, and consisted of facts not opinions. The court stated that it would be error to wholly disregard or reject it even though he had been an interested party. Id. citing Brannen v. State, 94 Fla. 656, 114 So. 429; Kinney v. Mosher, 100 So. 2d 644 (Fla. 1st DCA 1958). Rinaldi's friendship for the appellants, unaccompanied by facts from which adverse conclusion could be drawn, and none appear in the record, does not constitute an impeachment of his veracity. Id. citing In re Estate of Krugle, 134 So. 2d 860 (Fla. 2d DCA 1961). The appellate court found that the chancellor patently misconceived the legal effect of Rinaldi's testimony. Id. at 249.

In the instant case, the referee blatantly stated that "Dr. Butler was willing to testify to that which would assist his patient in the Bar proceeding." (R.6). Notwithstanding the fact that Dr. Butler may have been interested in his patient's well being and outcome of this hearing, his interest in his patient does not constitute an impeachment of his veracity, pursuant to Krugle and Laragione above.

II. WHETHER THE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED IN THE EXCLUSION OF THE TESTIMONY OF APPELLANT'S WIFE REGARDING HER OPINION OF APPELLANT'S SANITY AT THE TIME OF THE ALLEGED OFFENSES WHERE SHE HAD ADEQUATE OPPORTUNITY TO OBSERVE THE CONDUCT OF APPELLANT.

In Florida, the general rule is that the mental condition or appearance of a person, or his manner, habit, or conduct in that regard, may be proved by the opinion of an ordinary witness, where the witness is shown to have had adequate opportunity to observe the manner or conduct of such person. Sealey v. State, 89 Fla. 439, 105 So. 137 (Fla. 1925)(holding that it was permissible to ask nonexpert witness whether the condition of person's mind was rational and normal); See also, Rivers v. State, 458 So.2d 762 (Fla. 1984)(it is a well established principle of law in this state that an otherwise qualified witness who is not a medical expert can testify about a person's mental condition, provided the testimony is based on personal knowledge and observation); Garron v. State, 528 So. 2d 353 (Fla. 1988)(witnesses who have known and observed a defendant over an extended period of time may also be competent to testify as to their nonexpert opinion on the defendant's sanity); Hall v. State, 78 Fla. 420, 83 So. 513, 8 ALR 1034 (Fla. 1919) (where witnesses testified that in their opinion defendant was of "unsound mind," or "not in his right head"); and Hixon v. State, 165 So. 2d 436 (Fla. 2d DCA 1964).

In other words, the opinions of nonexpert witnesses based on facts known to them and testified to by them are evidence which the jury may and should consider. 24 Fla. Jur. 2d Evidence and Witnesses Section 656 (1993). A nonexpert witness can detail the

facts know to him which show insanity, and thereupon express an opinion as to the sanity of the person whose mental condition is being investigated. Hixon v. State supra.

In the instant case, Appellant's wife testified and as the person who had observed Appellant's behavior on a regular basis throughout his forty some visits to his psychiatrist was competent to voice her lay opinion at to his sanity at the time of the alleged offenses. At the instant hearing, Appellant's wife testified that she had observed him over a long period of time during which Appellant suffered with his mental disorder and prior to the alleged offenses. Appellant's wife testified as to his impaired judgment and the erratic behavior patterns which she had personally observed: (1) in preparing certain legal documents one day, (T.341), and revoking everything soon thereafter (T.343); (2) in telling the wife to go see a lawyer one minute (T.343), and then becoming hysterical and wanting to know why she had gone to see a lawyer the next (T.348); in working around the clock and not sleeping (T.351,353,369-70); in becoming restless, argumentative and agitated (T.351); in considering buying property priced beyond his means (T.352); in becoming a concert promoter (T.353); in solving world problems in the Middle East (T.355); in representing the public as a lawyer (T.361,363), in attempting to sell the marital home without the wife's knowledge (T.365); in taking and arranging trips for his family in limousines (T.365,366); in paying entrance fees to one Disney park and forty-five minutes later becoming upset and wanting to go to another Disney park (T.367); in

directing traffic during a parade in Orlando (T.367); in falling asleep while cooking causing fire damage to the house (T.379); in driving his car backwards into the garage door without opening the garage door first (T.379); in planning a meeting with the Governor of Florida (T.370); and in appearing to demonstrate erratic peaks and valleys in his behavior (T.374-74).

Based on Appellant's wife's extensive observations of Appellant, his attorney asked her opinion as to Peter's competence during the period of July 1990 to January 1992. (T.382). The referee erroneously sustained the Appellee's objection but allowed counsel to proffer that Appellant's wife opinion that Peter was incompetent during this time period. (T.382).

In spite of the referee's decision to exclude the Appellant's wife from testifying as to her opinion as to Appellant's sanity at the time of the alleged offenses, in his report the referee states that "Respondent's wife's testimony did not indicate that from December 1990 to December 1991 Respondent did not know right from wrong." (R.6). Plainly, the referee cannot have it both ways!

