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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 AMENDED CROSS REPLY BRIEF

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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. "IB" will refer to the Initial Brief of Respondent filed May 5, 1994. "AB" will refer to the Answer Brief and Initial Brief in Support of Cross Petition for Review of The Florida Bar filed May 27, 1994. "RB" will refer to the Reply Brief of Respondent filed June 14, 1994.

STATEMENT OF FACTS
AND OF THE CASE

CASE NO. 82,097

The Florida Bar adopts by reference its initial statement of the facts and of the case as contained in its Answer Brief and Initial Brief in Support of Cross Petition for Review.

SUMMARY OF ARGUMENT

The Respondent's argument in his Reply Brief is based almost entirely on misstatements of The Florida Bar's position and illogical interpretations of the Referee's findings and recommendations. Respondent argues in his Brief that The Florida Bar conceded that Koren acquiesced to loan the \$5,000.00 earnest money deposit to Respondent for personal use and therefore, no misappropriation occurred. This is not a correct statement of The Florida Bar's position. The Bar acknowledged that Koren acquiesced to permitting Respondent to use the deposit for his personal use only after, and without knowledge that, Respondent had already misappropriated the funds.

Respondent further argues that all of the charges against him can be capsuled into one basic charge that being that, he misused \$5,000.00 of his client's funds for personal use, and that the charge stems from one disgruntled client. The Bar strongly disagrees with this argument. Respondent's misconduct in this case involved two separate clients. In addition, Respondent's misconduct included: misappropriation of clients' funds; misrepresentation, fraud and deceit; commission of a criminal act; entering into a business transaction with a client without full disclosure of potential conflict of interest; various acts of negligence in representation of the clients; and multiple trust account violations.

Respondent also argues in his Reply Brief that Mr. Koren's testimony regarding when he gave his permission for the loan was

discredited because Koren had changed his position after animosity and bitterness had developed between Koren and Respondent. Respondent's position is not supported by the record or the Referee's findings. The Referee believed testimony of Koren's prior lawyer, Baum, that Koren did not provide or review his information regarding the date when Koren gave his permission for the loan, and the Referee accordingly found that Respondent misappropriated the funds before obtaining Koren's permission to use the funds.

Finally, Respondent argues that the Report of Referee is "replete with inconsistencies and should, therefore, be disapproved". Respondent argues that the Referee's finding that he had lied under oath either during his deposition in Koren v. Montello or during the grievance committee hearing was inconsistent with the Referee's recommendation that he be found not guilty of violating Rule 4-8.1(a) and (b). Such a finding is not inconsistent with the Referee's recommendation that Respondent be found not guilty of violating Rule 4-8.1(a) and (b). The Referee recommended a not guilty finding because the Bar failed to sustain its burden of proof that the Respondent lied during the grievance committee hearing, rather than during his deposition in the civil case of Koren v. Montello. The evidence was clear and convincing that Respondent lied under oath; however, the evidence was not clear and convincing as to which occasion Respondent lied.

The Referee's findings of fact and recommendations of guilt should be upheld by this Court.

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 Florida Bar stands on its position as set forth in its Answer Brief and Initial Brief in Support of Cross Petition for Review.

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.

The Florida Bar stands on its position as set forth in its
Answer Brief and Initial Brief in Support of Cross Petition for
Review.

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.

The Florida Bar stands on its position as set forth in its Answer Brief and Initial Brief in Support of Cross Petition for Review. In addition, The Florida Bar cross replies to Respondent's Reply Brief as follows:

Respondent argues in his Reply Brief that The Florida Bar conceded in its Answer Brief that Koren gave his permission to Respondent to use the \$5,000.00 escrow deposit and therefore, no misappropriation of client's funds occurred. (RB p. 10). Respondent's presentation of The Florida Bar's argument is inaccurate and his conclusion based thereon incorrect.

