

No. _____

In The
Supreme Court of the United States

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PHILIP M. KLEINSMITH,

Petitioner,

vs.

THE STATE OF COLORADO,

Respondent.

◆

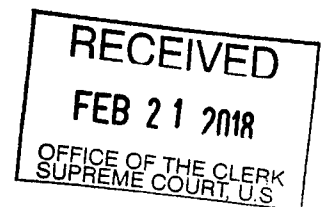
**On Petition For A Writ Of Certiorari
To The Supreme Court
Of The State Of Colorado**

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. *First Question.* Should the Colorado Supreme Court's disbarment of Mr. Kleinsmith be reversed because it is based on that Court's ruling that all funds received by a lawyer for expenses already incurred are the property of others, i.e. trust funds, said ruling being a contradictory, arbitrary and capricious reading of Rules 1.15A(a) and 1.15B(1) and (2) of the Colorado Rules of Professional Conduct (CRPC) (hereinafter "The Funds Rules") and Rule 8.4(c), CRPC, and, therefore, a violation of his right to due process under the 14th Amendment to the U.S. Constitution?

B. *Second Question.* Should the Colorado Supreme Court's disbarment of Mr. Kleinsmith be reversed because that Court's ruling that all funds received by a lawyer for expenses already incurred are the property of others, i.e. trust funds, said ruling being an irrational reading of The Funds Rules and Rule 8.4(c), CRPC, and, because that ruling permits the imposition of a severe penalty of disbarment on a lawyer as an agent of a law firm that any other agent of any other business is not subject, and therefore, violations of his right to the equal protection of the law under the 14th Amendment to the U.S. Constitution?

PARTIES

Philip M. Kleinsmith, Petitioner.

The State of Colorado, Respondent.

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The opinion of the Colorado Supreme Court is not published in P3d yet. It is cited as *Matter of Kleinsmith*, 2017WL4873281.

JURISDICTION

- A. Date of Opinion Appealed: October 30, 2017
- B. Date of Order Respecting Rehearing: November 20, 2017
- C. Date of Order Granting Extension of Time to File This Petition: None
- D. Statute Confirming Jurisdiction to Review by Certiorari: 28 USCA 2104

The Supreme Court has jurisdiction to hear this case under 28 U.S.C. § 1257(a).

APPLICABLE RULES AND CONSTITUTIONAL PROVISIONS

A. Colorado Rules of Civil Procedure

“The Supreme Court exercises all jurisdiction over all matters involving the licensing and regulation of those persons who practice law in Colorado.” (C.R.C.P. 202.1)

“Every attorney licensed to practice law in the state of Colorado is subject to the disciplinary and disability jurisdiction of the Supreme Court in all matters relating to the practice of law.” (C.R.C.P. 251.1(b))

“(a) The office of Presiding Disciplinary Judge of The Supreme Court of Colorado is hereby established . . .”

(b) . . . ;

(c) The Presiding Disciplinary Judge shall be authorized and empowered to act in accord with these Rules and to . . .

(d) Impose discipline on an attorney (C.R.C.P. 251.16)

“The Regulation Counsel shall act in accordance with these rules and:

(1) . . . ;

(2) . . . ;

(3) Conduct investigations as provided by C.R.C.P. 251.9 and 251.10 . . . ;

(4) Prepare and prosecute disciplinary and disability actions against attorneys as provided by these Rules;

(5) . . . ;

(6) Prepare and prosecute petitions for immediate suspension in conformity with C.R.C.P. 251.8; (C.R.C.P. 251.3)

“(a) *Post-Trial Motions*. Within 14 days of entry of judgment as provided in C.R.C.P. 58 . . . a party may move for post-trial relief, including:

(1) A new trial of all or part of the issues; . . .

