IN THE SUPREME COURT OF FLORIDA
(Before A Referee)

Case Nos. 81,379
(Fla. Bar Case No. 92-31,232 19A)

THE FLORIDA BAR

Complainant,

v.

PHILLIP H. TAYLOR

Respondent.
_____/

81,903
(Florida Bar Case No. 92-31,972 19A)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein, according to the Rules of Discipline, final hearing was held on December 12 and 13, 1993.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Janice K. Wichrowski, Bar Counsel

For The Respondent: G. Michael Keenan, Esquire

These cases were consolidated for purposes of final hearing, although documentary evidence, testimony and arguments were kept separate.

II. Findings of Fact: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find as follows:

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1. In the fall of 1991, Respondent was employed as an associate in the West Palm Beach, Florida, law firm of Searcy, Denney, Scarola, Barnhardt & Shipley, P.A. ("Searcy firm").

2. Also at that time Respondent continued to be on probationary admission to The Florida Bar, which, in part, required that he practice only with other member(s) of the Florida Bar (Respondents No. 1 in evidence).

3. Respondent's area of practice at the Searcy firm primarily involved medical malpractice cases. This was only natural, since he is also a medical doctor (although he does not have an active license).

4. One of the Searcy firm's clients was Alicia Slagle and her minor daughter, who had a medical negligence claim for brain damage suffered by the child at the time she was born. Respondent was the primary associate at the Searcy firm working on the case and had frequent contact with Ms. Slagle. Apparently such cases involve a great deal of client "hand-holding" due to the complex problems of the children, which was especially true for the Respondent's involvement in light of his medical training and experience.

5. During this period of time Respondent became concerned about the continued viability of his employment with the Searcy firm, in large part, due to its demand that all associates sign an employment contract containing certain provisions with which Respondent disagreed.

6. As a result of such concern and knowing the condition of his admission to The Florida Bar, Respondent contacted attorney Willie E. Gary to inquire about potential employment with his firm. He first spoke with Mr. Gary by telephone on Friday, November 15, 1991, and personally met with him two days later. Respondent did not formally accept employment with Mr. Gary at that time.

7. Also during this same period of time, Respondent continued to have contact with Ms. Slagle and advised her about his <u>possible</u> departure from the Searcy firm.

8. On November 21, 1991, Respondent made his decision to resign from the Searcy firm after first speaking with Mr. Gary to make sure he could be employed by his law firm. Apparently, he first advised Mr. Searcy by telephone and immediately thereafter submitted handwritten and typed letters

of resignation (Respondent's Exhibits 5 & 6 in evidence).

9. On November 27, 1991, the Searcy firm sued the Respondent, Mr. Gary and their law firm in the Circuit Court of Palm Beach County, Florida, and obtained an ex parte injunction prohibiting them from communicating with certain of the Searcy firm's clients, including Ms. Slagle (Bar's Exhibits 1 & 2 in evidence).

10. A motion was filed to dissolve the injunction and a hearing was commenced to consider the issue before the Honorable John D. Wessel, Circuit Judge, on December 10, 1991. Both the Respondent and Ms. Slagle testified in that proceeding. The entire transcript of that proceeding was admitted into evidence as Bar's Exhibit No. 5. The motion to dissolve the injunction was ultimately denied (Bar's Exhibit No. 4 in evidence).

11. It is important to keep in mind that The Florida Bar has not charged the Respondent with improperly soliciting the Searcy firm's clients. Rather, he has been charged with testifying falsely to Judge Wessel about the nature and content of his contacts with Ms. Slagle for the purpose of having the injunction vacated or modified.

12. The Florida Bar's burden in this regard is to prove its case by clear and convincing evidence. In my view it has failed to meet its burden.