Respondent's misappropriation of his client's funds occurred before Koren acquiesced to the loan. Koren issued the \$5,000.00 check on January 4, 1991, to Respondent's trust account as a refundable earnest money deposit for the purchase of a shopping center. (RR, p.8). Respondent deposited Koren's check on January 7, 1991, and on the same day, withdrew Koren's \$5,000.00 deposit and used it for his own purposes without Koren's knowledge or consent. (TRII, p. 201; R, TFB Exhibits No. 7 and No. 9). Koren wrote to Respondent on January 28, 1991, requesting the return of his \$5,000.00 earnest money deposit if the sale of the shopping center was not going to occur. (R, TFB Exhibit No. 2). Between January 28, 1991 and February 5, 1991, Koren traveled from Miami to Palm Harbor to get his \$5,000.00 deposit from Respondent. It was

at this time, after the funds had already been misappropriated by Respondent, that Koren acquiesced to loaning the \$5,000.00 to Respondent on a short-term basis when it appeared to Koren that Respondent was not going to return the money on that day. (TRI, pp. 236-237).

At the time of obtaining Koren's permission to use the \$5,000.00, Respondent failed to inform Koren that he had already withdrawn and used the funds for his own purposes over three (3) weeks earlier without his client's permission. Respondent did not put the terms of the \$5,000.00 loan in writing, he did not advise his client of his potential conflict of interest, and he did not advise his client to seek independent legal counsel regarding the loan. Respondent misappropriated his client's funds, misrepresented to his client the surrounding circumstances at the time of obtaining his permission to use the funds, entered into a business transaction with his client without disclosing his potential conflict of interest, and failed to protect his client's interests.

Respondent's interpretation of The Florida Bar's foregoing argument as presented in its Answer Brief as a concession of The Florida Bar that Koren acquiesced to the loan and Respondent's conclusion that there was, therefore, no misappropriation of funds by Respondent is completely incorrect and unsupported by the facts of this case.

ISSUE IV

WHETHER THE REFEREE'S FINDINGS OF FACT BASED ON THE TELEPHONIC TESTIMONY OF PHILLIPPE TISSEUX 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.

The Florida Bar stands on its position as set forth in its Answer Brief and Initial Brief in Support of Cross Petition for Review.

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.

The Florida Bar stands on its position as set forth in its Answer Brief and Initial Brief in Support of Cross Petition for Review. In addition, The Florida Bar cross replies to Respondent's Reply Brief as follows:

Respondent's contention that all of the allegations against Respondent could be "capsuled into one basic charge: that appellant misused \$5,000.00 of his client's funds for personal use" and that charge stemmed from one disgruntled former client, is contrary to the evidence in the record and the findings and recommendations of the Referee. (RB p. 12; RR pp. 2-23). The Bar strongly disagrees with this statement. The charges against Respondent were numerous and stemmed not only from his misconduct towards Koren, but also from his misconduct towards another client, Mr. Tisseaux, as well as from various trust account violations. Respondent's misconduct involved the following: misappropriation of client's funds from not only Mr. Koren, but also from another client, Mr. Tisseaux; misrepresentation, fraud and deceit towards both of the aforementioned clients; failure to provide competent representation to a client; failure to act with reasonable diligence; failure to keep a client reasonably informed; entering into a business transaction with a client without full disclosure to client of potential conflict of interest; commission of a criminal act of theft of client's funds; failure to hold a client's property or

funds in trust separate from his own property and funds; and multiple violations of the rules regulating maintenance of trust accounts. The Florida Bar's Statement of the Facts and of the Case in its Answer Brief, as well as the Findings of Fact and Recommendations in the Report of Referee set forth detailed facts regarding specific misconduct and rule violations engaged in by Respondent. (AB pp. 1-17; RR pp. 2-22).

Further, The Florida Bar has not conceded that the \$5,000.00 used by Respondent for his personal use was a loan to be repaid or that Respondent's subsequent restitution to Koren has made him whole as was argued by Respondent in his Reply Brief (RB p. 12). To the contrary, it is The Florida Bar's position and the finding of the Referee that Koren's \$5,000.00 check made payable to Respondent's trust account was to be an earnest money deposit if a contract to purchase a shopping center was presented and accepted by Dr. Kadry. (RR p. 8). Respondent did not repay the \$5,000.00 to Koren until after charges were brought against him by The Florida Bar, and the repayment did not include interest. (TRI, pp. 181-182, 252; AB p. 8). Koren was deprived of his \$5,000.00 for almost three (3) years and Koren received no interest for the time that Respondent used his funds. Koren consequently has not been "made whole" as argued by Respondent. (RB p. 12).