(d) *Grounds for New Trial* . . . a new trial may be granted for any of the following causes:

(1) . . . ;

(6) Error of Law” (C.R.C.P. Rule 59)

“Within 14 days of the entry of an order as provided by this rule . . . a party may apply for post-hearing relief as provided by C.R.C.P. 59.” (C.R.C.P. 251.19)

“(c) *Appeal-How Taken*. An appeal from a Hearing Board to the Supreme Court shall be taken by filing a notice of appeal within the time set forth in this Rule”

“(g) The notice of appeal required by this rule shall be filed with the Supreme Court . . . within 21 days of the mailing of the decision from which the party appeals . . . ” (C.R.C.P. 251.27)

B. Colorado Rules of Appellate Procedure

“(a) *Time to Serve and File Brief*. The Appellant must serve and file the opening brief within 42 days after the record is filed . . . ” (C.A.R. Rule 31)

C. Colorado Rules of Professional Conduct

“A lawyer shall hold the property of a client or a third person that is in the lawyer’s possession in connection with a representation separate from the lawyers’ own property. Funds

shall be kept in trust accounts maintained in compliance with Rule 1.15B” (C.R.P.C. 1.15A(a))

“(a) Every lawyer in private practice in this state shall maintain in the lawyers’ own name or in the name of the lawyer’s law firm:

(1) A trust account or accounts, separate from any business . . . accounts . . . into which the lawyer shall deposit, or shall cause the law firm to deposit, all funds entrusted to the lawyer’s care and any advance payment of fees that have not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account when the lawyer is not holding such funds or payments.

(2) A business account or accounts into which the lawyer shall deposit or cause the law firm to deposit, all funds received for legal services. (C.R.P.C. 1.15B(a)(1) and (2)).”

Before June 17, 2014, these rules read the same, but with different numbering. Hereinafter, these rules are referred to as “The Funds Rules”.

“It is professional misconduct for a lawyer to . . . :

(c) engage in conduct involving dishonesty, fraud, deceit or mis-representation,” (Rule 8.4(c) CRPC)

D. Constitutional Provisions

“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without the due process of law; nor deny any person within its jurisdiction the equal protection of the laws" (U.S. Constitution, Amendment XIV, Section 1)

STATEMENT OF THE CASE

A. Underlying Facts

Philip M. Kleinsmith was admitted to the Colorado bar in October 1967. He was and is subject to attorney discipline by the Colorado Supreme Court through the Presiding Disciplinary Judge (hereinafter "PDJ") and the Regulation Counsel (*CO Supreme Court v. District Court*, 850 P.2d 150, 152 (CO 1983), and Rules 202.1, 251.1(b), 251.3, 251.16 CRPC). The judgment appealed herein (Appendix A attached) is the Colorado Supreme Court's affirmance of the PDJ's disbarment of Mr. Kleinsmith (Appendixes B and C attached).

At all relevant times to these facts, Mr. Kleinsmith acted as an employee and officer of Kleinsmith & Associates, P.C., a Colorado corporation (hereinafter "The Firm"). He was The Firm's sole shareholder.

The Firm represented U.S. Bank in seventy-four real estate foreclosures in 2012, 2013 and 2014. In

those foreclosures The Firm hired First American Title Co., LLC, and First American Title Co. of Montana, Inc. (hereinafter collectively "First American") to provide The Firm with title services (hereinafter "Title Services"). First American provided the Title Services and invoiced The Firm a total of \$57,338.00 therefor. The Firm invoiced U.S. Bank therefor via multiple invoices that included other incurred expenses and incurred attorneys fees. By multiple payments, U.S. Bank paid the \$57,338.00 (hereinafter "The U.S. Bank Payments"). There was no agreement between U.S. Bank and The Firm that The Firm was required to pay The U.S. Bank Payments to First American. There was no agreement between The Firm and First American that the Firm was required to pay The U.S. Bank Payments to First American. The Firm used the U.S. Bank Payments to pay expenses other than First American's Title Services. None of those other expenses were payments to Mr. Kleinsmith.

In these foreclosures, The Firm's initial services for U. S. Bank were:

- (1) A demand letter and other required letters were prepared and mailed to the liable parties and Title Services were requested;

- (2) An attorney examined the Title Services to determine whether any assignments and/or other documents were needed to be prepared, signed and recorded and who were the parties to be notified in the foreclosure;

(3) The initial foreclosure documents were prepared, mailed, filed and recorded;

(4) U.S. Bank was billed for the attorneys fees incurred, the Title Services incurred (with no reference to First American) and other expenses incurred.

