IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA ex rel. THE FLORIDA BAR,	*
Complainant,	*
v.	*
HAL H. McCAGHREN,	*
Respondent.	*

REPORT OF REFEREE

October 16, 1962 the undersigned received notice of his appointment as referee to take testimony in the above-styled cause, to report findings of fact and law herein, and to make recommendations thereon. Under said appointment made by the Board of Governors of The Florida Bar, I, acting as such referee, proceeded with this cause as set forth below.

The Complaint, filed May 28, 1962 by counsel for The Florida Bar, alleged that the Respondent was guilty of professional misconduct during the latter part of 1959 in that he either (a) connived to have an adulterous act committed to benefit his client in divorce proceedings, or (b) passively allowed or permitted his client to connive to have the said adulterous act committed. A further charge (c) is that the Respondent knew (or should have known) that photographic evidence of adultery was obtained through connivance and that with chicane he used said evidence to obtain an advantageous property settlement for his client. Charge (d) of the Complaint alleges that Respondent paid $3,750 to the person Respondent alleged committed the adulterous act, that part payment was made the day suit was filed and part a few days following final decree, and that said payments were made under such circumstances as indicate deceit, misconduct, lack of candor, and lack of fairness.

HISTORY

Pursuant to notice served on November 15, 1962, final hearing was held on January 3, 1963 in the offices of Farish & Farish, Attorneys, West Palm Beach. The selection of the place for hearing was by stipulation of the parties and filed in this cause on November 16, 1962.

At the final hearing the following persons were present:

The Respondent:	Hal H. McCaghren of West Palm Beach
Counsel for Respondent:	Jos. D. Farish, Jr. of West Palm Beach
Counsel for Complainant:	W. C. Owen, Jr. of West Palm Beach
Referee:	Francis K. Buckley of Fort Lauderdale

SUMMARY OF EVIDENCE AND FINDINGS

From the pleadings, introductory statements of counsel, and the evidence, the facts set forth in paragraphs 1 through 7, below, are not controverted:

1. Respondent was engaged by a Mr. Daly to represent him in domestic problems. He also represented this client in other matters after the divorce proceedings hereinafter mentioned.

2. Suit for divorce was filed October 23, 1959 in Palm Beach County. Mr. Daly alleged adultery.

3. The act of adultery charged was purportedly committed in the Daly home by Mrs. Daly late in the evening of October 13 or 14, 1959 with one, De Sarro. At that time Mr. Daly was in a Fort Lauderdale hospital.

4. Respondent, around 6:00 p.m. of the same evening the act took place, arranged with two private detectives for them to take pictures of Mrs. Daly, telling the detectives that he expected a man would call upon Mrs. Daly that evening.

5. The detectives set up their surveillance at the time and place suggested and entered the Daly house through an unlocked kitchen door. They caught Mrs. Daly and De Sarro in the act of adultery and took two pictures.

6. Within twenty-four hours the pictures were in Respondent's hands. In a few days Respondent filed the divorce suit for Mr. Daly and without delay showed the pictures to Mrs. Daly's attorney.

7. As a result of the pictures, Mrs. Daly and her attorney

accepted a low property settlement ($15,000 for Mrs. Daly and $2,500 for her attorney). The Dalys had been married about nine years, and Mr. Daly was a man of considerable wealth (probably then worth over $800,000). Mrs. Daly was represented by a reputable member of the Palm Beach County bar. He testified at the hearing herein and confirmed that he believed the settlement she made was the best that Mrs. Daly could get because of the damaging effect of the pictures.

8. At this point the undersigned digresses from the above uncontroverted facts to observe:

(a) The question is ever present in a consideration of this case as to what extent, if any, the Respondent directly, or even indirectly but knowingly, participated in setting up the commission of adultery through connivance, if such connivance actually occurred. It is further recognized that Mr. Daly could have been solely responsible for all of the connivance features, if there was connivance at all, and then called upon his attorney, the Respondent, merely to secure evidence. In such a situation it is recognized that an attorney might have acquired sufficient knowledge of happenings to be in the position of knowingly cooperating in the connivance of his client. Likewise it must be acknowledged that an attorney might have no actual knowledge of any connivance. An attorney's suspicions are not enough, and an attorney, because he may realize that something could be connived as well as genuinely happen, is not obligated to put his client on trial and proceed to interrogate his client by leading and possibly embarrassing questions challenging the actions or situations the client takes or reports to him. If the attorney observes or knows that something is wrong, he would be a participant in it. In the absence of such knowledge, the attorney is privileged to carry out lawful requests of his principal.

