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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,903 + 81,379

[TFB Case No. 92-31,972 (19A)]

THE FLORIDA BAR,

Complainant,

v.

PHILLIP H. TAYLOR, III,

Respondent.

______________________/

RESPONDENT, PHILLIP H. TAYLOR, III'S, ANSWER BRIEF

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INTRODUCTION

In this Answer Brief, the following designations shall be used.

"BAR" shall refer to THE FLORIDA BAR, Complainant before the Referee and before this Court.

"TAYLOR" shall refer to PHILLIP H. TAYLOR, Respondent before the Referee and before this Court.

TR-__ shall refer to the transcript of the proceedings held before the Referee, the Honorable Scott M. Kenney held on December 14, 1993, unless otherwise noted.

Reference to Exhibits shall refer to exhibits admitted by Petitioner and Respondent during the final hearing held on December 14, 1993.

STATEMENT OF THE CASE

While TAYLOR does not take issue with the BAR'S Statement of the Case, it is incomplete. Thus, the following Supplement is provided by TAYLOR.

In its Complaint filed August 9, 1993, the BAR charged TAYLOR with violating three Rules of Discipline and Rules of Professional Conduct:

a. committing an act contrary to honesty and justice (Rule of Discipline 3-4.3);

b. violating the Rules of Professional Conduct (Rule of Professional Conduct 4-8.4(a); and

c. engaging in conduct that is prejudicial to the administration of justice (Rule of Professional Conduct 4-8.4(d)).

The BAR'S charges emanated from an Order entered by the Superior Court of New Hampshire, upon the Petition of TAYLOR'S first wife, Margaret Taylor, finding that TAYLOR owed child support in the amount of $37,850.00 between September of 1982 and June of 1990. The BAR did not formerly charge TAYLOR with the violation of the 1972 Order establishing TAYLOR'S child support obligation. The BAR did not charge TAYLOR with any unethical conduct from 1972 to the date of the New Hampshire Court Order in August of 1991. The New Hampshire Court Order, made no specific finding of any misconduct on the part of TAYLOR. The New Hampshire Court Order merely liquidated TAYLOR'S delinquent child support obligation. The Order did not impose any conditions upon

TAYLOR, did not order payment, did not impose incarceration, and contained no purge provision as is required by a contempt order. In its Complaint, the BAR merely alleged that TAYLOR'S child support delinquency standing alone, justified discipline.

On January 5, 1994, the Referee found that TAYLOR was not guilty of the charges brought against him. At Paragraph 2 of his recommendation, the Referee found that "[t]his case is most akin to a private civil matter between Respondent and his former wife. The situation has not had an adverse impact on his ability to practice law. Nor does it involve dishonesty, moral turpitude, immorality, deceit or breach of trust. I believe the court's comments in The Florida Bar v. Della-Donna, 583 So.2d 307, 312 (Fla. 1991), should be seriously considered and that The Florida Bar should not be acting as a de facto collections agent for child support in a civil matter." TAYLOR was admitted to the BAR in November of 1989 without condition concerning his child support obligations. To punish TAYLOR now, the Referee stated, would amount to ex post facto punishment.

Despite the Referee's findings and recommendations which are supported by competent and substantial evidence and which are not "clearly erroneous," the BAR has prosecuted this appeal not because of TAYLOR'S conduct, but as it argues to "respond to the [Florida] Legislature's request that the Supreme Court of Florida adopt sanctions similar to those at Section 61.13015, Florida Statutes (1993). An attorney should not be subject to discipline without regard to his conduct merely to respond to the

Legislature or outside political pressure.

STATEMENT OF THE FACTS

While the BAR does not take issue with the Referee's Findings of Fact, it nonetheless misstates, mischaracterizes or omits facts upon which the Referee relied. Illustratively, interwoven with its Summary of Argument, the BAR states that TAYLOR continuously ignored a 1972 Court Order requiring the payment of child support. No evidence was presented establishing this fact nor did the Referee make such a finding. TAYLOR fulfilled his child support obligations through September 9, 1982 and continued to make support payments to Phillip and Tracy thereafter. TAYLOR also paid child support for two other children, Megan and Kelly while supporting three infant children from 1989 through the present. This misstatement of fact unfairly prejudices TAYLOR by ignoring his continued efforts to meet his child support obligations.

