087

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PHILLIP H. TAYLOR,

Respondent.

Case No. 81,903 + 81,379
[TFB Case No. 92-31,972 (19A)]

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THE FLORIDA BAR'S REPLY BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on December 14, 1993, shall be referred to as "T", followed by the cited page number.

The Report of Referee dated January 5, 1994, will be referred to as "ROR", followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____)

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

ARGUMENT

POINT I

IT IS APPROPRIATE THAT THE SUPREME COURT OF FLORIDA DISCIPLINE ATTORNEYS WHO FAIL TO OBEY COURT ORDERS.

The central issue in this case is that the respondent was held in contempt of court by the Superior Court of the State of New Hampshire on August 30, 1991, after he had been admitted to the bar in this state, Bar Ex. 6. It just so happens the contempt involved his failure to pay child support, an issue of concern in this state as evidenced by the passage of major revisions to Section 61.13015, Fla. Stat. (1993) in July of 1993. The respondent argues that the bar is pursuing this matter simply because it involves child support issues. This is incorrect. Anytime it is brought to the bar's attention that an attorney has been held in contempt, the bar investigates. This matter would have proceeded even had the respondent's contempt finding involved some other behavior, such as refusing to comply with valid discovery demands, The Florida Bar v. Bloom, 632 So. 2d 1016 (Fla. 1994), or failure to abide by a visitation order, The Florida Bar v. Shannon, 506 So. 2d 1036 (Fla. 1987). Clearly, contempt is a serious matter for an attorney, regardless of whether the lawyer is acting in a professional or personal capacity. An attorney is an officer of the court and as such is held to a higher standard of care than a nonlawyer.

> Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally

> essential afterwards. (Citations omitted). Whenever the condition is broken the privilege is lost. The Florida Bar v. Massfeller, 170 So. 2d 834, 839 (Fla. 1964), quoting In re Rouss, 221 N.Y. 81, 116 N.E. 782.

The respondent was not suffering from the effects of alcoholism at the time he was held in contempt of court. What the public may perceive here is that a lawyer can fail to pay his child support, be held in contempt of court, and not be disciplined because his troubles allegedly stemmed from problems with substance abuse prior to becoming an attorney, the fact that he has too many minor children to be able to fully support them all, and he has a long history of financial problems and an increasing amount of personal debt. It appears the respondent could never make enough income to satisfy all his obligations. The bar submits that this is not an excuse for ignoring a valid court order.

Attorneys can and indeed have been disciplined for conduct which was not associated with the practice of law and for which criminal charges were not sought. The following cases are an example.

In The Florida Bar v. Hosner, 520 So. 2d 567 (Fla. 1988), an attorney was publicly reprimanded because the automobile leasing company he owned failed to provide the title of a car to a purchaser. The attorney could not deliver the title because he had used it as collateral for personal loans. The attorney argued, among other things, that he could not be disciplined because the misconduct did not relate to the practice of law.

This Court disagreed, noting that if it were to follow such an argument, it "would be powerless to discipline attorneys who engage in conduct that is illegal, but not related to the practice of law, such as dealing in cocaine, or securities fraud. Obviously we may discipline attorneys who engage in such conduct, just as we disciplined Hosner for engaging in conduct which is improper, though not necessarily related to the practice of law."

In The Florida Bar v. Holmes, 503 So. 2d 1244 (Fla. 1987), an attorney was disbarred for engaging in multiple counts of misconduct, one of which did not involve the practice of law. In the first count of the bar's complaint, the attorney was charged with making misrepresentations in connection with his purchase of a home. While negotiating the sale, the attorney informed the sellers he would need two months to arrange his finances for the purchase. The parties then executed a contract for sale and purchase. For two and one-half months the attorney told the sellers he had made an application for financing and the bank had told him the loan approval was certain and imminent. He told them the bank merely was slow in processing his loan and he needed an extension of the closing date. He assured the sellers the closing would take place and encouraged them to contract to purchase another home. Relying upon his representations, the sellers did so. On the closing date, the attorney told the sellers the bank still had not processed his loan and he needed another delay. Thereafter, he refused to return the sellers' repeated telephone calls. The sellers eventually contacted the

bank and discovered that the attorney had made no effort to obtain any financing. The attorney, when confronted, told the sellers he had applied for the loan but had not pursued it because he had obtained private financing. This was not true. He later told the sellers the private financing had fallen through. Upon finally applying for the loan some four months after entering into the contract for sale and purchase, the attorney failed and refused either to submit the necessary documentation or communicate with the lending officials despite their repeated inquiries. The referee recommended the attorney be found guilty of violating Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility, which prohibited conduct by an attorney constituting dishonesty, fraud, deceit or misrepresentation. This Court upheld the referee's recommendation. The disbarment was warranted because of the other misconduct charged by the bar in the additional counts of its complaint.