(b) It is recognized that Mr. Daly and/or the Respondent could have hired or encouraged De Sarro to commit the act. On the other hand, it is equally well recognized that Mr. Daly and/or the Respondent might have had sufficient knowledge of Mrs. Daly's past activities to expect that the adultery would be committed that particular evening while Mr. Daly was away from his home and in the hospital. It is further recognized that Mr. Daly could have

connived to employ De Sarro to commit the act and then could have requested the Respondent to get the evidence, without giving the Respondent any reason to know that the expected act had been connived.

(c) Up to the point of the presently narrated uncontroverted details, i.e. up through the presentation of the pictures and the forcing of a very favorable property settlement for Mr. Daly as a result of the adultery evidenced by the pictures, the Respondent could have been completely innocent of any wrongdoing. Securing the services of detectives to take pictures to obtain evidence for a client's cause is in itself perfectly legitimate. The Respondent could even have been derelict in his responsibilities to his client had he not done so, if the client said, e.g. that he had every reason to believe De Sarro will visit his wife tonight while he is in the hospital and would, he expected, probably have relations with her. There is also nothing improper in the Respondent's agreeing to pay $250.00 for the desired picture nor in giving an additional bonus to the detectives for the job well done. The Respondent (assuming he is innocent) and the detectives did not bring about the drastic results for Mrs. Daly. The Florida law forfeited her alimony for adultery, and it was she who committed the act. There was also nothing improper in the Respondent's forcing a very favorable property settlement for his client as a result of the damaging evidence. In other words, therefore, there is nothing improper in anything the Respondent did unless he participated directly in the connivance or proceeded to gain an advantage for Mr. Daly over Mrs. Daly, knowing that the adulterous act had been connived. The whole issue in this proceeding, therefore, revolves upon the two questions: First, did the Respondent participate directly in a connived adulterous act? Second, did he passively but knowingly allow his client to connive such adulterous act or did he, knowing that an adulterous act had been connived, take advantage of it for his client, Mr. Daly, over Mrs. Daly?

9. So much for the digression for observations as to the issues. The undersigned returns now to the evidence.

10. Returning then to the evidence, it can be said that there is

very little, if any, contradiction in the testimony of the witnesses. The real problem comes in determining what the facts prove as to Respondent's possible guilt and also as to whether or not there are sufficient items in evidence to prove the charges. Stating the problem differently, one finds that there is no direct evidence pointing to the guilt of the Respondent. All the evidence, except for Respondent's own testimony, is circumstantial. The circumstantial evidence clearly raises the question of whether or not the Respondent was guilty of directly or indirectly, but knowingly, participating in a connived adultery, but such evidence likewise leaves the undersigned with the realization that the Respondent could have been completely innocent of any direct connection with connivance, if connivance ever in fact took place, a fact itself not positively proved, as mentioned below.

11. A further difficulty in the case is that there is no proof that Mr. Daly himself participated in any connivance to bring about his wife's act of adultery, although hovering throughout is the guess or suspicion that he did.

12. Persons, whether they are Mr. Daly or the Respondent, cannot be judged on guess or suspicion. They can be judged on circumstantial evidence, but such evidence must be of such character that only the guilt of the accused can adequately explain the circumstances and that no other explanation is reasonably probable.

13. In the instant case, it is recognized from a number of circumstances that the Respondent's conduct is suspicious and that those circumstances could point to his being guilty of knowingly participating in the connivance of adultery or of his taking advantage of it after he acquired knowledge that it had been committed, but equally as well those same circumstances could indicate that he did not directly participate and that he did not, except as hereinafter explained, indirectly, but knowingly, participate.

14. Both counsel for the Bar and counsel for the Respondent handled their presentations very well, but it is observed that the following gaps in evidence exist:

(a) Neither side offered Mr. Daly either in person or by

deposition. The evidence indicated he was alive and that there was no illness or infirmity affecting his ability to testify.