13. Essentially, the Bar's case is based upon conflicts between the testimony of Respondent and Ms. Slagle.

In some instances I find there was no conflict or that Respondent's testimony was accurate. For example, both Respondent and Ms. Slagle testified that prior to November 21, 1991, Respondent told her about the possibility that the was leaving the Searcy firm. Thus, when he was asked questions which included words connoting certainly of departure he was

truthful in testifying that such conversations did not occur.

In other instances, Ms. Slagle's testimony conflicted with itself. For example, at page 29 of the hearing transcript (first section of Bar's Exhibit No. 5) Ms. Slagle testified that during a conversation which took place prior to November 21, 1991, Respondent asked if she would go with him if he left the Searcy firm. However, she subsequently testified at page 24 of her deposition (second section of Bar's Exhibit No. 5)[1], the Respondent actually told her that clients had a choice.

Finally, Ms. Slagle testified at page 31 of the hearing transcript (first section of Bar's Exhibit No. 5) that Respondent telephoned her and wanted her to sign a contract and dismiss the Searcy firm. However, that took place after Respondent's resignation. Thus, it cannot be considered as a basis to refute Respondent's testimony of what he said to her prior to November 21, 1991.

A total consideration of Ms. Slagle's testimony discloses an individual who had developed a rapport with the Respondent and was concerned about what would happen with her daughter's case if he left the Searcy firm. Undoubtedly, Respondent's possible departure and her possible termination of representation were discussed prior to November 21, 1991. However, there are questions about exactly what was said and when it was said. Such questions preclude a finding of false testimony by Respondent by clear and convincing evidence.

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1. Respondent was formerly married to Margaret Taylor. They were

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[1]Part of Ms. Slagle's testimony was taken by deposition after Judge Wessel had to adjourn the courtroom proceedings to handle other matters on his docket.

divorced on March 8, 1972, in the Superior Court of the State of New Hampshire, Equity #11,638. At the time of the divorce the parties had two minor children. Pursuant to an agreement, Respondent was ordered to pay $450.00 per month in child support and maintain adequate medical insurance.

2. After the divorce Respondent became a successful medical doctor and businessman. He ultimately lost everything, including another marriage, due to alcohol and drug addictions, culminating in personal bankruptcy.

3. He began treatment for addictions in 1984. Later he entered, and subsequently graduated from, law school. However, he was also becoming increasingly delinquent in his child support payments to Margaret Taylor. These payments had never been modified or abated by order of the New Hampshire court.

4. When Respondent applied for admission to The Florida Bar in 1988, one of the things disclosed to, and considered by, the Florida Board of Bar Examiners, was his child support problems with Margaret Taylor. Although those problems were not resolved, Respondent was admitted on a probationary status in 1989 and the conditions imposed did not involve the delinquent child support due the former Mrs. Taylor (Respondent's No. 10 in evidence).

5. After his admission, Respondent became an associate in the law firm of Montgomery, Searcy & Denney, P.A. n/k/a Searcy, Denney, Scarola, Barnhart & Shipley, P.A.

6. On March 1, 1991, Margaret Taylor filed a petition to hold Respondent in contempt for nonpayment of child support in the original New Hampshire divorce proceeding.

7. On August 30, 1991, after a hearing on the merits, the New Hampshire court entered its order finding "...that at times..." between "... September, 1982, through June, 1990,..." Respondent had the ability to pay

child support and without just cause failed to do so. The court also rejected Respondent's argument of an oral modification due to lack of consideration, since Respondent failed to comply with its terms. As a consequence, he was found in contempt of court and his former wife was awarded attorneys' fees (Bar No. 6 in evidence). No further sanctions or requirements were imposed by the court. That order was not appealed and remains outstanding.

III. Recommendation As To Whether Or Not The Respondent Should Be Found Guilty:

As to each case I make the following recommendations as to guilt or innocence.