First American obtained a judgment in a State of Montana court for the unpaid \$57,338.00 owed it by The Firm. Although both Mr. Kleinsmith and The Firm were sued, that judgment was only against The Firm. That Court specifically ruled that Mr. Kleinsmith had no liability for that judgment. That judgment was made a Colorado judgment. It has not been paid.

B. Proceedings Before Disciplinary Judge

On February 12, 2016, an attorney for First American requested pursuant to Rule 251.3, CRCP (quoted above), Colorado's Regulatory Counsel to investigate The Firm's failure to pay it the \$57,338.00 owed to it by The Firm. Regulatory Counsel wrote to Mr. Kleinsmith and he responded.

On April 1, 2016, pursuant to that same Rule, Regulatory Counsel filed his Petition for Immediate Suspension of Mr. Kleinsmith. It alleged that the U.S. Bank Payments were trust funds and the property of First American and that The Firm had committed conversion and violated Rule C.R.P.C. Rule 8.4(c) (quoted above), and The Funds Rules (quoted above) by not paying the U.S. Bank Payments to First American. Therefore, Mr. Kleinsmith should be immediately

suspended from the practice of law. Mr. Kleinsmith answered alleging that because the U.S. Bank Payments were payments for incurred expenses and were not trust funds of First American that had to be paid to First American, but, were property of The Firm which it could use to pay any of The Firm's obligations.

A hearing was held on May 23, 2016, before the PDJ. At the conclusion of the hearing, Mr. Kleinsmith submitted his Hearing Brief. It argued that The Funds Rules (quoted above) defined that funds received by a lawyer were of two types:

- (1) "Trust money", the property of others, i.e. monies paid to a lawyer for expenses and/or attorney's fees not yet incurred, and;
- (2) "Business money", the property of the lawyer, i.e. monies paid to a lawyer for expenses and/or attorney's fees already incurred.

The Hearing Brief argued that the U.S. Bank Payments were funds received for incurred expenses, and, therefore, The Firm's property and its use of them to pay The Firm's debts, other than its debt to First American, was not conversion, conversion being Regulatory Counsel's argument that Mr. Kleinsmith should be immediately suspended. Therefore, Mr. Kleinsmith requested that the PDJ deny the Petition.

The Hearing Brief also argued that the premise of Regulatory Counsel's argument that all funds received by a lawyer for expenses, already incurred, or not already incurred, are trust money arbitrarily and irrationally disregarded the clear meaning of The Funds Rules and was a violation of Mr. Kleinsmith's due process rights and equal protection rights under the 14th Amendment to the U.S. Constitution.

On May 31, 2016, the PDJ entered his Report Setting Forth Findings of Fact and Recommendation of Immediate Suspension under CRCP 251.8(b)(2). On June 10, 2016, following that Report the Colorado Supreme Court ordered Mr. Kleinsmith's immediate suspension. The PDJ's Report states:

"The PDJ concludes that Respondent's reasoning is contrary to the Rules of Professional Conduct and the Colorado case law. As noted above, claims of knowing conversion are governed by Colo RPC 8.4(c) and the interpretive case law. Here, the PDJ finds the elements of knowing conversion under *Varallo* (*People v. Varallo*, 913 P.2d 1, 10 and 11 (CO 1996)) are present: U.S. Bank provided approximately \$55,000.00 to the Respondent for title services rendered by First American, Respondent knew that First American was entitled to that money for services it had performed, and Respondent knew that U.S. Bank had not authorized him to use those funds for any purpose other than paying for title services. In short, Respondent had no valid basis for

treating the \$55,000 as his own (p. 4, Appendix E attached).

On the same page of that Report, the PDJ found:

“A holistic reading of the trust account rules does not support the interpretation that a lawyer may do what he or she pleases with monies provided by a client to reimburse third party costs.”