Similarly, the BAR states that TAYLOR simply ignored the New Hampshire 1972 and 1991 Orders. Again, the evidence does not support this misstatement and the Referee, in fact, made no such finding. Thus, TAYLOR is compelled to recite a thorough and accurate statement of facts.

In November of 1989, TAYLOR was conditionally admitted to BAR due to his history of alcoholism and addiction. (Petitioner's Exhibit 10). During the admission process, TAYLOR'S, background was completely investigated by the BAR. TAYLOR completely disclosed not only his child support obligation to the BAR but, also, his drug addiction, his alcoholism, and his

financial misfortune. (TR-50-51). As TAYLOR previously disclosed to the BAR, he and Margaret Taylor were married in 1961 (TR-34; ll. 9-10) and divorced in 1972 (TR-34; ll. 14-16). There were two children born of the marriage: Tracy in 1964 and Phillip in 1969 (TR-34; ll. 17-24). They are the subject of TAYLOR'S child support obligation. Pursuant to an agreement, TAYLOR obligated himself to pay $450.00 per month in child support for Tracy and Phillip. Tracy moved out of her mother's house and was emancipated in 1980. (TR-38; ll. 15-21). Phillip was emancipated in 1987.

In 1972, TAYLOR married Kathy Cole (TR-35; ll. 3-9) and had two children: Megan in 1976 and Kelly in 1977 (TR-35; l. 23 through TR-36 l. 5). Due to TAYLOR'S disease of alcoholism and addiction, Kathy and TAYLOR were divorced in 1982 (TR-35; ll. 11-19)(Respondent's Exhibit 1). TAYLOR has made child support payments to Megan and Kelly of $2,000.00 (TR-37; ll. 20-25) and has continued to pay child support to the best of his ability even at the present time in the amount of $1,250.00 (TR-38; ll. 1-6). According to the Affidavit of Kathy Cole submitted in support of TAYLOR'S admission to the BAR in 1989, TAYLOR rarely failed to send money for the support of his children (Respondent's Exhibit 1).

In addition to being responsible for the support of Tracy and Phillip and Megan and Kelly, TAYLOR, in 1987 married Jacinta Taylor (TR-26; ll. 11-14) and had three children with her: Zachary born in 1987; Courtney born in 1988; and Jessica born in

1990 (TR-27; l. 17 through TR-28; l. 7). In late 1990, TAYLOR'S wife left him for another man which caused him to become solely responsible for the care and support of three children ages 4, 3 and 1. (TR-28; l. 9 through TR-29; l. 14). At that time, Tracy and Phillip were emancipated, TAYLOR continued to meet his support obligations to Megan and Kelly and with the help of family and advances of bonus monies from his employer, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., TAYLOR supported, cared for and loved his three minor children. (TR-29; ll.9-14).

As TAYLOR had informed the BAR during the admission process, his disease of addiction and alcoholism caused him to reach a bottom most could never imagine. (TR-50; l.6 through TR-51 l. 18). Although his disease had manifested itself in the 1970's and even prior thereto, by the late 1970's and early 1980's, his addiction to cocaine had blossomed completely. (TR-43; ll. 9-12). Tragically, TAYLOR lost his second family, his career as a physician, and all of his businesses. (TR-43; ll. 12-17). He lost himself and his ability to function in society at any level. (TR-43; ll. 18-21). In 1980 he left Nevada in the dead of winter for Nebraska with all his possessions in a trailer. (TR-43; ll. 17-22). Daily existence was a struggle, financial ruin was patent, and avoiding suicide was his primary concern. (TR-43-45).