In Hixon, 165 So. 2d 436 (Fla. 2d DCA 1964), the defendant was convicted of first degree murder and he appealed. The appellate court stated that the lay witnesses' testimony presented a meager evidentiary matter as against the total evidence of the defense that defendant was insane at time he killed his former wife where the testimony was based on brief opportunities for observation of defendant. The appellate court found that the prosecution had failed to overcome the presumption that defendant was insane when

he killed. The Hixon court in reaching its decision stated:

> In a criminal prosecution, a lay or nonexpert witness may be permitted to give an opinion regarding the sanity or insanity of the person whose mental condition is in issue, but he cannot express a general opinion as to sanity nor give opinions independent of facts and circumstances within his own knowledge. The opinion, rather, is to be given after the witness has testified with regard to appearances, actions, and conduct of the person whose sanity is being investigated; and such a witness must testify from personal knowledge and observation. Thus, a nonexpert witness who bases his testimony upon relevant facts and circumstances known to and detailed by him may give an opinion as to sanity. Citing 20 Am. Jur. Evidence Sections 852, 853, 854, pages 713-716; 2 Underhill's Criminal Evidence, pages 1157, 1151; 2 Warton's Criminal Evidence, Section 532, pages 371-372; Armstrong v. State, 30 Fla. 170, 11 So. 618 (Fla. 1892); Hall v. State, 78 Fla. 420, 83 So. 513 (Fla. 1919).

Hixon at 441.

Hixon was a case where because of the presumption of continuing insanity, the prosecution was faced with the burden of overcoming that presumption by establishing that Hixon at the time of the killings knew right from wrong. The opportunities of the states' nonexpert witnesses for observation were brief and limited to a single occasion subsequent to the shooting. In the words of the appellate court:

> As to specifics or details of relevant facts and circumstances with respect to particular acts, conversations, appearances, or conduct of Hixon, their testimony presents but meager evidentiary matter as against the total evidence of the defense and as against the presumption which was created by it.

Hixon at 441.

Hixon was adjudged mentally ill and also was diagnosed insane before the homicide and was diagnosed and adjudged insane after

that act. The shooting occurred four months following his escape from the Ohio hospital and five months from the date he was taken to Florida State Hospital, where he was detained for about four years after the homicide. Examining psychiatrists testified that he was in a state of remission and was found "sane enough" to stand trial.

Finally in addition to the presumption of continuing insanity of the accused to the time of the shooting, there was the unanimous opinion of the Florida doctors that, at the time of the act in question, Hixon did not know right from wrong. Id. The appellate court held that the verdict which runs clearly counter to the evidence, must be reversed. Hixon at 442.

Similarly, in Butler v. State, 261 So. 2d 508 (Fla. 1st DCA 1972), the defendant was convicted of first-degree arson and he appealed. The appellate court found that where the crucial issue at trial, following defendant's discharge from the state hospital, was the question of defendant's sanity at the time of the offense, the defendant's sister, who had observed him over a long period of time during which he suffered a mental disorder and prior to the instant offense, was competent to voice her lay opinion at to his sanity at the time of the offense. Butler at 510.

The Butler court held that the trial court erred in refusing to allow a lay witness to voice her opinion as to the question of defendant's sanity at the time of the alleged offense. Id.

The sanity of Butler was the crucial defense issue. The two court-appointed psychiatrists, who had previously examined the

defendant testified substantially the same as reflected in their respective reports which resulted in the defendant being adjudicated insane. After a proper predicate was laid, defendant's sister was asked her opinion as to the defendant's sanity at the time of the offense. The trial court in sustaining the State's objection opined that: "She can state what she has observed, and what observations she has made, but the question of the sanity is a legal question and not a medical question." Butler at 510.

The Butler court stated that the case of Byrd v. State, 178 So. 2d 884 (Fla. 2d DCA 1965) was squarely on point. In Byrd, two psychiatrists testified that in their opinion Byrd was insane at the time he was charged with assault with intent to commit murder. The State's sole witness in proof of Byrd's sanity was a deputy sheriff, who testified that he knew defendant on a first name basis; had observed him within the framework of the events leading up to, during and subsequent to the assault; and expressed his opinion as a layman, that Byrd was sane. Upon the authority of Byrd, the Butler court held that the sister of Appellant Butler, who had observed him over the long period of time during which he suffered a mental disorder and prior to the instant offense, was competent to voice her lay opinion as to his sanity. Butler at 510.

Similarly numerous probate courts have held that lay opinion testimony is admissible to determine the competency of a testator on the date deeds were executed. Florida probate courts have admitted lay opinion testimony of witnesses, including a woman who had witnessed decedent's will and had known the testator for 40 or

50 years, a registered nurse, and an attorney whom testator visited, and held that their testimony constituted competent evidence of a testator's testamentary capacity and that the trial court was not obliged to reject that evidence in light of medical testimony to the contrary. In re Estate of Hammermann, 387 So. 2d 409 (Fla. 4th DCA 1980).

In affirming the trial court's denial of appellant's petition for revocation of the decedent's will with prejudice, the Hammermann court quoted the Supreme Court case of In re Estate of Zimmerman, 84 So. 2d 560, 562 (Fla. 1956) which stated:

> A study of the pertinent cases reveals that the precise condition of the testator's mental health at the time he executed his will may be established in more ways than one. It may be established by direct proof as to its condition when the will was executed or it may be established by inferences from proof of his mental condition leading up to and following the execution of the will when such proof is properly related and connected. ...

Hammermann at 411.

Accordingly, it was the opinion of the Hammermann court that the lay opinion testimony was competent evidence of the testator's testamentary capacity on the date of the testator signed the will and that the trial court was not obliged to reject that evidence in light of medical testimony to the contrary. It found ample support for the conclusion of the trial court and affirmed the judgment. Id. at 411.