In The Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968), an attorney was disbarred after engaging in sexual misconduct with his step-daughter. Although it was a criminal offense because she was a minor at the time, no charges ever were brought. The attorney was found to have violated the oath of admission. The lawyer argued his abilities as an attorney should not be measured by his personal life, nor should it be the subject of a bar proceeding. This Court disagreed. His conduct brought dishonor on the profession and was evidence of bad moral character.

The respondent's conduct resulting in his contempt of court is indeed a proper basis for discipline.

ARGUMENT

POINT II

THE REFEREE'S CONCLUSION OF LAW THAT AN ATTORNEY SHOULD NOT BE DISCIPLINED FOR BEING HELD IN CONTEMPT OF COURT DUE TO A FAILURE TO PAY CHILD SUPPORT IS ERRONEOUS.

Simply put, there are no ex post facto considerations in this case. The rules the respondent has been charged with violating existed at the time he was held in contempt of court. He is not charged with misconduct associated with violating any statute. The statute referred to by the bar in its initial brief was included for the purpose of bringing to this Court's attention the concerns of the legislative branch about professionals who are found in contempt of court for failing to pay child support. Attorneys, unlike other professionals, may be disciplined for being held in contempt of court for other reasons. Attorneys are officers of the court and are bound to abide by the judicial system. The respondent's conduct in failing to abide by a court order is intolerable and is not excused by his arguments in mitigation.

Although the respondent maintains he made good faith efforts to pay his support, the bar submits this would be more appropriately addressed in domestic relations case. This was an argument for the civil court to consider and it did, Bar Ex. 6. Re-litigating the civil case here is no more appropriate than it was at the referee level. The contempt order speaks for itself, Bar Ex. 6.

Not only has the respondent failed to take any steps to purge himself of the contempt, it appears he never will do so due to his increasing debt. The respondent's apparent financial irresponsibility further reflects adversely on his character.

ARGUMENT

POINT III

THE APPROPRIATE LEVEL OF DISCIPLINE FOR BEING HELD IN CONTEMPT OF COURT FOR FAILING TO ABIDE BY A CHILD SUPPORT OBLIGATION IS A NINETY-ONE DAY SUSPENSION AND PAYMENT OF COSTS.

The bar opposes remanding this matter to the referee for the purpose of arguing mitigation in the event this Court finds the respondent guilty. The referee merely makes a recommendation. It is this Court that makes the final determination as to the appropriate level of discipline, The Florida Bar v. Pearce, 19 Fla. L. Weekly S87 (Fla. Feb. 10, 1994). The respondent's entire case was actually nothing more than a presentation of his mitigation before the referee, such as his many dependents, T-27-29, 32, 34-35, 37-38, debts, T-33-34, 74-76, 78-83, 87-88, and substance abuse problems, T-41-46. Further, this Court has, in the past, imposed discipline in cases where a referee has recommended a finding of not guilty and this Court, on appeal, had found the recommendation to be erroneous. See The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983), where a referee's findings of fact and recommendation as to not guilty were found not to be supported by the record and this Court imposed a public reprimand.

The respondent has chosen to make his conditional admission status a matter of public record in this case. The respondent's status apparently concerns his past substance abuse problems.

However, because the respondent has chosen to bring his admission status into these proceedings, Respondent's Ex. 10, this Court also should take that matter into consideration in imposing discipline.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, conclusions of law and recommendation of not guilty and instead impose a discipline of a ninety-one (91) day suspension, requiring proof of rehabilitation prior to reinstatement, and payment of costs, currently totalling $1,786.11.

Respectfully submitted,

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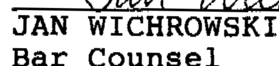
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing reply brief have been furnished by regular U. S. mail to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U. S. mail to Mr. Michael Keenan, counsel for respondent, at 325 Clematis Street, Suite A - 2nd Floor, West Palm Beach, Florida 33401; and a copy of the foregoing has been furnished by regular U. S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 11th day of May, 1994.

JAN WICHROWSKI
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