In December of 1984, through the grace of God, TAYLOR commenced his recovery from the disease of alcoholism and addiction forming a spiritual bond with The Lord and immersing

himself in the program of Alcoholics Anonymous. (TR-45; ll. 9-14; TR-47; ll. 12-23). Since December of 1984, TAYLOR has been alcohol and drug free. Since 1984, as part of his program of recovery, TAYLOR has communicated with Margaret Taylor and his children, Tracy and Phillip, and attempted to make amends to them. (TR-47; ll. 12-23; TR-49; ll. 5-8). TAYLOR has always maintained a close relationship with his daughter, Tracy. (TR-39; ll. 9-11). TAYLOR also maintained a similar relationship with his son, Phillip until 1989 when Margaret Taylor began alienating TAYLOR from his son in an effort to collect alleged child support. (TR-39; ll. 12-25; TR-40; ll. 1-11).

The record is clear and uncontroverted that TAYLOR continually attempted and in most instances did meet his child support obligations. TAYLOR paid and continues to pay child support for Megan and Kelly. (TR-37; ll. 17-25; TR-38; ll. 1-6). TAYLOR has cared for three children, Zachary, Courtney and Jessica. (TR-27; l. 17 through TR-29; l. 14). As importantly, TAYLOR continually attempted to meet his obligations to Phillip and Tracy. (TR-40; l. 12 through TR-41; l. 13). The New Hampshire Court found that TAYLOR'S child support obligations were met through September of 1982. (BAR'S Exhibit 1). TAYLOR continued to make payments to Margaret Taylor in November of 1992 ($1,000.00); November of 1993 ($1,500.00); February of 1994 ($1,000.00). (TAYLOR'S Exhibit 2; TR-68; l. 16 through TR-69; l. 12). In fact, in the fall of 1989, when TAYLOR was seeking admission to the BAR, he paid support of $2,000.00 to Margaret

Taylor's attorney, William Baker. As TAYLOR testified:

Q.	(Mr. Keenan):	So you were making payments all way through 1989?
A.	(TAYLOR):	Yes, sir.
Q.	(Mr. Keenan):	The best you could?
A.	(TAYLOR):	My calculation was that I was pretty close to being current except for a few thousand dollars at that point in time.

(TR-69; ll. 3-9).

Additionally, TAYLOR had sent several support payments directly to Phillip of $150.00 per month from 1986 through 1988 (fifteen months) and to Tracy from 1984 to 1988 ($1,000.00). (TAYLOR'S Exhibit 2). The New Hampshire Court, in its Order, adopted TAYLOR'S proposed findings of fact that in February of 1984, TAYLOR made a $1,000.00 support payment to Margaret Taylor. The Court also found by granting the first sentence of TAYLOR'S proposed Findings of Fact 16, that since early 1985, TAYLOR had paid sums directly to Tracy and Phillip according to his agreement with Margaret Taylor. (TAYLOR'S Exhibit 7). These payments to Margaret, Tracy and Phillip, while perhaps not fulfilling his total support obligation, nonetheless evidenced a herculean effort on TAYLOR'S part to support his children in view of his personal and financial tragedies.

TAYLOR also attempted to resolve his disputed child support obligation both during the admission process and after his admission to the BAR. (TR-53; l. 17 through TR-58; 1.15; TAYLOR'S Exhibit 3; TR-63; ll. 3-7). In May of 1989, TAYLOR sent