Likewise, in a civil action filed to set aside a deed to real property on the basis of alleged incompetency of the grantor, the trial judge was held to have abused his discretion in refusing to

permit the grantor's attorney who had prepared the deed to testify concerning the grantor's competence on the day the deed was executed, where the attorney had sufficient opportunity to observe the grantor. However, where the excluded testimony was cumulative to admitted testimony on the grantor's competency by other witnesses and where the rejected testimony was later inadvertently admitted, the error was deemed harmless. Connell v. Green, 330 So. 2d 473 (Fla. 1st DCA 1976).

However, in the instant case the expert testimony of Dr. Butler was not cumulative and the rejection of his testimony was not harmless in light of the referee's decision to exclude the lay opinion of Appellant's wife as to her opinion of Appellant's sanity at the time of the alleged offenses.

Clearly, pursuant to the case law and arguments cited above, the referee clearly abused his discretion in excluding the testimony of Appellant's wife where she had observed him over a very long period of time during which he suffered from manic depression and prior to the time of the alleged offenses. She was definitely competent to voice her lay opinion as to Appellant's sanity at the time of the alleged offenses. The fact that the referee found that Appellant's wife's testimony failed to provide evidence as to whether Appellant knew right from wrong at the time of the alleged offenses is totally absurd in light of his exclusion of this evidence in spite of the laying of a proper foundation by counsel.

III. WHETHER THE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHEN COLLATERAL ESTOPPEL PRECLUDED APPELLEE FROM PRESENTING FACTS INTO EVIDENCE WHICH ARE CONTRARY TO FACTS PREVIOUSLY PRESENTED IN PRIOR LITIGATION WHERE APPELLEE'S WITNESS TESTIFIED HERE THAT HE HAD NOT AUTHORIZED THE APPELLANT TO USE DESIGNATED FUNDS FOR HIS PERSONAL USE BUT WHO HAD PREVIOUSLY PLEAD AND/OR TESTIFIED UNDER OATH IN A PREVIOUS TRIAL THAT HE HAD IN FACT AUTHORIZED APPELLANT TO UTILIZE SAID FUNDS FOR APPELLANT'S PERSONAL USE.

In Florida, the general rule is that under the principle of estoppel by judgment, parties are estopped from litigating in a second suit points and questions which were common to both first and second causes of action and which actually were adjudicated in the prior litigation, notwithstanding lack of mutuality. Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989); and Monyek v. Klein, 329 So. 2d 25 (Fla. 3d DCA 1976).

In Zeidwig, a client filed a suit against his former attorney in a criminal prosecution for the attorney's alleged malpractice. The trial court held that the client was collaterally estopped from asserting his claim again but the appellate court in reversing certified the question to the Florida Supreme Court as one of great public importance. The Supreme Court of Florida rephrased the question as:

> Whether identity or mutuality of the parties or their privies is a prerequisite in Florida to the defensive application of the doctrine of collateral estoppel in the criminal-to-civil context.

Zeidwig at 209. In answering in the negative, the Supreme Court approved the use of defensive collateral estoppel to prevent a criminal defendant, as a plaintiff, from relitigating the same issue which had been litigated in prior criminal proceedings, notwithstanding lack of mutuality. Id. at 209.

The Supreme Court concluded that, where a defendant in a criminal case has had a full and fair opportunity to present his claim in a prior criminal proceeding, and a judicial determination is made that he received the effective assistance of counsel, then the defendant/attorney in a subsequent civil malpractice action brought by the criminal defendant may defensively assert collateral estoppel. In reaching its decision, the Supreme Court reasoned,

> If we were to allow a claim in this instance, we would be approving a policy that would approve the imprisonment of a defendant for a criminal offense after a judicial determination that the defendant has failed in attacking his conviction on grounds of ineffective assistance of counsel but which would allow the same defendant to collect from his counsel damages in a civil suit for ineffective representation because he was improperly imprisoned. To fail to allow the use of collateral estoppel in this circumstance is neither logical nor reasonable."

Zeidwig at 214.

In discussing the public policy justification for the application of collateral estoppel in this type of circumstances, the Supreme Court referred to Johnson v. Raban, 702 S.W.2d 134 (Mo. Ct. App. 1985), which stated:

> It would undermine the effective administration of the judicial system to ignore completely a prior decision of a court of competent jurisdiction in this state on the same issue which plaintiff seeks to relitigate in a subsequent action.

Zeidwig at 214.

Similarly, in another case the First District Court of Appeal of Florida held that under the principle of estoppel by judgment, parties are estopped from litigating in a second suit points and

questions which were common to both first and second causes of action and which actually were adjudicated in prior litigation. Monyek v. Klein, 329 So. 2d 25 (Fla. 3d DCA 1976).

In Monyek, the plaintiff filed a legal malpractice action seeking compensatory and punitive damages for his attorneys' alleged negligence in failing to draft an agreement clearly setting forth the terms of real estate ventures. The appellate court affirmed the trial court's decision that the plaintiff was collaterally estopped by the judgment in the prior suit arising out of the same transaction in which the court found that the attorneys had made full disclosure to plaintiff of the terms and conditions of the real estate acquisition. Monyek at 26.

The Monyek court found that at the conclusion of the trial, the judge, finding that Klein and the law firm had made full disclosure of the terms and conditions of the real estate acquisitions and that they had not breached a fiduciary duty to Monyek, entered judgment against him. This judgement was not appealed. Id.

Approximately a year and a half later Monyek filed the instant suit seeking compensatory and punitive damages for defendants' alleged negligence in failing to properly represent Monyek. Following discovery, defendants filed a motion for summary judgment which was granted on the ground that plaintiff's action was barred by the doctrine of collateral estoppel. Plaintiff appealed. Id. at 26.