On July 1, 2016, pursuant to Rule 251.3, CRCP (quoted above) Regulatory Counsel filed a Complaint requesting Mr. Kleinsmith’s disbarment. Mr. Kleinsmith filed his Answer thereto. On August 1, 2016, Mr. Kleinsmith filed his Motion for Summary Judgment Dismissing Petitioner’s Complaint. It repeated the definition of funds received for incurred expenses, but, called them “Operating Funds”. It defined two types of “trust money”: “Unincurred Expense Trust Funds” and “Pure Trust Funds”. “Unincurred Expense Trust Funds” were defined as funds paid to a law firm for legal expenses not yet incurred and/or legal services not yet performed. “Pure Trust Funds” were defined as other’s property.

This Motion’s first conclusion was that because all of the U.S. Bank Payments were payments for Title Expenses, incurred expenses or “Operating Funds”, they were The Firm’s property which it could use to pay any obligations of The Firm. Conversely, they were not payment of unincurred attorneys fees and/or unincurred expenses, “Unincurred Expense Trust Funds” or the property of others, here, the property of First

American. Not being such, The Firm could not convert them and the Complaint should be dismissed.

The Motion also argued that an interpretation of The Funds Rules that all funds received by a lawyer as payment for incurred expenses were the property of the party with whom the expense was incurred that had to be paid to that party and the use of them to pay other firm obligations was conversion was contradictory, arbitrary, capricious and irrational and violated Mr. Kleinsmith's constitutional rights to due process and equal protection of the law.

Regulatory Counsel responded to Mr. Kleinsmith's Motion and filed his Cross Motion For Summary Judgment. It requested Mr. Kleinsmith's disbarment. It argued that the aforesaid interpretation of the Funds Rules was not contradictory, arbitrary, capricious and irrational because Mr. Kleinsmith's use of the U.S. Bank Payments was a dishonest conversion of those payments under C.R.P.C. Rule 8.4(a) (quoted above).

On September 16, 2016, the PDJ denied Mr. Kleinsmith's Summary Judgment Motion and granted Regulatory Counsel's Cross Motion (Appendix C attached). The PDJ characterizes Mr. Kleinsmith's statement of the types of funds received as "tortured, inconsistent with the content of" The Funds Rules, "and at odds with Colorado case law (p. 5, Appendix C). Other than citing C.R.P.C. 8.4(c), the PDJ does not explain how Mr. Kleinsmith's statement is "tortured," and "inconsistent" with the content of "The Funds Rules". The case law cited is discussed below (p. 16).

On November 18, 2016, the PDJ and the hearing board entered their Opinion and Decision Imposing Sanctions (Appendix B attached). On November 22, 2016, in accord with C.R.C.P. Rules 59 and 251.19, Mr. Kleinsmith filed his Revised Post-Judgment Motions. On December 14, 2016 they were denied. C.R.C.P. Rule 251.27 (quoted above) gave Mr. Kleinsmith twenty-one days to appeal this denial.

C. Proceedings before Colorado Supreme Court

On December 30, 2016, by his Notice of Appeal and Designation of Record Mr. Kleinsmith appealed the decision of the PDJ and hearing board to the Colorado Supreme Court. That Court gave Mr. Kleinsmith thru May 3, 2017, to file his Opening Brief. It was filed on April 28, 2017. It recited the facts stated above. In it Mr. Kleinsmith again argued that The Funds Rules defined the funds received by a law firm to be of three types: "Pure Trust Funds", "Unincurred Expense Trust Funds" and "Operating Funds". He again argued that the U.S. Bank Payments were payments for incurred expenses, The Firm's property, which it could not convert. Finally, he again argued that the PDJ's ruling that all funds received by a law firm for incurred expenses are trust funds and the property of the person with whom the law firm incurred the expenses which when used to pay other expenses was conversion was contradictory, arbitrary, capricious and irrational and a violation of Mr. Kleinsmith's due process and equal protection rights.