a settlement proposal to Margaret Taylor which was rejected. (TR-58; ll. 11-12). In May and June of 1990, TAYLOR corresponded and communicated with Margaret Taylor's attorney to resolve this dispute asking for an accounting and documentation evidencing monies received by Margaret Taylor and the children. (TR-63; ll. 3 through TR-66; l. 2). This was never provided. (TR-65; ll. 6-10) After being served with Margaret Taylor's Petition from New Hampshire, TAYLOR, who was unable to afford counsel, travelled to New Hampshire, borrowed money from his father, and retained and met with a New Hampshire lawyer, James Laffan, on the day of the hearing. (TR-67; ll. 3 through TR-68; l. 11; TR-70; l. 19 through TR-71; l. 1). TAYLOR sought a continuance from the New Hampshire Court to conduct discovery to determine the accurate amount of child support he owed which Motion was denied. (TR-71; ll. 2-13). TAYLOR'S attempted to reach his children, Phillip and Tracy, to confirm monies sent to them but was unsuccessful for they had been instructed by Margaret Taylor not to talk to him. (TR-71; ll. 14-19). TAYLOR attempted to take the deposition of Margaret Taylor, but her counsel refused to make her available to TAYLOR. (TR-72; ll. 3, 14). As James Laffan, TAYLOR'S New Hampshire attorney testified even without financial documentation, TAYLOR demonstrated to the Court that he made payments subsequent to September of 1982 to Margaret Taylor and directly to Phillip and Tracy, although he was not given credit for same. (Exhibit 11, p. 24, ll. 10-20). Perhaps this best explains the ambiguous finding of the New Hampshire Court that at

times TAYLOR had the ability to pay child support while failing to find for any specific time period between September of 1982 and June of 1990, that TAYLOR, in fact, had actual income sufficient to pay child support. A more plausible explanation, however, is the fact that there was never any evidence presented to the New Hampshire Court that TAYLOR even had income to meet his support obligations. (TAYLOR Exhibit 11 at pp. 27-28; TR-83; l. 16 through TR-84; l. 22).

TAYLOR'S inability in August of 1991 to remit payment of the $37,850.00 in child support claimed by Margaret Taylor was evidenced by his Financial Affidavit which demonstrated the devastating financial impact of his addiction and alcoholism. (TAYLOR'S Exhibit 4; TR-73; ll. 23 through TR-83 1.15). TAYLOR had $2,500.00 in assets against liabilities of $162,000.00. His monthly income from his employer was insufficient to meet his monthly expenses which were increased by the desertion of his wife and the need to care for three infant children. (TR-74; l. 5 through TR-75; l. 25; TR-32; l. 16 through TR-33; l. 22). Even with advances against bonuses to be earned from his employer, TAYLOR was unable to meet all of his expenses. (TR-75; ll. 24-25; TR-76 ll. 1-9). While TAYLOR has maintained a willingness to negotiate a resolution of his child support obligation with Margaret Taylor and his children since August of 1991, his financial condition has significantly worsened as a result of claims made by his former employers, Searcy, Denney, Scarola, Barnhart & Shipley, P.A. ($80,000.00 to $90,000.00), Willie E.

Gary, as well as be subject to a $1.7 million judgment. (TR-78; 1.22 through TR-83; l. 15). TAYLOR'S decision to forego appeal of the New Hampshire Order was born out of financial inability to prosecute the appeal (TR-84; l. 23 through TR-84; l. 25) and the advice of his counsel, James Laffan and John Sherrard, his Florida counsel, that he could either collaterally attack the New Hampshire Order or defend its enforcement when it was domesticated by Margaret Taylor in Florida. (TR-86; l. through TR-87; l. 6). At the present time, the New Hampshire Order has not been domesticated in Florida. Instead, Margaret Taylor is seeking to utilize the BAR as a vehicle to collect her judgment. (TR-87; ll. 7-16).

SUMMARY OF ARGUMENT

I. The Referee's findings of fact and recommendation of not guilty is supported by substantial and competent evidence. It is undisputed that TAYLOR did not engage in any conduct involving fraud, dishonesty, deceit or which would adversely reflect upon his character as an attorney. At all times, TAYLOR made his child support payments in good faith and to the best of his ability. TAYLOR was not engaged in any conduct which would subject him to discipline.