In affirming the summary judgment, the appellate court relied

on the ruling in Golden View Condominium, Inc. v. City of Hollandale, 279 So. 2d 323 (Fla. 4th DCA 1973), which held that under the principle of estoppel by judgment, parties are estopped from litigating in a second suit points and questions which were common to both the first and second causes of action and which actually were adjudicated in the prior litigation. Monyek at 26.

Following the logic in the case law as set forth above, the testimony of Appellee's witness, Murry Koren, (Koren) must be excluded under the principle of collateral estoppel by judgment.

The Appellant testified and sworn court documents support that Koren made a personal loan to Appellant whereby he authorized Appellant to utilize the five thousand dollar escrow money for concert activities once the verbal offer for the shopping center deal was turned down. (T.141,142)(Respondent's Exhibits 1, 2, 3, 4). Under the rationale of the Golden View Condominium and Monyek courts, parties are estopped from litigating in a second suit points and questions which were common to both the first and second causes of action and which actually were adjudicated, Appellee's are estopped from litigating the five thousand dollar loan to Appellant from Koren, which was adjudicated against Koren in Koren v. Montello.

In the alternative, at the hearing Koren testified that he made a secured loan to Mr. Montello for the purposes of the concert for Thirty Thousand Dollars, which was twenty-five thousand dollars plus the five thousand which had been previously taken by Peter as a refundable deposit for the shopping center deal. (T.49). Later,

Koren filed a lawsuit (Respondent Exhibit 1) and other verified pleadings (Respondent Exhibits 2, 3, 4) against Montello (T.185), in which he plead under oath that he had in fact loaned the five thousand dollars first deposited as earnest money plus another twenty-five thousand dollars to Montello. (T.252). Koren had a full and fair opportunity to present his claim in a prior court proceeding, and the judge ruled against him. (T.252).

Appellant, who was an indispensable party/witness in that trial now seeks to defensively assert collateral estoppel, pursuant to Zeidwig. Following the rationale of the Florida Supreme Court, if the court now were to allow Koren claim that he loaned the same funds to Appellant, you would be approving a policy that would approve of a plaintiff after a judicial determination that funds could not be collected from one defendant but which would allow the same defendant to bring the same charges against another innocent defendant.

Furthermore, it would undermine the effective administration of the judicial system to ignore completely a prior decision of a court of competent jurisdiction in this state on the same issue which Koren/Bar seeks to relitigate in this proceeding. Thus, Koren's testimony regarding the alleged five thousand dollar loan to Appellant must be excluded under the doctrine of collateral estoppel.

IV. WHETHER THE REFEREE'S REPORT WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHERE TELEPHONIC TESTIMONY OF A FOREIGN WITNESS TESTIFYING FROM A FOREIGN COUNTRY WAS ADMITTED WHERE THE OATH ADMINISTERED WAS NOT EXECUTED IN ACCORDANCE WITH THE REQUIREMENTS OF THE FLORIDA STATUTES AND SAID TESTIMONY WAS NOT COMPETENT EVIDENCE TO SUPPORT APPELLEE'S CONTENTIONS.

In Florida, the established rule of law is that an attempted oath administered by one not qualified to administer it is in effect no oath. Crockett v. Cassels, 95 Fla. 851, 116 So. 865 (Fla. 1928). Furthermore, oaths which are not executed in accordance with the statutory requirement for taking of oaths, affidavits, and acknowledgements in foreign countries fail to constitute competent evidence to support a party's contention. Hamilton v. Alexander Proudfoot Co. World Headquarters, 576 So. 2d 1339 (Fla. 4th DCA 1991).

In the instant case, a witness testified telephonically from Costa Rica who was not sworn in accordance the requirements of Section 92.50(3), Florida Statutes (1989). Prior to administering the oath to the person on the phone testifying from a foreign country, the referee expressed concern about whether the Appellee "had a notary or anything" in Costa Rica who could properly authenticate that the witness was who he purported to be. (T.118). He even asked her if she wanted to reset the witness to testify later when a notary was present. The following dialogue then occurred:

THE COURT: Well, I want to have him sworn in.

MS. MAHON: Well, normally the referee --

THE COURT: You're saying I can do it?

MS. MAHON: Yeah. ...

THE COURT: But I don't even know this man.

MS. MAHON: I never met him either. ...

(T.119). Even though Appellant did not object to this witness testifying, he did raise an objection to the procedural way it transpired. After overruling the objection the referee stated "I will swear this man in, and I want the record to be clear I don't know this man, I wouldn't recognize his voice or anything like that." (T.122). The referee then administered the oath to the witness on the other end of the phone line.

Clearly, an unsworn witness is not competent to testify. Crockett v. Cassels, 95 Fla. 851, 116 So. 865 (1928); and Houck v. State, 421 So. 2d 1113 (Fla. 1st DCA 1982)(held that the trial court erred in not only soliciting unsworn testimony by assistant state attorney, but also in giving consideration to such unsworn testimony). Section 90.605, Florida Statutes (1985), requires that "each witness shall declare that he will testify truthfully, by taking an oath or affirmation," and the only exception made by this section is for young children. Houck at 1115.

Where a witness is to testify from a foreign country, Section 92.50, Florida Statutes (1994) provides in part the following:

> 92.50. Oaths, affidavits, and acknowledgments; who may take of administer; requirements ...
> (3) IN FOREIGN COUNTRIES.--Oaths, affidavits, and acknowledgments, required or authorized by the laws of this state, may be taken or administered in any foreign country, by or before any judge or justice of a court of last resort, any notary public of such foreign country, any minister, consul general, charge d'affaires, or consul of the United States resident in such country. The jurat, or certificate of proof or acknowledgement,

> shall be authenticated by the signature and official seal of the officer or person taking or administering the same; provided, however, when taken or administered by or before any judge or justice of a court of last resort, the seal of such court may be affixed as the seal of such judge or justice.

