IN THE SUPREME COURT
STATE OF FLORIDA

6/29

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PETER CHARLES CLEMENT,

Appellant,

vs.

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

THE FLORIDA BAR,

Appellee.

_____/

REPLY BRIEF

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PRELIMINARY STATEMENT

The symbols for references used in the Appellant's initial brief will also be used in this reply brief and are restated for convenience. 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"

"IB" for "Initial Brief"

"AB" for "Answer Brief"

STATEMENT OF THE CASE AND OF THE FACTS

It is submitted that the case and facts in this cause were sufficiently stated by the Appellant in the Statement of the Case and of the Facts contained in his Initial Brief. The Appellant, therefore, adopts for this Reply Brief the Statement of the Case and of the Facts of his Initial Brief by reference.

QUESTION PRESENTED

The Appellant and Appellee in the earlier briefs have used different statements of the Question Presented. The Appellant adheres to his original statement of the Question Presented, which is restated here for convenience.

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 facts and recommendations contained in the referee's report should not be approved where the bar failed to present clear and convincing evidence free of substantial doubts and inconsistencies. Appellant did not know right from wrong 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 of the alleged offenses. 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 presented testimony as to his irrational behavior in both 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 and relied upon testimony from a witness which was inconsistent with prior sworn pleadings he filed in a case in which he lost before the animosity and bitterness developed between the witness and Appellant. Furthermore, the referee committed reversible error where it solicited and admitted telephonic testimony from a witness in a foreign country where the oath was not executed in accordance with the statutory requirements for taking oaths in foreign countries and thereby said testimony should be excluded from

consideration. Finally, the referee committed reversible error where the referee's recommendations for punishment are too harsh and the Appellee's recommendation for disbarment is totally unreasonable in light of the mitigating factors found by the referee and 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 Appellee's position that the unrebutted expert testimony of Appellant's treating physician should be rejected as unworthy of belief is unsupported by Florida case law. IB.20-26. In fact, in the only case relied upon by the Appellee in its first argument this Court held that where an attorney was found guilty of diversion of monies thought to be with permission of the owner, a suspension for only 90 days was warranted. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). Following the Stalnaker holding here, even if Appellant were guilty of diversion of Koran's monies thought to be with his permission then only a suspension for 90 days would be warranted.

Despite the total lack of supporting case law, Appellee's argument must also fail because of its incompleteness. Although the Appellee concedes that no other expert testimony was provided to rebut the testimony of Dr. Butler, Appellee argued that Dr. Butler's prior testimony rebutted his ultimate testimony at trial. AB.26. Even though examples of discrepancies in Dr. Butler's testimony were provided (IB.21-25), Appellee failed to mention the reasonable explanations provided by Dr. Butler.

At the hearing, Dr. Butler stated that two letters with different dates were concerning different matters, i.e., Appellant's mania in one letter and his mania and depression in the

other. (T.271, IB.8). Also, regarding the fact that certain documents were not provided to Appellee when Appellant's original file was copied and sent, Dr. Butler explained that he had delegated this task to his clerical staff as usual and that he failed to notice that certain documents were not sent. If he were attempting to cover up as the Appellee insinuates, common sense should prevail, after all why did he bring the entire file to court including the missing documents if he were trying to conceal information from the Bar?

In light of the reasonable explanations provided by Dr. Butler, Appellee's argument that Dr. Butler's prior testimony rebutted the doctor's ultimate trial testimony lacks substance and is not persuasive.

Therefore, the Referee's findings and rulings regarding Dr. Butler's lack of credibility should not be approved and the doctor's opinion that Appellant did not know right from wrong at the time of the alleged offenses should be given full consideration. Based upon the record, this Court should concur with Appellant that there is simply an absence of evidence to support the referee's recommendation on this issue.

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.

Appellee argues that the referee was correct in its exclusion of the testimony of Appellant's wife regarding her opinion of Appellant's sanity at the time of the alleged offenses once again without citing a single Florida case in support of this argument.

Appellee first argues that since Appellant's wife had not "provided any testimony to establish that she knew or understood the legal test for insanity or incompetency," that the exclusion of her opinion testimony was proper. AB.27. In Florida, however, such a requirement does not exist and furthermore absolutely no case law or statute exists which supports such a requirement. Rather, in Florida the case law merely requires that an ordinary witnesses must have had an adequate opportunity to observe the manner or conduct of such person before they may offer their opinion as to the mental condition or appearance of said person. IB.12. and cases cited in Appellant's initial brief.