The majority opinion of the Colorado Supreme Court dated October 30, 2017 (attached as Appendix A, pp. 6 and 7) adopted the PDJ's opinion quoted above (p. 11). It did not disagree with Mr. Kleinsmith's statement of the three types of funds received by a law firm, but found that:

"The fact that the applicable rules do not require funds like those at issue (i.e. incurred expenses) to be kept in a trust account does not mean, . . . that a lawyer may use such funds for his or her own purposes. To the contrary, regardless of where these funds are deposited, a lawyer knowingly converts them when he or she takes them, knowing that they were not intended for him or her and that the taking was unauthorized" (Appendix A, p. 9).

The majority opinion (Appendix A, pp. 11, 12) also found that Mr. Kleinsmith's constitutional arguments were meritless. They ruled that because the "conduct encompassed by the rule is readily understandable to a licensed lawyer," the cited rules of professional conduct are not vague and that a rule is not vague if it can be given two different interpretations. Finally, they ruled that because Mr. Kleinsmith was not a member of a suspect class and Colorado has a legitimate state interest in regulating attorneys, the cited rules do not violate Mr. Kleinsmith's equal protection rights (Appendix A, pp. 12, 13).

Therefore, the Colorado Supreme Court affirmed the PDJ's and hearing board's rulings of disbarment. (Appendixes B and C attached).

The dissenting opinion of two justices effectively agrees with Mr. Kleinsmith's statement of the types of funds received by a law firm and that the U.S. Bank Payments were The Firm's property and not convertible. It specifically rejects the PDJ's and the majority's conclusion that Mr. Kleinsmith knew that the U.S. Bank Payments were to be paid to First American because U.S. Bank had entrusted them to him for that purpose because there was no evidence of that (Appendix A p. 1 of the dissent). It also rejects the conclusion that Mr. Kleinsmith knowingly converted the U.S. Bank Payments reasoning that the Funds Rules made them The Firm's property (*ibid*, pp. 2 and 3).

On November 11, 2017 and within the 14 days allowed for a Motion for Rehearing (C.A.R. Rule 40(a)(1) quoted above), Mr. Kleinsmith requested same. It was denied with the same Justices dissenting Justice Eid having left the Court (Appendix F attached).

ARGUMENTS

A. Argument of First Issue

Contradictory statements are opposite statements which cannot exist at the same time, e.g. something cannot exist and not exist at the same time. Rule 8.4(c), CRPC, states that dishonest, fraudulent, deceitful or misrepresentative conduct is "unprofessional conduct" for which a lawyer can be sanctioned. Conversion, the wrongful disposition of another's property as if it were one's own property (Black's Law Dictionary, Ninth Edition), is certainly one of these types of conduct. The

premise of conversion is that the property involved is owned by someone other than the converter. Therefore, if an attorney is to be sanctioned for conversion, the property involved must be another's property under the law which defines conversion as sanctionable conduct, here, the Colorado Rules of Professional Conduct (C.R.P.C.)

The Funds Rules (part of C.R.P.C.) define funds received by a law firm as payment for expenses incurred as the law firm's property. The U.S. Bank Payments were payments for Title Services which The Firm had incurred and, therefore, its property and not the property of another. Therefore, The Firm and Mr. Kleinsmith could not convert them. Contradictory to this, the Colorado Supreme Court concludes that these funds were another's property and that, therefore, Mr. Kleinsmith converted them.

The Court states six reasons for its false conclusion. First, it states that the U.S. Bank Payments were funds entrusted to Mr. Kleinsmith for payment to First American (Appendix A, p. 7). The Court cites no factual basis for this. It is a fact manufactured by the Court. The record proves that The Firm's invoices that the U.S. Bank Payments paid did not identify First American as the provider of the Title Services. Secondly, the Court states that neither U.S. Bank nor First American authorized the use of the U.S. Bank Payments for payment of The Firm's debts other than the payment of The Firm's debts to First American. The Court cites no factual basis for this. It is also a fact manufactured by the Court. Thirdly, the Court states that the U.S. Bank

Payments were First American's property (Appendix A, p. 7). The Court cites no factual basis for this. Fourthly, on the false assumption that the U.S. Bank Payments were First American's property, the Court cites C.R.P.C. Rule 1.15A(a) and (b) for the proposition that the U.S. Bank Payments must have been paid to First American. Being based on a false premise, the conclusion is also false.