In Florida, the general rule is that affidavits or testimony that is not executed in accordance with the statutory requirements for taking oaths, affidavits, and acknowledgements in foreign countries is not competent evidence to support a party's contention. Hamilton, at 1341. In Hamilton, a former employer brought an action against a former employee for breach of contract. After the trial court denied the employee's motion to dismiss for lack of personal jurisdiction, the employee appealed. In reversing the trial court, the appellate court found that an affidavit submitted from Mr. Smith, who was Hamilton's supervisor in Australia was not executed in accordance with the requirements of Section 92.50(3), Florida Statutes (1989), pertaining to the taking of oaths, affidavits, and acknowledgments in foreign countries and that the affidavit "WAS NOT COMPETENT EVIDENCE TO SUPPORT [A PARTY'S] CONTENTIONS." (Emphasis added). Hamilton, at 1341.

Pursuant to the established Rules of Civil Procedure in Florida, where a witness is to testify from a foreign country, the law provides that the oath must be administered in the foreign country before a notary or other public official authorized to administer same in such country. Section 92.50, Fla. Stat. (1994). Here, the oath was not executed in accordance with the statutory requirement for taking oaths in foreign countries, therefore, the testimony of Mr. Tisseaux from Costa Rica must be excluded.

V. WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHERE APPELLANT PRESENTED DETAILED EVIDENCE OF HIS DIAGNOSIS AND TREATMENT OF HIS MENTAL CONDITION, HIS EARLIER COMPETENCY IN THE PRACTICE OF LAW, HIS SUDDEN, MARKED DETERIORATION IN PERSONAL AND PROFESSIONAL BEHAVIOR AROUND THE OCCURRENCE OF EVENTS UNDERLYING THE BAR COMPLAINT, AND HIS SUBSEQUENT RETURN TO HIS NORMAL HIGH STANDARD OF CONDUCT AND THE RECOMMENDED DISCIPLINE OF SUSPENSION FROM THE PRACTICE OF LAW FOR THIRTY-SIX (36) MONTHS PUNISHMENT WAS NOT WARRANTED IN LIGHT OF APPELLANT'S UNBLEMISHED RECORD.

Florida Standards for Imposing Lawyer Sanctions provides guidance in the different factors that may justify a reduction in the degree of discipline to be imposed. Mitigation Standard 9.32 lists the mitigating circumstances, including but not limited to factors such as (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; ... and (h) physical or mental disability or impairment....

Pursuant to Florida case law, the established rule in disciplinary proceedings is that referees must consider a respondent's mental illness in mitigation of his wrongful actions. See, e.g., The Florida Bar v. Perri, 435 So. 2d 827 (Fla. 1983); The Florida Bar v. Moran, 273 So. 2d 379 (Fla. 1973); and The Florida Bar v. Parsons, 238 So. 2d 644 (Fla. 1970).

At the instant hearing, Appellant presented competent evidence of his manic depressive illness and the treatment of his mental condition. (R.23). Appellant presented several character witnesses who testified as to his earlier competency in the practice of law, including such positive testimony from Koren. (T.34). Appellant presented competent evidence of his marked deterioration in

personal and professional behavior at the time of the alleged offenses. (T.341, 343, 348, 351, 352, 353, 355, 361, 363, 365, 366, 367, 369-70, 374-74). Appellant presented competent evidence of his subsequent return to normal high standard of conduct. (T.379).

The referee found Appellant guilty of both counts and recommended his suspension from the practice of law for thirty-six months. Here, Appellant has an unblemished record. Appellant presented numerous witnesses who testified as to the excellent professional services he provided to them, such as, a chiropractic physician testified that Appellant was "very efficient" in handling cases (T.9); an insurance agent testified that Appellant did a "fantastic job" (T.14); a realtor testified that Appellant was "quite professional" [sic], (T.67) and that she was never concerned about the many occasions that Appellant had her escrow money in his account (T.69); a beneficiary testified that Appellant won a reversal in a guardianship matter and was "always responsive" and "always answered my phone calls." (T.81).

Competent testimony was also presented concerning the numerous occasions when Appellant handled legal matters on a pro bono basis without receiving pay. Examples of such occasions included testimony of where he handled an eviction proceeding for a woman with only a 7th grade education (T.41-42), he won a money judgment for a "poor" client and refusing to accept payment (T.44), when he successfully handled numerous referrals from his clergyman on behalf of people who could not afford to pay (T.47); and where he successfully handled a custody matter for a disabled woman with

systemic lupus (T.73-74).

Another member of the Florida Bar who is a practicing attorney and bankruptcy trustee even opined that Appellant was a "very competent attorney." (T.58, 64).

Character witnesses also testified that Appellant had contributed to the community by such volunteer activities as sponsoring little league teams (T.18) and in heading numerous committees for the local Chamber of Commerce (T.10).

In a recent Florida Supreme Court case, with facts remarkably similar to those of the instant case, a defendant was appointed as a guardian for an individual who suffered cardiac arrest resulting in brain damage while being treated in the hospital. The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). During a certain period of time, Neu without permission of his client, withdrew over fifty-two thousand dollars from the client's trust fund. Forty thousand of this came on four unauthorized withdrawals from the guardianship. Neu deposited this money into his own trust account. Id.