Appellant's wife had ample opportunity to observe Appellant over the entire time that the alleged offenses occurred. Appellant's wife's opinion that he did not know right from wrong at the time of the alleged offenses should have been admitted and given full consideration by the referee. The referee's decision to exclude said opinion testimony, therefore, constituted reversible error.

Appellee next argues that since the referee heard other

testimony including that from Dr. Butler concerning Appellant's mental condition that the exclusion of Appellant's wife's lay opinion testimony was "harmless." AB.27. In the preceding pages of its brief, Appellee ironically argues quite forcibly that Dr. Butler's testimony lacked credibility. AB.20-26. Clearly, Appellee seeks to have its cake and eat it too with this argument!

The referee here clearly abused his discretion in excluding the opinion testimony of Appellant's wife where she had observed Appellant over a very long period of time during which he suffered from a bi-polar, manic-depressive disorder as well as prior and subsequent to the time of the alleged offenses. Based upon the record, this Court should concur with Appellant that there is simply an absence of evidence to support the referee's recommendation on this issue.

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.

Appellee concedes in this argument that although Koran initially refused to loan Appellant the $5,000.00 earnest money on deposit, he "ACQUIESCED." AB.29. This is exactly Appellant's point. Koran authorized Appellant to use the escrow deposit for his own personal use when Koran agreed to make a $5,000 loan to Appellant. Since Koran gave his permission (even though he may have been reluctant) to Appellant to use the $5,000 escrow deposit, no misappropriation of client's funds occurred. Based upon the record, this Court should concur with Appellant that there is simply an absence of evidence to support the referee's recommendation on this issue.

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.

Appellee argues that since in bar disciplinary proceedings a referee is not bound by the technical rules of evidence, then the testimony of Mr. Tisseaux from Costa Rica should not be excluded even though it was administered in violation of the established Rules of Civil Procedure in Florida and Section 92.50 of the Florida Statutes. AB.32. Even though a referee may not be bound by the technical rules of evidence, he is bound to uphold Appellant's procedural due process rights which safeguard Appellant's liberty and property and are mandated by the 6th Amendment and made applicable to the states' procedure by the 14th Amendment of the U.S. Constitution. Appellee here seeks to deny Appellant his livelihood and thereby deny him his Constitutional property rights. Mr. Tisseaux's testimony was admitted in direct violation of the U.S. Constitution, the established Rules of Civil Procedure and the Florida Statutes. IB.25-27. Based on the tainted testimony in the record, this Court should concur with Appellant that there is simply an absence of evidence to support the referee's recommendation on this issue.

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.

It is Appellee's position that Appellant should be disbarred because of his misconduct in light of the aggravating factors and notwithstanding the mitigating factors found by the referee. AB.33-47. It is Appellant's position that disbarment is not appropriate for this case in light of the mitigating factors found by the referee notwithstanding the aggravating factors.

The allegations against Appellant can be capsuled into one basic charge: that Appellant misused $5,000 of his client's funds for personal use. This charge stems from a single complaint filed by one, sole disgruntled former client. AB.37. Appellee concedes and Appellant and Koran both testified that the $5,000 used by Appellant for his personal use was a loan to be repaid. AB.29. Moreover, Koren has received $5,000 from Appellant and thus has been made whole.

In a similar disciplinary proceeding, the Supreme Court found that where the respondent presented an array of support for his good character, good reputation, dependability, integrity and fidelity to duty on his part, none of which was contradicted by anyone but the key witness, no ground whatever existed upon which it would be authorized to disbar the attorney. State v. Oxford,

127 So. 2d 107 (Fla. 1960). In Oxford, the allegations against the respondent were supported only by the testimony of one key witness. In her first appearance she testified that respondent knew nothing about the counterclaim in question. This testimony the court noted was given at a time before the animosity and bitterness had materialized between the key witness and the respondent. In her final testimony the key witness completely reversed her story and charged that the respondent had directed her in all her improper activities. The court stated that "No lawyer should be disbarred on discredited evidence." Id. at 111.

Similarly, in the instant case Koren first stated that his escrow funds on deposit with Appellant were loaned to Mr. Montello, based on Koren v. Montello. After Koren's lawsuit was dismissed by the court, an animosity and bitterness developed between Koren and Appellant and Koren then filed this complaint with the Florida Bar and then similarly completely reversed his story and stated that Appellant had misappropriated the same escrow funds. Pursuant to the holding in Oxford, this court should find that Appellant should not be disbarred on the discredited evidence provided by Koren.