(b) De Sarro's testimony was not available because he had died before the hearing herein. (It is noted here that his testimony taken before a grievance committee was proferred by the complainant in this cause, The Florida Bar, but was rejected by the undersigned -- more on this below in paragraph 15.)

(c) Mrs. Daly's testimony was not presented either in person or by deposition. There was some evidence that she had at some earlier time been in an institution for alcoholism, but no clear evidence was introduced as to where she was at the time of the hearing or earlier and no excuse was given why she was not called. It is recognized, of course, that Mr. Daly and Mrs. Daly might not be expected to contribute much towards the resolving of the issues in this proceeding. Mr. Daly, had he either personally or through his attorney committed the suggested connivance, probably would be reluctant to admit it. Mrs. Daly's testimony might also be of little benefit. Nevertheless these guesses as to their testimony do not fill the existing void in the establishment of a case against the Respondent.

15. Relative to the testimony of De Sarro that was proffered herein by Petitioner as Proferred Exhibit 1, the views of the undersigned in rejecting this proffer are the following:

(a) It was taken by the grievance committee and not as part of the formal proceedings (which the instant proceedings are) charging the Respondent pursuant to Article XI of the Integration Rule of the Florida Bar.

(b) Although Respondent and his counsel were present at the time the testimony of De Sarro was taken and were afforded a limited right of cross-examination, the Respondent and his attorney were under no duty to cross-examine and there was no rule then or now in effect which would preclude them in their right of cross-examination at such time as the testimony of De Sarro was sought to be introduced in the instant formal proceedings.

(c) There is opportunity under the instant proceedings for

taking depositions for use in evidence and/or for discovery. There is no reason why Petitioner could not have followed such procedures. Had same been done, the deposition of De Sarro, now dead, could have been introduced in evidence.

(d) In any event, the fact that the Petitioner did not, or could not (if De Sarro died before these formal charges were filed), take De Sarro's deposition does not mean that the Petitioner can now introduce other testimony of De Sarro even if given in the presence of the Respondent.

(e) The fact that Respondent and his attorney apparently did to some extent cross-examine De Sarro at the earlier hearing -- even if such cross-examination was without any limitation imposed by the grievance committee (amount of limitation imposed or the extent of the opportunity given for such cross-examination being itself a question in dispute), such full right of cross-examination is not a waiver by the Respondent of such cross examination available to him under the Integration Rules, either live before the Referee or in deposition taken pursuant to the rules governing depositions.

16. The more important circumstances which undoubtedly in the Complainant's analysis of the case make the Respondent suspect of actively, or knowingly but passively, participating in the alleged connived adultery are the following:

(a) The circumstances involving the cash payments made by Respondent to De Sarro. These are more fully set forth in this report in paragraph 19, below, as the undersigned bases his opinion of the guilt of Respondent as to charges (c) and (d) of the Complaint on the said circumstances. There was no direct testimony connecting the payments with any connived adultery. Respondent testified that he was instructed by his client to pay the amounts to De Sarro, that he did not question the motives of his client, and that he had no belief that they were for any connived adultery. Respondent did testify that he took the cash out of funds that he had been holding for his client Daly "for the divorce". An accounting report prepared by Respondent and received in evidence as Complainant's Exhibit 3 indicates the same fact, namely, that the payments to De Sarro were deducted from $6,000 received October 22, 1959 "for costs for detectives and supporting evidence".

In this regard it must be noted that, although the circumstances of the payments of $3,750 indicate misconduct of Respondent (as more fully covered below under 19), these circumstances do not in the opinion of the undersigned necessarily indicate that Respondent himself had anything to do with the alleged connivance. (as compared with Respondent's being guilty of chicanery in subsequently taking advantage of connived adultery -- covered in subsequent paragraphs).

(b) Respondent's efficiency in securing the damaging evidence was remarkable. Respondent telephoned the detective about 6:00 p.m., told him that he expected a man would visit Mrs. Daly that evening (describing him in a general way), and requested the detective to try to enter the Daly house and take pictures. The detective and his associate entered the house through an unlocked kitchen door, caught Mrs. Daly and De Sarro in adultery, and took two pictures. (It should be noted here that Respondent testified that he had received a telephone call from Mr. Daly from a Fort Lauderdale hospital immediately before Respondent contacted the detective, and that Mr. Daly advised Respondent that he, Daly, expected a man would visit the Daly house that evening.) In this connection there is disputed testimony as to whether or not the Respondent told the detective that the back door would be open. The detective testified that Respondent said that she usually leaves a back door open. Respondent denied that he said anything about the door being open. The undersigned could not decide which of the two witnesses was correct or truthful on this question and resolved the doubt in favor of Respondent. The circumstances described in this subparagraph, however, could equally be in effect if Respondent's conduct was entirely proper and beyond any cause for criticism. A good, efficient, and intelligent attorney would have similarly proceeded to protect his client's interests.