These funds were put towards a music venture which Neu was promoting in south Florida, similarly to the concert venture of Appellant and Koren. The music venture failed but Neu managed to repay the funds. Even though an unauthorized withdrawal took place, the court ruled that in order to find an attorney acted with dishonesty, fraud or misrepresentation, the Bar must show the necessary element of intent. Courts have found that an attorney's lack of intent to deprive, defraud or misappropriate a client's funds supported a finding that the attorney's conduct did not

constitute dishonesty, misrepresentation, or fraud. The Florida Bar must establish that Neu intended to convert his clients funds and consequently that he acted with the level of dishonesty, misrepresentation, deceit and fraud. Id.

Since the Bar failed to prove that Neu acted with intent, the Supreme Court held that the negligent co-mingling of personal and trust funds resulted in a trust violation which warranted only a six-month suspension. Id.

In The Florida Bar v. Parsons, 238 So. 2d 644 (Fla. 1970), the appellant has been charged in circuit court with passing worthless checks, but he was found not guilty by reason of insanity. The Florida Bar subsequently brought disciplinary charges against him on these and other allegations of misconduct. Parsons' insanity notwithstanding, the Court accepted the recommended discipline of a one-year suspension, pending restitution to those injured and restoration of mental competence, and probationary supervision. Cited in The Florida Bar v. Musleh, 453 So. 2d 794, at 797 (Fla. 1984).

Similarly, in The Florida Bar v. Musleh, 453 So. 2d 794 (Fla. 1984), even though the referee gave the proper weight and effect to respondent's evidence of mental illness, the court found that the recommended suspension from the practice of law for six months was not warranted, but rather only a suspension for 90 days was justified in light of the respondent's unblemished record. Id.

In Musleh, the Bar filed a complaint alleging violations of various rules. Respondent answered that the conduct giving rise to

the complaint was "not intentional or willful, but occurred during a time when he was mentally incompetent and not responsible for his acts." Id. at 796. Respondent recited the outcome of his criminal trial and also detailed the diagnosis of bi-polar affective disorder--manic-depressive illness and the treatment of his mental condition. He did not deny the nature or the occurrence of the events underlying the criminal charges and the Bar complaint. Id.

At the hearing, respondent presented several character witnesses, including several professional colleagues and personal friends, who testified as to his 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. Id.

The referee found that respondent was clearly mentally ill at the time of the infractions and recommended that respondent be found guilty on all counts and be suspended from the practice of law for six months. Musleh at 796.

The Supreme Court stated that "in weighing the proper discipline to be assessed on the facts of each case, courts are mindful of the three purposes of Bar discipline--punishment of the offender, deterrence of those who might be tempted to emulate the wrongdoer, and protection of the public." Id. at 797 citing The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). While recognizing the gravity of respondent's misconduct, the Supreme Court stated that it would consider in mitigation his

> severely limited ability to control his activity. We cannot see how greater deterrence or protection of the public will be achieved by a lengthy suspension of one who, until this episode, had an unblemished record and who has now, with the help of ongoing medical assistance, returned to his former level of conduct and practice. We, therefore, suspend respondent from the practice of law for ninety days."...

(Emphasis added). Musleh at 794.

Pursuant to the Florida Mitigation Standards and the Supreme Court ruling in Musleh, under these circumstances the recommended punishment is not warranted in light of Appellant's unblemished record and proven mental disability.

Absolutely no bar grievance procedures had ever been filed against Appellant prior to the instant action. The recommended punishment including public speeches at Appellant's own expense and forcing Appellant to seek out an additional physician to treat and report to the Bar again at his own expense while taking away Appellant's livelihood for thirty-six months is UNWARRANTED, UNPRECEDENTED and INSENSITIVE to the nature of mental illness and the recovery process. In fact, the Florida Bar now has adopted a program for its members which treats mental illness and is strictly confidential.

VI. WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED WHERE THE RECOMMENDED DISCIPLINE OF SUSPENSION FROM THE PRACTICE OF LAW FOR THIRTY-SIX (36) MONTHS PUNISHMENT IS UNREASONABLE AND IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT WHEN REASONABLE ALTERNATIVES EXIST WHICH COULD BE UTILIZED.

A. The Americans with Disabilities Act (ADA) prohibits discrimination against persons with mental disabilities.

The ADA prohibits discrimination against persons with mental disabilities. 42 U.S.C. Section 12132 of the Americans with Disabilities Act (ADA) 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 denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Relevant definitions provided in Section 12131 of the Act are as follows:

> **Public entity** is defined to mean (A) "any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; ...."
>
> **Qualified individual with a disability** is defined to mean "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

Discrimination on the basis of disability in discipline and in

discharge policies are prohibited by the ADA and other federal laws regulating discrimination. 42 U.S.C. Section 12112(a); 28 C.F.R. Section 41.52(c)(2); 41 C.F.R. Section 60-250.4(a); 60-741.4(a).

If an employee requires accommodation to perform marginal job functions, and an employer has refused to provide a reasonable accommodation that did not constitute an undue hardship, it may not discipline or terminate the employee for unsatisfactory performance caused by the lack of accommodations. However, an employer can hold employees with disabilities to the same standard of performance of essential job functions, with or without accommodation, as other similarly situated employees without disabilities. Technical Assistance on the Employment Provisions (Title I) of the Americans with Disabilities Act - Explanation of Key Legal Requirements, Equal Employment Opportunity Commission, January 28, 1992.