In other similar disciplinary proceedings, the Supreme Court has held that conduct relating to deficits in trust account which extended over a two-year period and amounted to over $24,000 warranted a suspension for six months, The Florida Bar v. Welty, 382 So. 2d 1220 (Fla. 1980), and that a violation of fiduciary duties in connections to failing to deliver a $5,000 check to the proper party warranted only a public reprimand. The Florida Bar v.

Sterling, 380 So. 2d 1295 (Fla. 1980).

In another disciplinary proceeding, the Supreme Court similarly held that self-dealing by an attorney to his client's detriment and to his own personal gain, and lying under oath before the grievance committee or referee hearing or both, in an effort to hide that he had taken advantage of his clients for his own personal gain, warranted only a 90-day suspension from the practice of law with automatic reinstatement after that time, to be followed by supervised probation of six months. The Florida Bar v. Neeley, 372 So. 2d 89 (Fla 1979).

In another disciplinary proceedings, the Supreme Court has also held that the attorney's use of funds held in trust for his client to pay personal expenses warranted a three-months suspension from the practice of law. The Florida Bar v. Lee, 397 So. 2d 921 (Fla. 1981); The Florida Bar v. Kates, 387 So. 2d 947 (Fla. 1980)(failure to properly account for trust monies and neglect in assisting client warrants suspension from the practice of law for period of three months and one day).

Furthermore, it is well settled that in disciplinary hearings, the Bar must prove its allegations by clear and convincing evidence free of substantial doubts or inconsistencies. The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970). This Court also requires that not only a wrong, but a corrupt motive be present to authorize disbarment. Zachary v. State, 53 Fla. 94, 43 So. 925 (1907). The penalty should not be made for the purpose of punishment, The Florida Bar v. King, 174 So. 2d 398 (Fla. 1965),

and neither prejudice nor passion should enter into the determination. The Florida Bar v. Bass, 106 So. 2d 77 (Fla. 1958). The purpose of assessing penalties is to protect the public interest and to give fair treatment to the accused attorney. The Florida Bar v. Ruskin, 126 So. 2d 142 (Fla. 1961). The discipline should be corrective and the controlling considerations should be the gravity of the charges, the injury suffered, and the character of the accused. Holland v. Flournoy, 142 Fla. 459, 195 So. 138 (1940). Applying these standards, this Court cannot agree with Appellee that Appellant should be disbarred.

Appellee also argues that the Florida Standards for Imposing Lawyer Sanctions support its position that disbarment is appropriate and applicable in the instant case. AB.45-46. However, each of the standards cited begin, "Absent aggravating or mitigation circumstances, ..." The referee here found an abundance of mitigating circumstances to be present, not the least of which is that Appellant suffered from a bi-polar, manic-depressive disorder. AB.37. Thus the standards are not applicable and do not support disbarment in the instant case.

Finally, Appellant would like to address a final inconsistency in the Referee's report. Appellee correctly notes that the referee recommended that Appellant be found NOT GUILTY of violating Rule 4-8.1(a) and (b). AB.8. Thus, Appellant was clearly found NOT to have knowingly made a false statement of material fact. Rule 4.8.1(a).

Notwithstanding that Appellant was found not to have knowingly

made a false statement, the Answer Brief continually recites that the referee found that Appellant lied under oath during his deposition in Koren v. Montello or during the grievance committee hearing in this cause. AB.8, 35, 38, 39, 44. Thus, the referee's report is replete with inconsistencies and should therefore be disapproved.

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CONCLUSION

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

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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.

The Appellee's argument that the ADA does not apply to the instant case int supported by case law or statutory interpretation. The ADA as currently constituted applies not only to someone seeking membership or employment, but also under what circumstances discipline may be imposed. Discrimination on the basis of disability and 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).

Appellee argues that Appellant is not qualified to practice law or be a member of the Florida Bar because of conduct which occurred in the past while Appellant was suffering from bipolar manic depression, a recognized disability under the ADA. This is contrary to the intent of the statute. The ADA requires that the party seeking to impose discipline, impose reasonable alternatives to discipline where the party suffers from a disability.

Appellant presented significant testimony from both expert and lay witnesses which clearly established the existence of the recognized disability at the time of the actions which led to the discipline. Reasonable alternatives to the sanctions suggested include continued regular psycho-therapy with appropriate monitoring and progress reports filed with the court.

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_____/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing was 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 14th day of June, 1994.

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