(c) Suspicion arises from the fee of $25,000 admittedly charged by Respondent for his services in the divorce. Except for Respondent's efficient handling of the procurement of damaging evidence and his forcing by it (It could not have required much effort with the damaging pictures he had) a favorable settlement agreement for his client, there is nothing in the litigation that appears to have

been complicated, protracted, or to have required the application of any particular legal talent (beyond the fundamental knowledge that adultery is a ground for divorce, that by adultery a wife loses alimony, and that pictures are the best evidence of an adulterous act). It must be observed, however, that the Respondent is not accused of overcharging his client. Although the fee of $25,000 for handling a relatively simple divorce case for a man worth around $800,000 does raise a suspicion, one cannot properly conclude that it establishes Respondent's participation in the case to the extent of direct connivance or of even passive connivance. It could equally well indicate nothing more than an overcharge for services absolutely proper. It could also equally well cover more extensive services than were disclosed in the hearing. In this regard Respondent did testify that he had started on the case a considerable period before the month of October 1959. With respect to all of the circumstances involving the $25,000 fee for a relatively simple case, although it does raise the suspicion that such a payment probably covers services for bringing about the adultery and securing the pictures, this is a guess or suspicion only; and Respondent cannot be judged on suspicion. Consequently, the undersigned has excluded this circumstance as any proof of the charges in the Complaint.

17. Although the undersigned has concluded that Complainant has not sustained the burden of proving Charges (a) and (b), that Respondent connived to have the adulterous act committed or that Respondent passively allowed or permitted his client to connive to have such act committed; an entirely different conclusion as to Respondent's guilt has been reached with respect to Charges (c) and (d) of the Complaint.

18. It is the opinion of the undersigned that Respondent was guilty of chicane and misconduct in taking advantage of a known connived adulterous act (i.e. adultery committed by the connivance of someone and known by Respondent to have been connived at the time Respondent took advantage of it); and the undersigned accordingly concludes that Respondent is guilty of Charges (c) and (d) of the Complaint. Charges (c) and (d) of the Complaint are: (c) that Respondent knew (or should have known) that evidence (photographs) was obtained through

connivance and that with chicane he used said evidence to obtain an advantageous property settlement for his client; and (d), Respondent was guilty of deceit, misconduct, lack of candor and fairness in that he paid $3,750 to the person Respondent alleged committed the adulterous act.

19. The critical items of evidence which prompt the undersigned to reach this conclusion (although not being able to find Respondent guilty of charges (a) and (b) of the Complaint) are the following:

(a) On the very day the divorce action was filed, Respondent paid De Sarro $1,500.00 in cash. (See Complainant's Exhibit 1 showing Bill of Complaint for divorce filed on October 23, 1959 and Complainant's Composite Exhibit No. 2 showing $1,500 paid on October 23, 1959).

(b) Almost immediately after the final decree was entered, Respondent paid De Sarro $2,000.00 in cash. The interval was actually four days -- from Thursday when the decree was entered until Monday. Saturday and Sunday are excluded as being days unlikely to occasion payment anyway, and it is known also that an attorney does not generally know that a final decree has been entered in a divorce action of the nature of Daly v. Daly until some hours or even one or two days after its actual entry. Hence that is why the undersigned refers to the $2,000 payment as having been made "almost immediately" after the decree was entered. (See Complainant's Exhibit No. 1 showing Final Decree dated and recorded on November 19, 1959 and Complainant's Composite Exhibit No. 2 showing $2,000 paid November 23, 1959.)

(c) Respondent himself testified that at the time he gave the $1,500 payment he knew De Sarro, the payee, was the same person photographed with Mrs. Daly in the adulterous act. [Record 110]

(d) The payments of the $1,500 and $2,000 were in cash and made in a parking lot near Respondent's office rather than as one would expect any proper disbursement made by a lawyer for a client to be made, namely, in the lawyer's office or at least under such circumstances that would not arouse a suspicion of a pay-off or of something being done surreptiously and improperly.