Employers must insure that those employees who need an accommodation to perform a job function are not evaluated on their ability to perform the function without the accommodation, and that the evaluation is not downgraded in any way because the accommodation is necessary.

In the instant case, it is clear that The Florida Bar Association meets the required definition of a "Public Entity" within in the meaning of the ADA since it clearly is an agency of the State of Florida charged with the regulation of several thousands state licensed attorneys. Also, Appellant is clearly a "Qualified Individual with a Disability" within the meaning of the

ADA where he is an individual with a disability who meets the essential eligibility requirements for the receipt of services and the participation in programs provided by the Florida Bar since he was and is a member.

Unquestionably, discrimination on the basis of Appellant's disability in the instant disciplinary proceeding and in the suspension policies by the Florida Bar are prohibited by the ADA and other federal laws, as cited above.

B. Bar Associations are subject to the ADA.

Bar Associations are employers subject to the provisions of the ADA. In a very recent bar examination accommodations case, the federal district court ruled that under the ADA the exam applicant, who had a severe visual disability, should be allowed a four-day, rather than a two-day, testing schedule, along with other accommodation. D'Amico v. New York State Board of Law Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993).

In D'Amico, the applicant for the bar examination showed the presence of irreparable injury to her ability to be admitted to practice law and secure legal employment as a result of alleged ongoing discrimination in violation of the ADA from the refusal of the Board of Law Examiners to allow a four-day period to take the test rather than the usual two days in light of the applicant's severe visual disability, which the court found supported the issuance of a preliminary injunction to compel the board to provide the applicant with her requested accommodations.

The court further stated that an individual analysis must be

made with every request for testing accommodations by people with disabilities and determination of reasonableness of accommodations under the ADA must be made on a case-by-case basis. Relying on the opinion of the applicant's treating physician, the court said that the board's position should be given little weight, since it had "no ability to make determinations about the physical capabilities of one afflicted with the disability or disease." The D'Amico court ruled that the applicant for the state bar examination with severe visual disability established a sufficient likelihood of success on the merits to warrant a preliminary injunction requiring the examiners to provide all testing accommodations recommended by applicant's physician absent any medical evidence to rebut applicant's physician's opinion on nature of the disability and applicant's abilities, and despite the Board's claim that its testing expertise in determining that applicant could reasonably take the test in two days took precedence over physician's medical opinion. Id. at 221.

It is fundamental that The Florida Bar Association is an employer and subject to the provisions of the ADA. Even the Florida Supreme Court may be held liable in its capacity as a rule-making body for the Florida Bar, as evidenced by the recently filed case in Miami by several bar applicants against the Florida Board of Bar Examiners and the Florida Supreme Court.

In the instant case an individual analysis and determination of the reasonableness of accommodations must be made on a case by case basis. Following the reasoning of the D'Amico court, the

opinion of the Appellant's treating physician must be given great weight and the board's position should be given little weight, since here too it has "no ability to make determinations about the physical [or mental] capabilities" of the Appellant's disability or disease. D'Amico.

C. Manic depression is considered a mental handicap for purposes of the ADA.

Manic depression is a mental handicap which is actionable under the ADA. In a 1985 case, a person sought monetary and injunctive relief for injuries sustained as a result of discrimination on the basis of his mental handicap in violation of the Rehabilitation Act of 1973, as amended in 1978, 29 U.S.C. Section 701 et seq. and the regulations promulgated thereunder. Gardner v. Morris, 752 F. 2d 1271 (8th Cir. 1985). Gardner was diagnosed as a manic depressive in 1973. The court stated that

> An individual suffering from this disorder can experience bi-polar episodes of the illness -- mania and depression. During a manic episode a person exhibits euphoria, rapidity of thought and speech, hyperactivity, paranoia, impaired judgement, impaired social and work habits, hypersexuality, and a tendency to sleep less than normal. During a depressive episode a person experiences diminished motor capacity, sadness, crying, inability to sleep or excessive sleep, loss of interest, hopelessness, and thoughts of suicide. An individual afflicted with manic depressive syndrome may be unable to communicate his or her problems to others during an episode and may resist necessary medical attention.

Id. at 1274. Although, the court found no discrimination based on the narrow facts of the case, it stated further that a person who can "perform the essentials of the job if afforded reasonable accommodations" is entitled to an opportunity to perform that job. Citing Treadwell v. Alexander, 707 F. 2d 473 at 477 (11th Cir.

1983).

However, the ultimate test is whether, with or without reasonable accommodation, a handicapped person "can perform the essential functions of the position in question without endangering the health and safety of the individual or others." 29 C.F.R. Section 1613.702(f) (1984); see Prewitt v. Unites States Postal Service, 663 F. 2d 292 at 310 (5th Cir. 1991).

Statistics show that a great number of attorneys suffer from depression. A recent North Carolina Bar Association survey showed that at any particular time, some 18 percent of attorneys are clinically depressed and that of these, some 5 percent are both addicted and depressed. These rates are twice that of the general population.

In response to an appeals court holding, some local bar associations have discontinued questions on the bar application asking whether the applicant had ever been treated or counseled for drug addition, alcoholism or mental health problems, or had ever entered an institution for such care. Questions relating to drug addiction and alcoholism have been limited to the last five years and an estimated 15 percent of lawyers are reported to have a dependency problem of some kind.