As to Case No. 81-379

I recommend that the Respondent be found not guilty and specifically that he be found not guilty of the following violations charged by The Florida Bar, to wit:

Rule of Discipline 3-4.3 for engaging in conduct that is contrary to honesty and justice; and

The following Rules of Professional Conduct: 4-3.3(a)(1) for knowingly making a false statement of material fact or law to a tribunal; 4-4.1(a) for knowingly making a false statement of material fact or law to a third person; 4-8.4(b) for committing a original act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects; 4-8.4(d) for engaging in conduct that is prejudicial to the administration of justice.

The reason for my recommendation is the failure of The Florida Bar to prove the basis for those charges by clear and convincing evidence.

As to Case No. 81,903

I recommend that the Respondent be found not guilty and specifically

that he be found not guilty of the following violations charged by The Florida Bar, to wit:

Rule of Discipline 3-4.3 for committing an act that is unlawful or contrary to honesty and justice; and

The following Rules of Professional Conduct: 4-8.4(a) for violating the Rules of Professional Conduct; and 4-8.4(d) for engaging in conduct that is prejudicial to the administration of justice.

The reasons for my recommendation in this particular case do not involve the burden of proof. The material facts are not in dispute. Rather, they are as follows:

1. Neither side has cited a reported Florida case where a lawyer has been sanctioned for failure to pay child support or some other domestic relations debt, except The Florida Bar v. Langston 540 S. 2d 118 (Fla. 1989). However, in Langston the attorney perjured himself and entered into a calculated scheme to defraud his wife and consequently the court. No such egregious facts are present in this case. Nor did the New Hampshire court find that Respondent perjured himself or attempt to commit fraud on the court relative to his defense of oral modification. Rather, it essentially held that any such modification lacked consideration because Respondent failed to fully perform his end of the bargain.

2. This case is more 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 collection agent for child support in a civil matter.

3. The actual subject matter of the Complaint in this case was the August 30, 1991, order of the New Hampshire court (Bar's Exhibit No. 6). It was really a civil judgment. Further, The Florida Bar did not formally charge the Respondent with misconduct under the 1972 divorce decree.

4. That same August 30, 1991, order was not specific as to the date of Respondent's contemptuous conduct (it occurred "at times" between September, 1982 and June 1990). That fact, considered with the fact that Respondent's problems with his former wife were considered prior to his probationary admission into The Florida Bar in 1989, make me wonder if this would not amount to something similar to ex post facto punishment.

5. Finally, I do not believe the actions of the Respondent in this case are factually similar to those of any lawyer previously sanctioned on the record in Florida for conduct in his or her personal life. If this Court wishes to make the definitive statement that an attorney, who is found in contempt for failure to pay child support, is subject to sanction, absent some other conduct, such as perjury, dishonesty, deceit, etc., so be it. However, I do not believe the Rules of Discipline or the Rules of Professional Conduct specifically address it at this time.[2]

IV Recommendation as to Disciplinary Measures to be Applied:

Having found the Respondent not guilty in both cases, no discipline is recommended.

V. Past History and Past Disciplinary Record:

Having found the Respondent not guilty in both cases, this section is not applicable.

VI. Statement of Costs and Manner in Which Costs Should be Taxed.

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[2]I am aware of various legislative proposals to address this particular issue for professional licensees in Florida.

Having found the Respondent not guilty in both cases, I recommend that costs not be charged to the Respondent.

DATED this 4th day of January, 1994.

SCOTT M. KENNEY, REFEREE

Copies To:
SEE ATTACHED MAILING LIST

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a conformed that a copy of the above-report of referee has been served on Janice K. Wichrowski, Bar Counsel at The Florida Bar, 880 North Orange Ave., Suite 200, Orlando, Florida, 328; G. Michael Keenan, Esquire, Suite A, Second Floor, 325 Clematis St., West Palm Beach, Florida 33401; and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32999-postage prepaid, via first class mail, postage prepaid, this 5th day of Jan., 1994.

Myra Eldridge
Judicial Assistant

The Florida Bar v Phillip H. Taylor

Case No. 93-30,902 (19A)

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