(e) The receipts taken by Respondent for these payments (See Complainant's Composite Exhibit No. 2, copy of which is, for convenient reference, also inserted on page immediately following this page), were, as to the last two (the receipts of November 23 and November 24), prepared by the Respondent himself and signed by De Sarro. The first one was prepared by someone never identified (Respondent testified that he did not prepare it) on Respondent's office stationery. It was presented by Respondent to De Sarro for De Sarro to sign. [Record pages 103-108] The undersigned, therefore, holds Respondent responsible for the choice of words used in all three receipts.

(f) The most convincing aspect of these receipt forms is their consistent reference to an "agreement". The first one, which was on the day the divorce action was filed, refers to the $1,500 as a "partial payment" and provides "balance due on completion of agreement". The one on a Monday (November 23, 1959) after the entry of the final decree on a Thursday (November 19, 1959) covers $2,000 payment and recites "leaving disputed balance on agreement of $250.00". The last receipt dated November 24, 1959 covers $250.00 and recited "Final payment on agreement". It is obvious to the undersigned that the Respondent (who participated in the preparation or exchange of the receipt forms, paid De Sarro the cash represented by the receipts and took and preserved the receipts) must have known what the "agreement" was. It is inconceivable that Respondent would refer in general terms to "an agreement" and not believe that he and the other party to the three receipt forms were not in accord as to what they were referring when they both adopted that term.

(g) Respondent never did, to the satisfaction of the undersigned, testify as to what <u>he</u> meant by the reference to "agreement", although he did testify that he was carrying out instructions for his client and claimed he did not know what "agreement" the client and De Sarro had entered. It must be remembered that Respondent initiated the reference to the "agreement". Respondent chose the terminology used in the receipt taken on the very day the divorce action was filed.

(h) An important supporting item of evidence to establish that

COMPLAINANT'S COMPOSITE EXHIBIT NO. 2

DeSarro receipt to Hal H. McCaghren dated October 23, 1959

HAL H. McCAGHREN
Attorney-at-Law
810 Citizens Building
West Palm Beach, Florida
Phone Temple 3-1965

10/23/59

Received of Hal H. McCaghren $1500 this date partial payment, balance due on completion of agreement

/s/Bill De Sarro

DeSarro receipt to Hal H. McCaghren dated November 23, 1959 (a Monday)

11/23/59

Rec'd $2000^{00} of Hal H. McCaghren leaving disputed balance on agreement of $250^{00}

/s/Bill DeSarro

DeSarro receipt to Hal H. McCaghren dated November 24, 1959

11/24/59

Rec'd $250^{00} of Hal H. McCaghren, Final payment on agreement

/s/Bill DeSarro

Referee's Note:

Complaint for divorce (Francis A. Daly vs. Pearl R. Daly, Palm Beach Chancery No. 59 C 1679-C) was filed on October 23, 1959. (See Complainant's Exhibit No. 1).

Final decree in favor of Francis A. Daly was entered and recorded on November 19, 1963 (See Complainant's Exhibit No. 1). This was a Thursday.

(This is an insert page and follows page 11)

Respondent knew (on at least the date, October 23, 1959, he filed the suit for divorce and paid De Sarro $1,500) of the connived adultery and took advantage of it is that the money he used to pay De Sarro came out of funds entrusted to him on October 22, 1959, one day before he filed the case, by his client, Mr. Daly "for costs for detectives and supporting evidence" (See Complainant's Exhibit No. 3). It is not reasonable to follow Respondent's contention (that he did not know for what purpose he was paying out his client's funds, although he did have his "suspicion" -- Record page 112), as Respondent on his own accounting shows that the disbursements to De Sarro were from funds he received from Mr. Daly "for costs for detectives and supporting evidence". In fairness to Respondent it must be noted that he claims (Record page 112) that when he made the $1,500 payment to De Sarro he had the suspicion that it was for services rendered by Mr. De Sarro to Daly for going to bed with Daly's wife, but Respondent said (page 112):

> "I had the suspicion, yes; yes,
> but no proof, no knowledge of it,
> suspicion, yes, suspicion of a
> lot of things."