II. The Referee's application of existing law and ethical standards to TAYLOR was correct. The parties agreed and the Referee found no instance when an attorney had been disciplined for failure to pay child support in the absence of other egregious conduct. During TAYLOR'S admission process to the BAR, the BAR was made aware of the very facts surrounding TAYLOR'S support obligations which form the basis of the BAR'S attempt to discipline him presently. Based upon existing ethical considerations and case law, the BAR admitted TAYLOR in November of 1989 without condition as to the child support obligation. Between November of 1989 and August of 1991, existing ethical considerations, disciplinary rules and case law have remained unchanged and the BAR cites to no additional conduct which would subject TAYLOR to discipline. The BAR'S attempt to discipline TAYLOR amounts to ex post facto punishment of TAYLOR. Moreover, the BAR'S attempt to discipline TAYLOR based upon the retroactive application of some disciplinary rule, ethical consideration or

policy determination which the BAR is now asking this Court to enunciate is impermissible. Sufficient protections exist to discipline an attorney who through fraud, dishonesty, deceit or other unlawful or unethical means seeks to avoid any debt, including child support. TAYLOR has not engaged in such conduct.

III. In the event that the Referee's findings and recommendation of not guilty is not affirmed, the issue of discipline should be remanded to the Referee for consideration. Pursuant to the agreement of the parties, as accepted by the Referee, evidence of mitigation and discipline was not presented. Instead, the Referee stated that, in the event he found TAYLOR guilty, he would hold a subsequent hearing to take evidence on the issues of mitigation and discipline.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS ARE SUPPORTED BY COMPETENT EVIDENCE AND MUST BE AFFIRMED.

This court has consistently held that the findings of fact and recommendations of a referee must be accepted if they are supported by competent evidence. The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990). Although the court's scope of review is broader with respect to a referee's legal conclusions and punishment, they nonetheless come to the court with a presumption of correctness unless thy are clearly erroneous or not supported by the evidence. The Florida Bar v. Poplack, 559 So.2d 116, 118 (Fla. 1992); The Florida Bar v. Langston, 540 So.2d 118 (Fla. 1989). A party seeking to overturn a referee's findings and recommendations has the burden of showing that the referee's report is clearly erroneous or is lacking in evidentiary support. The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992); The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). If the findings of the referee are supported by competent, substantial evidence, the court is precluded from reweighing the evidence or substituting its judgment for that of the referee. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987).

The BAR'S argument before the Referee and this Court is simple - because TAYLOR failed to pay a private debt, to wit child support, he is subject to discipline. Though simplistic, the BAR'S position is not supported by the existing Professional Rules of Conduct, Rules of Discipline, or case law. As the

Referee correctly concluded, mere failure to pay child support or any private debt without fraud, deceit, dishonesty or other conduct reflecting upon an attorney's fitness to practice law does not render him subject to sanctions.

This Court has recognized that an attorney's conduct in his personal life, as opposed to his professional life, can subject him to discipline. The Florida Bar v. Bennett, 267 So.2d 481 (Fla. 1973); The Florida Bar v. Clements, 131 So.2d 198 (Fla. 1961). However, in order to subject an attorney to discipline, the attorney's personal conduct must have some nexus to or be connected with his fitness to practice law. Rule 4-8.4(1), Rules Regulating the Florida Bar. As the comment to the aforedescribed Rule provides:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust or serious interferences with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

See, Comment to Rule 4-8.4(i), Rules Regulating The Florida Bar.

> In any event, an attorney will not be disciplined for misconduct outside of his professional capacity unless such misconduct is of a serious nature, and tends to show him to be an unfit person to be an attorney.

7 CJS, Attorney & Client, sec. 75, p. 974:

Consistent with the settled principle above, this Court has refused to impose discipline for an attorney to vindicate purely personal interests. As this Court set forth in The Florida Bar v. Della-Donna, 583 So.2d 307, 311 (Fla. 1989):

> As has been recognized for many years, [d]isciplinary proceedings against attorneys are instituted in the public interest and to preserve the purity of the courts. No private rights except those of the accused attorney are involved. Application of Harper, 84 So.2d 700, 702 (Fla. 1956); The Florida Bar v. Winn, 208 So.2d 809, 810-11 (Fla., cert. denied, 393 U.S. 914 (1968); In Re: Keenan, 287 Mass. 577, 583, 192 N.E. 65, 68 (1934). See, also, State ex rel. Kehoe v. McRae, 49 Fla. 389, 394-95, 38 So. 605, 607 (1905)(disbarment proceedings are not designed as a penalty or punishment for any malfeasance or dereliction of duty by and attorney, but are solely for the purpose of purging the role of legal practitioners for an unworthy or disreputable member).