Next, the Colorado Supreme Court asserts that even if the Funds Rules permitted the U.S. Bank Payments to be placed "temporarily" in The Firm's Operating Account, "nothing in the applicable rule allowed him to treat those funds as his own." (Appendix A, pp. 8, 9). A fair reading of the Funds Rules does not support this legal conclusion. The fair reading thereof is that funds received in payment of incurred expenses are the property of the law firm, permanently. This conclusion is definitively concurred with in *The Advance Fee Dilemma: Should Payments Be Deposited to the Client Trust Account or to the General Office Account* (10 Cordoza L. Rev. 647 (1989)).

Finally, the Colorado Supreme Court attempts to justify its conclusion that the U.S. Bank Payments were First American's property, by citing four Colorado Supreme Court cases, *People v. Finesilver*, 826 P.2d 1256 (CO 1992); *People v. Varallo*, 913 P.2d 1 (CO 1996); *People v. Levenhar*, 934 P.2d 1355 (CO 1997) and *In Re Bilderback*, 971 P.2d 1001 (CO 1999). These cases are not authority for this conclusion for two reasons. First, none of these cases discuss or recognize that the Funds Rules recognize funds received as payment for

incurred expenses as the property of the law firm. Secondly, in all four cases the attorney involved appropriated advance payment for expenses not incurred or advance payment for attorneys fees not incurred for other purposes or misappropriated monies given the lawyer which were clearly designated as another's property. Therefore, these cases are not authority for the conclusion that the U.S. Bank Payments were the property of First American.

The effect of the foregoing is that the plain meaning of C.R.P.C. 8.4(c) and The Funds Rules is that funds received as payment of incurred expenses are the property of the law firm. Being such, they cannot be another's property and the use of them to pay other expenses of the law firm cannot be conversion.

The conclusion of the Colorado Supreme Court that the U.S. Bank Payments were the property of First American is contradictory to the clear meaning of C.R.P.C. Rule 8.4(c) and The Funds Rules. The dissenting opinion of the Colorado Supreme Court is based on this contradictoriness (Appendix A, dissenting opinion). Being contradictory, it is also arbitrary and capricious and a violation of the due process clause of the 14th Amendment to the U.S. Constitution.

"The touchstone of due process is protection against the arbitrary action of government."
Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L.Ed.2d 935, 952 (1974). Also see *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 415 U.S. 351, 129 L.Ed.2d 336 (1994).

An "arbitrary" conclusion is one that is "founded on prejudice or preference rather than on reason or fact" (Black's Law Dictionary, Ninth Edition). A "capricious" conclusion is a conclusion that is "contrary to the evidence" (ibid). The above argument on contradictoriness demonstrates that the Colorado Supreme Court's conclusion that the U.S. Bank Payments were the property of First American also demonstrates that it is "founded on prejudice or preference" and "contrary to the evidence". Stated most kindly, that Court's "prejudice and preference" is to uphold the much too broad interpretation of the four Colorado cases cited above that all funds received by a law firm for incurred or not incurred expenses are the property of others or trust funds, rather, than that only funds received for unincurred expenses are trust funds. This later correct statement is based upon a holistic and fair reading of these four cases, C.R.P.C. 8.4(c) and The Funds Rules. Further, it places the business of the practice of law on parity with the operation of any other business, to-wit, funds received in payment of the business's incurred expenses make these funds the business's property. Cynically, the Court's conclusion is founded on the Court's prejudice that any attorney who does not pay all of his practice's debts must be disbarred.

The Colorado Supreme Court's finding that The Funds Rules make all funds received for expenses trust funds is false (Appendix A, p. 7). This appeal and the dissenting opinion of that Court (Appendix A, dissenting opinion) demonstrate this.

Factually, here, it is undisputed that the U.S. Bank Payments were payments for expenses already incurred by The Firm. Applying the correct law of the aforesaid cases, C.R.P.C. 8.4(c) and The Funds Rules, the U.S. Bank Payments were The Firm's property, and, therefore, incapable of conversion. Therefore, the disbarment of Mr. Kleinsmith was a violation of his constitutional due process rights.