Few studies actually document the diagnoses or present problems of law students. However, in Florida, an unpublished study from the University of Miami Counseling Center which gathered data over two and one-half years, stated that 31% of law students were presented with conflict in or breakup of their primary

relationship, 23% presented with occupational or academic concerns, 13% presented with generalized depression, 5% presented with social/dating problems, 5% presented with generalized anxiety or tension, 5% presented with family conflicts, 4% presented with physical problems, 3% presented with eating disorders, and 1% presented with drug or alcohol problems and one student was suicidal. Maher, A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants, 23 Indiana L. Rev. 821 at 844 (1990).

Clearly, manic depression is a disability within the meaning of the ADA. At the hearing, testimony was presented from Appellant's wife concerning Appellant's hyperactivity, paranoia, impaired judgment, his impaired social and work habits, as well as his tendency to sleep less than normal. See supra, Issue II. Appellant's physician testified and the referee found that appellant suffered from manic depression and experienced bi-polar episodes of the illness. (R.23). As a person diagnosed with manic depression, at times Appellant was unable to communicate his problems to others [perhaps because of denial] and was resistant to necessary medical attention. In fact Appellant had apparently even been able to fool his treating physician into thinking all was well, at times. Following the Gardner analysis, Appellant experienced and presented testimony of many of his symptoms of manic depression, which is considered a mental handicap for purposes of the ADA.

D. Florida has a Civil Rights prohibition similar to the ADA.

In Florida, the applicable laws include Florida Civil Rights Act of 1992, codified as Florida Statutes Section 760.01, et seq., as enacted by Chapter 92-177, eff. July 1, 1992 and Florida Statutes Section 760.11 (concerning damages), eff. Oct. 1, 1992.

Florida Civil Rights Act protects, among others, persons with mental handicaps, physical handicaps, sickle-cell traits, AIDS, ARC, and HIV infection.

Persons liable under the Florida Civil Rights Act are defined to be employers, public and private, of 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, as well as employment agencies and labor organizations.

Florida law makes it unlawful for any person to discriminate against any other person seeking a license, certification, or other credential needed to engage in a profession, occupation or trade, seeking to become a member or associate of such a club, association, or other organization, or seeking to take or pass such examination, because of handicap.

Clearly, the Florida Bar Association is a employer as defined by the Florida Civil Rights Act where it regulates the admission and practice of thousands of state licensed attorneys. The Florida Civil Rights Acto protects Appellant, as a person with a mental handicap, from discrimination by the Florida Bar Association.

E. Damages are recoverable in Florida.

In any civil action brought under this section, the court may

issue an order prohibiting the discriminatory practice and providing affirmative relief from the effects of the practice, including back pay. Fla. Stat. Section 760.11(1994). The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries and punitive damages not to exceed $100,000. The court has discretion to award the prevailing party reasonable attorney's fees to be determined in a manner consistent with federal case law involving actions brought under Title VII of the Civil Rights Act of 1964. However, a civil action filed under this section must begin no later than one year after the date of determination of reasonable cause by the commission.

In the instant case, Appellant is eligible to collect compensatory damages, including but not limited to, damages for mental anguish, loss of dignity and punitive damages not exceeding $100,000 from the Florida Bar Association.

F. Reasonable Alternatives Exist which should be utilized.

The Florida Bar provides for reasonable alternative forms of punishment which should be utilized in the instant case. In The Florida Bar v. Lord, 443 So. 2d 983 (Fla. 1983), the Florida Supreme Court has established a three-prong standard concerning the imposition of discipline. The court stated:

> We have held that Bar disciplinary proceedings must serve three purposes. First, the judgment must be fair to society both in terms of protecting the public from unethical conduct, at the same time not denying the public the services of a qualified lawyer.
>
> Second, the judgment must be fair to the respondent and shall be sufficient to punish a breach of ethics and at the same time encourage reformation and

> rehabilitation; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Id. at 986.

Prior to the alleged offenses, Appellant's wife sought help in the form of a mental health treatment program from the Florida Bar. (T.363). At that time, unfortunately no mental health programs were available through the Florida Bar. In fact, the Florida Bar has only very recently instituted a mental health treatment program designed to help attorney's suffering with depression and anxiety.

As alternative penalties, this Court could require Appellant so long as he retains membership in the Florida Bar to have regular treatment and require that his physician be released from any patient privilege and file written reports with the Clerk of the Supreme Court. This Court could also order a probationary period and/or order supervision from another member of the Bar to help oversee his activities.

Finally, this is not a case where Appellant after the alleged offenses occurred sought medical treatment. The record is clear, Appellant sought the psychiatric care of Dr. Butler prior to, during and after the alleged offenses occurred. In fact, Appellant sought Dr. Butler's help in excess of forty (40) times during the time of the alleged offenses. Therefore, reasonable alternative sanctions should be imposed in the instant case.

CONCLUSION

Respondent, therefore, submits that this Court based upon the facts and evidence presented above should reverse the Referee's Report and requests attorney fees, costs and such other and further relief as shall seem right and proper to this Court.

RAYMOND O. GROSS
Attorney for Appellant
GROSS & KWALL
133 North Fort Harrison Avenue
Clearwater, Florida 34615
(813) 441-4947
(FAX) 447-3158
Florida Bar No.: 151365

IN THE SUPREME COURT
STATE OF FLORIDA

PETER CHARLES CLEMENT,

Appellant,

vs.

THE FLORIDA BAR,

Appellee.

_____/

CASE NO. 82,097
TFB NO. 92-10,252 (6A)
93-10,633 (6A)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies were forwarded to the FLORIDA SUPREME COURT and one copy to BONNIE L. MAHON, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607 on the 5th day of May, 1994.

PETER C. CLEMENT
35084 U.S. 19 North
Palm Harbor, FL 34684
(813) 789-6000