Further, both this Court, and the BAR itself, have recognized that disciplinary proceedings are not appropriate in cases which do not involve misrepresentation, dishonesty, deceit, or fraudulent procurement and which involve a dispute over an attorney's failure to pay a personal debt. The Florida Bar v. Cook, 567 So.2d 1379 (Fla. 1990).

In the case before the Court, the BAR admits that the Referee's factual findings that TAYLOR was not involved in any misrepresentation, dishonesty, deceit, or fraudulent conduct are

correct. The BAR called no witnesses to contradict any testimony or evidence offered by TAYLOR before the Referee. The record is replete with numerous examples that TAYLOR, since commencing recovery from alcoholism and addiction in December of 1984, met his support obligations to all his children including those to Phillip and Tracy. TAYLOR made child support payments to Margaret Taylor and Phillip and Tracy in 1983, 1984, 1985, 1986, 1987, 1988 and 1989. In 1989, TAYLOR believed he had almost erased any child support delinquency. While refusing to give him credit, the New Hampshire COurt acknowledged the payments made by TAYLOR to Margaret Taylor, Phillip and Tracy through 1989. The New Hampshire Court did not make any specific finding as to TAYLOR'S ability to pay at any specific time between 1982 and 1990 and most importantly did not find that TAYLOR willfully or intentionally disobeyed any Order of the Court or obligation to pay child support. Neither the BAR nor the New Hampshire Court point to any dishonest, deceitful, illegal, fraudulent or unethical conduct by TAYLOR. When the BAR admitted TAYLOR in November of 1989 without any condition as to his child support obligation it confirmed TAYLOR'S fitness to practice law. TAYLOR has done nothing since then to prove the BAR was in error.

The BAR cites two cases for the proposition that this Court has previously disciplined attorney's held in contempt in domestic relations cases: The Florida Bar v. Langston, 540 So.2d 118 (Fla. 1989) and The Florida Bar v. Wishart, 543 So.2d 1250 (Fla. 1989). Both cases involve fraud, deceit, dishonesty and

egregious conduct distinguishable from TAYLOR.

In Langston, an attorney engaged in perjury and entered into a scheme to defraud himself and the court by concealing marital assets. The BAR presented no evidence of perjury or fraudulent conduct and, in fact, took no issue with the Referee's finding that none existed.

Similarly, in Wishart, an attorney, the step-grandfather of a child involved in a custody proceeding, consistently disobeyed court orders to return the child to her mother due to a close emotional involvement in the case and with the minor child. In finding the attorney guilty, the court recognized that his close, personal involvement in the case and his continuous disobedience of directions from the court impaired his professional judgment thus, rendering him unfit for the practice of law. In the instant case, the BAR, again, presented no evidence that TAYLOR deliberately or wilfully disobeyed any direction from the Court or that his professional judgment was impaired. Moreover, there was no such finding by the New Hampshire Court in its August, 1991 Order.

The cases relied upon by the BAR to support its argument that TAYLOR should be disciplined because the New Hampshire Court's Order was one of contempt are equally inapplicable. Those cases involve conduct undertaken by attorneys in their professional as opposed to private lives and/or involve fraud, dishonesty, deceit or other conduct not present here. Illustratively, in The Florida Bar v. Rood, 19 Fla. L. Weekly S51

(Fla. Jan. 20, 1994), an attorney who had previously been suspended for two years was found guilty of charging an excessive fee and failing to provide a closing statement to his clients. The referee also found him guilty of allowing a letter of credit to expire and of making a false statement to pay a judgment along with his being held in contempt of court. Here, TAYLOR did not make any false promises to Margaret Taylor or the Court. TAYLOR did not mislead Margaret Taylor or his children, the New Hampshire Court, or the BAR in connection with his admission to the BAR and the BAR has not proven or suggested otherwise.