Lastly, apparently referring to the contradiction between The Funds Rules and the Court's interpretation thereof, the Court concludes that a rule "is not impermissibly vague because it can be given two different interpretations". (Appendix A, p. 12). This may be true of shades of meanings. It cannot be true of contradictory interpretations. If it is true of contradictory interpretations, our ability to reason is destroyed. In legal terms such the conclusion is contradictory, arbitrary, capricious, irrational, and a violation of constitutional due process.

B. Argument of Second Issue

Mr. Kleinsmith's disbarment also violates his constitutional equal protection rights.

The Colorado Supreme Court's majority opinion misstates Mr. Kleinsmith's equal protection argument. (Appendix A, p. 13). The Court states:

"Kleinsmith has not asserted that he is a member of a suspect class or that the proceeding before the PDJ interfered with his exercise of a fundamental right. Accordingly, . . . ,

he must show that any differing treatment that he experienced did not rationally further a legitimate state interest.” (ibid.)

If the basis of Mr. Kleinsmith’s due process argument was based on a “suspect class” or a “fundamental right”, this quotation would be correct and relevant. Neither is true. The First Issue Argument is based upon the contradictoriness, arbitrariness, capriciousness and irrationality of the Court’s conclusion that all funds received by a law firm for incurred and unincurred expenses are trust funds. Because of these attributes the Court’s conclusion is invalid because it violates constitutional due process and equal protection. The dissenting opinion of the Court concurs with this (Appendix A, dissenting opinion). The United States Supreme Court agrees with this.

“ . . . if a law neither burdens a fundamental right nor targets a suspect class, we uphold legislative classification so long as it bears a rational relation to some legitimate end,” *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855, 865 (1996). Also see *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L.Ed.2d 299 (1984).

Therefore, the basis of Mr. Kleinsmith’s equal protection argument is that the Colorado Supreme Court’s majority decision’s ruling that The Funds Rules stand for the rule that all funds received by a law firm, either incurred or not incurred (Appendix A), are trust funds is irrational.

A reasonable reading of The Funds Rules quoted above is that they have two objectives: (1) to prescribe the two types of bank accounts a law firm must maintain, and; (2) to define the types of funds received that must be deposited to those bank accounts. The types of accounts are: a "trust account" and a "business account." When the funds received are "advance payment of expenses that have not been incurred" they must be deposited to the trust account, but, "a lawyer shall not be required to maintain a trust account when the lawyer is not holding such payments." All other funds received are to be deposited to the "business account".

Based on these rules, it is rational to conclude that the funds received and properly deposited to a "business account" are the property of the law firm, not the property of another person and, therefore, not subject to being converted. On the other hand, funds properly deposited to a "trust account" are the property of others and, therefore, subject to conversion.

It is irrational to conclude – as the Colorado Supreme Court does – that these rules prescribe that all funds received by a law firm for incurred or not incurred expenses are trust funds and the use of them to pay expenses other than to pay the creditors with whom the expense was incurred is conversion.

Based on this irrational conclusion and the fact that the U.S. Bank Payments were payments for expenses incurred with First American which were used to pay expenses other than the payment of these expenses, the Colorado Supreme Court concluded that

Mr. Kleinsmith had converted the U. S. Bank Payments and that, therefore, he should be disbarred. This reasoning being irrational, it is also a violation of Mr. Kleinsmith's constitutional equal protection rights.

Finally, the Court's interpretation of the Funds Rule also violates Mr. Kleinsmith's constitutional equal protection rights because it imposes the severe penalty of disbarment on a lawyer who is the agent of a law firm (i.e. sole proprietorship, partnership, LLC, corporation, etc.) that any other agent of any other business is not subject to *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S. Ct. 2472, 156 L.Ed.2d 503 (2003), Opinion of Justice O'Connor, citing *City of Cleburne v. Cleburne*, 473 U.S. 432, 105 S. Ct. 3249, 82 L.Ed.2d 313 (1985).

CONCLUSION

For these reasons, this Court should grant this Petition and review and reverse the disbarment of Mr. Kleinsmith.

Respectfully submitted,

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