It is the undersigned's opinion that the "knowledge" required to prove Respondent guilty of charges (c) and (d) of the Complaint is not the personal knowledge required of a witness testifying under oath. The "knowledge" that is required, and for which Respondent as a lawyer is held responsible, is practical, common-sense knowledge. Viewed in the experience of reasonable men, Respondent "knew" that he was paying off the man who participated in the connived adultery and Respondent, from at least on and after the date of October 23, 1959, knowingly took advantage of the connivance and on the basis of same exacted an unfair property settlement to the prejudice of the opposite party in the divorce suit.

(i) The undersigned might accept Respondent's contentions as to his claim that he did not know what was involved in the "agreement" mentioned in each of the three receipts (Complainant's Composite Exhibit No. 2) except for the timing of the events under consideration. The $1,500 payment was made the very day the divorce action was made, and the $2,000 payment was made almost as soon after the final decree was entered as Respondent and De Sarro

reasonably could have been expected to get together to complete the exchange of cash and a receipt therefor. In the mind of the undersigned, any other explanation of the circumstances seems beyond reasonable conjecture. The circumstances reasonably prove that Respondent, when he made the payments to De Sarro, knew that he was paying off De Sarro for services in a connived adultery.

(j) In the undersigned's appraisal of this case, the undersigned has come to the conclusion (as indicated in above paragraph 16) that the Complainant has not sustained the burden of proving Respondent guilty of charges (a) and (b) of the Complaint. Having reached that conclusion the undersigned must necessarily, in determining Respondent's guilt or innocence of charges (c) and (d) of the Complaint, give Respondent the full benefit of such determination. Accordingly, therefore, in weighing the evidence on Counts (c) and (d) it has been kept clearly in mind that Respondent did not participate in any connivance to have the adulterous act committed and also that he did not passively permit his client to bring about the adultery by connivance.

(k) We get then to the question of where does Respondent's participation in connivance b egin. The undersigned is of the opinion that it begins on or after November 23, 1959, the day Respondent filed the divorce action for his client Daly (in which suit the adultery is charged) and on the same day paid out of funds he held for Mr. Daly "for costs for detectives and supporting evidence" to De Sarro $1,500 as "partial payment, balance due on completion of agreement". (Complainant's Composite Exhibit 2) In the opinion of the undersigned, Respondent must on that date have known that the adultery had been connived. From that time forward Respondent's misconduct was in taking advantage of a situation <u>then</u> known to him to have been connived adultery, namely, forcing the opposition to accept a disadvantageous property settlement. This was done, according to its date, on November 2, 1959. It was acknowledged on the same date by both Mr. and Mrs. Daly.

(l) Respondent's further misconduct occurred when, sometime between November 2, 1959 and November 5, 1959, both dates inclusive, he stipulated

for the filing in the court record of a copy of the Separation and Property Settlement Agreement. At the time of this stipulation Respondent must have known that the adultery alleged in the divorce action had been connived; and Respondent knowingly proceeded by the signing of the Stipulation (with copy of the agreement attached) to take advantage of an act of adultery then known by Respondent to have been connived.

CONCLUSIONS

As indicated in the findings, the undersigned finds:

(a) Respondent not guilty of charges (a) and (b) of the Complaint.

(b) Guilty of charges (c) and (d) of the Complaint.

RECOMMENDATIONS

It is the recommendation of the undersigned that Respondent be suspended from practise for the period of three months.

COSTS

The undersigned has incurred costs as follows:

Certified mail fees on Notice of Hearing	$ .68
Mileage from Fort Lauderdale to West Palm Beach, and return, 96 miles at 10 cents	9.60
Toll payments and parking fees	1.60
Certified mail and postage, transmitting transcript and file along with this report	4.50
TOTAL:	$ 16.38

There has been no presentation to the undersigned by either Complainant or Respondent of any petition to tax witness subpoena fees or the fees for the court reporter and for the transcript.

With respect to the above costs of the Referee and any other proper taxable costs, it is the undersigned's recommendation that all such costs be taxed against the Respondent.

Dated this 8th day of January 1964 at Fort Lauderdale, Florida

Respectfully submitted

Francis K. Buckley

Francis K. Buckley
Referee

104 S. E. Sixth Street
Fort Lauderdale, Florida