In The Florida Bar v. McKenzie, 432 So.2d 566 (Fla. 1983), an attorney was disciplined for failure to appear at a court hearing on behalf of his client, refusing to return funds to a client and obtaining a default judgment despite being requested by out of state counsel to negotiate a settlement or permit his client to obtain in-state counsel. TAYLOR has not engaged in conduct even remotely similar to that in McKenzie and the BAR has not proven otherwise.

In The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982), an attorney was disciplined for failing to obey numerous orders of an appellate court to prosecute a criminal appeal by filing a brief. The BAR did not charge TAYLOR with the willful, intentional or continual disobedience of a Court Order while acting in his professional capacity or otherwise. The uncontroverted evidence is to the contrary. TAYLOR has continuously made an effort to meet his child support obligations

and the BAR so found when it admitted him to practice in 1989.

Lastly, in The Florida Bar v. Jackson, 494 So.2d 206 (Fla. 1986), an attorney was disciplined for his intentional defiance of a court order directing him to appear in court on a religious holiday. Again, other than presenting a certified copy of the New Hampshire Order and the Affidavit of Margaret Taylor, the BAR called no witnesses and presented no evidence to establish that TAYLOR intentionally, wilfully or continuously disobeyed a specific direction of the Court while acting in his capacity as an attorney. The BAR concedes that the finding and recommendations of the Referee are correct.

The cases cited by the BAR involve conduct distinguishable and inapposite to TAYLOR'S and do not compel a reversal of the finding of not guilty by the Referee.

II. THE BAR CANNOT DISCIPLINE TAYLOR FOR VIOLATION OF RULES AND REGULATIONS YET TO BE PROMULGATED.

Although the Rules of Professional Conduct contain no such provision, the BAR cites to recent legislation which gives the Department of Professional Regulation authority to suspend professional licenses in limited instances to support its position that TAYLOR must be disciplined. Section 61.13015, Florida Statutes (1993). The BAR'S argument fails for many reasons.

This Court, and not the legislature, has exclusive jurisdiction and authority to enact rules governing the practice

of law. In enacting rules and regulations governing attorneys, this Court has held that rules will be effective upon the members of the BAR when the opinions of the Supreme Court approving same become final. The court has held that an attorney cannot be found guilty of violating a rule of professional conduct which was not enacted until after the alleged misconduct occurred. The Florida Bar v. Trinkle, 580 So.2d 157, 159 (Fla. 1991). This Court's holding is consistent with the settled rule of statutory construction that statutes and rules interfering with vested rights or which create new obligations will not be given retroactive effect. Young v. Altenhaus, 472 So.2d 1152, 1159 (Fla. 1985). In the case before this Court, the BAR, recognizing that the Referee correctly applied existing law to TAYLOR, now asks this Court to, in effect, create a new rule of discipline and professional conduct requiring suspension if an attorney fails to pay child support and then, retroactively apply it to TAYLOR. Yet, the BAR has not and is unable to cite any authority for this proposition because to do so is impermissible as a matter of law. A party must know the rules before he can be charged with violating them.

