IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case No. SC10-1175

v.

KOKO HEAD,

Respondent.

TFB File Nos. 2009-31,193 (4C)
2010-30,043 (4C) and
2010-30,467 (4C)

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THE FLORIDA BAR'S REPLY BRIEF

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ARGUMENT

In Respondent's Answer Brief and Initial Brief on Cross Petition, as to Count I, Respondent merely attempts to negate all of the issues raised in the Bar's Initial Brief. Consequently, as to those arguments, there is nothing new to reply to and the Bar will rest on its arguments as presented in the Initial Brief.

However, Respondent has raised one new argument regarding Count II – that the Referee erred in finding him guilty of violating 4-1.8(h) because the Referee found that Respondent was obligated to notify his former client that he was entitled to independent representation when attempting to settle a "fee dispute." This argument must, however, fail since it incorrectly characterizes the situation and then misapprehends the language of the Rule.

Mr. Tastan filed his grievance with the Bar alleging that Respondent had not represented him appropriately in his water intrusion case. Mr. Tastan testified that, in his opinion, Respondent had undermined his case by such things as: failing to provide copies of documents including an offer of settlement, drafting poor responses, delaying the case unnecessarily by requesting many extensions, responding late on several occasions to important time sensitive documents, and failing to communicate with him.

Ultimately Respondent withdrew from Mr. Tastan's case which later proceeded to settlement via Mr. Tastan's successor attorney. TR I, 28 – 41.

The evidence adduced at trial shows that Mr. Tastan's complaint was initially closed by the Bar as a fee dispute. *See*, Respondent's Exhibit 25.

However, after a failed request for fee arbitration (*see*, Respondent's Exhibit 26), Respondent sent directly to Mr. Tastan a letter attaching a civil complaint for fees allegedly owed stating that Respondent would not file the complaint if Mr. Tastan signed a general release. *See*, TFB Exhibit X.

Mr. Tastan testified that he felt threatened by Respondent's letter and as a result, he forwarded this communication to the Bar. Consequently, the Bar reopened his grievance and then alleged that Respondent had violated Rule Regulating The Florida Bar 4-1.8(h) by failing to simultaneously advise Mr. Tastan of his right to counsel.

Respondent argues first that Mr. Tastan has not alleged malpractice and that the Bar has neither pled malpractice nor proven it. In the alternative, Respondent then argues that when he sent his letter, Mr. Tastan was indeed represented by successor counsel in the water intrusion case and so Respondent did not violate 4-1.8(h) because his former client was not "unrepresented" for purposes of the rule.

The Rule in question provides:

> **(h) Limiting Liability for Malpractice.** A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

The rule obviously contains two sentences. The first sentence governs the situation where an attorney-client relationship has not yet been created. Thus it is "prospective" or "happening in the future." In other words, the potential for malpractice has not happened yet. Pursuant to this first sentence, in order for an attorney to make an agreement "prospectively" limiting the attorney's liability for future malpractice, the client **must** be independently represented in making that agreement.

The second sentence, the one relevant here, governs the situation where the attorney-client relationship already exists or existed and actual or alleged malpractice has already occurred. That is the only reasonable meaning for "[a] lawyer shall not settle a claim for such liability." Likewise when the Rule states "with an unrepresented client or former client" that language must mean, as in the first sentence, with an "unrepresented" in the potential malpractice case "client or former client."

The second sentence of the Rule clearly requires the "client or former client" to be advised of their right to counsel for purposes of settling an actual or potential claim of malpractice.

In this case, there is ample evidence that Mr. Tastan believed (though he may never have used the actual word "malpractice") that Respondent had committed malpractice. The Bar does not have to plead it or prove it. It is enough that the former client believed it and that Respondent attempted to be released from it. Additionally, there is no evidence in this record that Mr. Tastan was independently represented by counsel as to the potential malpractice. Indeed, when Respondent sent his letter offering to settle and be released, he sent it directly to Mr. Tastan and not to any attorney on his behalf.

Therefore, based on the second sentence in Rule 4-1.8(h), the Referee appropriately found that Respondent had a duty to advise Mr. Tastan in writing when he sent his proposed settlement/release offer of his right to counsel in that new matter and failed in that duty by not advising Mr. Tastan of his right to independent counsel for settlement/release purposes.

CONCLUSION

Based upon the foregoing reasons and as previously argued in the Initial Brief, The Florida Bar respectfully requests that this Honorable Court affirm the Referee's finding of guilt on Rule 4-1.8(h) but reject the Referee's recommended discipline and instead suspend Respondent for 91-days accordingly and order that he pay The Florida Bar's costs in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Reply Brief regarding Supreme Court Case No. SC10-1175, TFB File Nos. 2009-31,193(4C), 2010-30,043 (4C), and 2010-30,467(4C), has been furnished by U.S. Mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, a true and correct copy has been mailed by certified mail #7008 1830 0000 4285 6048, return receipt requested, to Respondent, Koko Head, whose record bar address is Law Office of Koko Head, 100 State Road 13, Suite D, Saint Johns, FL 32259-3839, and a copy has been mailed to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32301, on this 25th day of July, 2011.

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Carlos Alberto Leon, Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Reply Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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Carlos Alberto Leon, Bar Counsel