The Respondent argues in his Reply Brief that Koren filed his complaint with The Florida Bar out of an animosity and bitterness that developed between Koren and Respondent after Koren's lawsuit, Koren v. Montello, was dismissed by the court. Respondent argues

that under the case State v. Oxford, 127 So. 2d 107 (Fla. 1960), Respondent should not be disbarred based on discredited evidence provided by Koren. (AB p. 13). Respondent relies on a statement contained in a pre-trial statement filed by Koren's lawyer, Baum, in the Koren v. Montello case which alleged that on or about January 4, 1991, Respondent requested permission to apply the \$5,000.00 for his own personal use as proof that Koren had reversed his story when he filed his complaint with The Florida Bar. (RB p. 13).

Respondent's conclusion is not supported by the evidence in the instant case. Koren's lawyer, Baum, testified in the final hearing before the Referee that he used the January 4, 1991 date in the pre-trial statement in Koren v. Montello because he did not know the specific date when Koren gave permission to transform the deposit into a loan, and so, he used the earliest date he had, the date of the check from Koren. Baum further testified that Koren did not state to him that he had given Respondent his permission as early as January 4, 1991, nor did Koren review the pleading before it was filed. (TRII pp. 91-100, RR pp. 9-10).

The Referee specifically found, based on Baum's testimony, that the pleadings filed in Koren v. Montello did not support Respondent's position that Koren agreed to loan him the \$5,000.00 on or prior to January 7, 1991. (RR p. 10). Koren's testimony and evidence was not discredited as suggested by the Respondent and, therefore, the holding in the Oxford case is not applicable to the instant case.

Finally, Respondent argued that the Referee's Report is "replete with inconsistencies and should therefore be disapproved" because the Referee found that Respondent either lied under oath during his deposition in Koren v. Montello or that he lied under oath during the grievance committee hearing but recommended that Respondent be found not guilty of violating Rule 4-8.1(a) and (b), Rules Regulating The Florida Bar. (RB p. 15). The Referee's findings and recommendations of guilt are not inconsistent. Respondent's interpretation of the Referee's findings and recommendations is again faulty. Respondent contends that because the Referee recommended Respondent be found not guilty of violating Rule 4-8.1(a) and (b) (a lawyer. . . in connection with a disciplinary matter shall not knowingly make a false statement of material fact or fail to disclose a fact necessary to correct a misapprehension. . .) he was therefore, found not to have knowingly made a false statement. (RB pp. 15-16). This is simply not correct.

The Referee specifically found that Respondent either lied under oath during his deposition in Koren v. Montello, or that he lied under oath during the grievance committee hearing because the testimony he gave in both proceedings was conflicting.

Rule 4-8.1(a) and (b) concerns an attorney knowingly making false statements or failing to correct misapprehensions in connection with a disciplinary matter. In order to sustain its burden of proof in regard to the foregoing rules, The Florida Bar had to establish by clear and convincing evidence that Respondent

was lying during the grievance committee hearing, rather than in his deposition in Koren v. Montello, since Koren v. Montello was a civil case. The Referee found Respondent not guilty of violating Rule 4-8.1(a) and (b) because The Florida Bar did not sustain its burden of proving that Respondent lied during the grievance committee hearing, rather than in his deposition in Koren v. Montello. (RR p. 19).

The Referee's recommendation that Respondent be found not guilty of violating Rule 4-8.1(a) and (b) is not inconsistent with his finding that Respondent lied under oath during the grievance committee hearing or his deposition in Koren v. Montello. The Referee simply was unable to determine in which proceeding Respondent lied.

ISSUE VI

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

The Florida Bar stands on its position as set forth in its Answer Brief and Initial Brief in Support of Cross Petition for Review.

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.

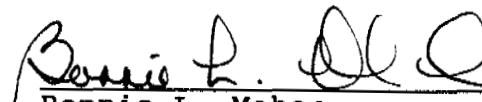
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Amended Cross Reply Brief has been furnished by Airborne Express to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy by regular U. S. mail to Raymond O. Gross, Esq., Counsel for Respondent, at 133 North Ft. Harrison Avenue, Clearwater, Florida 34615; and a copy by regular U. S. mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 25th day of July, 1994.


Bonnie L. Mahon