Even were this Court to look to recent legislation governing child support and license suspensions for guidance, these statutes do not make suspension automatic upon the failure to pay child support. A review of the recent legislation reveals that the legislature has enacted a procedure concluding with a court hearing where suspension of license may be denied for failure to

pay child support if suspension would result in irreparable harm to the obligor or employee, would not accomplish the objective of collecting the delinquency, where the obligor has demonstrated that he has made a good faith effort to reach an agreement with the obligee, or if there is an alternative remedy available to the obligee which is likely to accomplish the objective of collecting the delinquency. Section 61.13015(3)(a) and (b), Florida Statutes (1993). In the instant case, there is ample evidence in the record to conclude that (1) TAYLOR made a good faith effort to reach an agreement with Margaret Taylor concerning the child support delinquency; (2) that suspension of TAYLOR'S license to practice law would cause irreparable harm to him, his current children, as well as Kelly and Megan by denying him his ability to earn a living and will frustrate the objective of collecting the delinquency. Moreover, since the New Hampshire Order has been found to be a civil judgment, Margaret Taylor, as the obligee, has available to her all enforcement and collection remedies available in Florida. In this case, there is no need for the BAR to become a collection agency for private parties and their attempts to collect child support arrearages. Although the BAR did not and could not charge TAYLOR with a violation of Section 61.13015, Florida Statutes nor did it raise the issue before the Referee, the recently enacted legislation provides no support for its position that an attorney's failure to pay child support must result in his discipline.

III. DISCIPLINE - REMAND.

During the final hearing of these consolidated actions, BAR counsel and counsel for TAYLOR stipulated that the issue of mitigation and discipline would be reserved until the Referee made his recommendations. This stipulation was approved by the Court. (See, TR-123-129; Dec. 13, 1993, vol. II). Thus, no evidence of mitigation or discipline was presented by the BAR or TAYLOR to the Referee.

In determining discipline, a judgment must be fair to society, must be fair to the attorney, and must be sufficient to deter attorneys from similar conduct. The Florida Bar v. Poplack, supra, 599 So.2d 116. Thus, the appropriate level of discipline must be weighed in light of aggravating or mitigating circumstances presented by the parties. The Florida Bar v. Farbstein, 570 So.2d 933, 936 (Fla. 1990). In the instant case, were the Referee's finding of not guilty be reversed, TAYLOR, as well as the BAR, should be afforded an opportunity to present evidence or mitigation and appropriate discipline, if any, be imposed.

CONCLUSION

Contrary to the mischaracterization of the BAR, TAYLOR does not maintain that child support should not be paid. To the contrary, the uncontradicted evidence of this case demonstrates that TAYLOR has placed his child support obligations to his now emancipated children, Phillip and Tracy, to his minor children, Megan and Kelly, and to his three infant children, Zachary, Courtney and Jessica ahead of his other obligations. TAYLOR has always appreciated and has attempted to fulfill his child support obligations to all of his children despite his alcoholism and addiction and its devastating effect upon him personally and financially. The BAR understood and recognized this characteristic of TAYLOR when it admitted him in November of 1989 without condition as to the issue of child support.

The issues before this Court for review are simple and crystallized. First, does substantial and competent evidence support the Referee's findings of fact and recommendation that TAYLOR did not engage in conduct involving fraud, deceit, dishonesty, or which would otherwise adversely reflect upon his character and ability to practice law? As was the case in November of 1989, this question must now be answered in the affirmative. The BAR presented no evidence, not a single witness, to even hint that TAYLOR was in any way unfit to practice law.

Secondly, were the Referee's conclusions of law and finding of not guilty based upon the correct consideration and

application of existing law and rules? Again, the answer is in the affirmative. As the Referee concluded and the BAR admitted at the final hearing, no rule or precedent existed for disciplining an attorney for failure to pay child support or a private debt in the absence of fraud, deceit, dishonesty, or other egregious conduct which adversely reflects on the character and the ability of an attorney to practice law. Having answered these questions in the affirmative, the report of the Referee and his recommendation of not guilty must be approved and affirmed by this Court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and seven (7) copies of Respondent, Phillip H. Taylor, III's, Answer Brief have been furnished by regular U.S. Mail to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; and a true and correct copy of the foregoing Answer Brief was furnished by U.S. Mail to all parties on the attached mailing list, this 2nd day of May, 1994.

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The Florida Bar v. Phillip H. Taylor
Case No. 81,903
[TFB Case No. 92-31,972 (19A)]

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