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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,526

[TFB Case No. 93-31,902 (19A)]

THE FLORIDA BAR,

Complainant,

v.

PHILLIP H. TAYLOR, III,

Respondent.
_____/

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

By: G. Michael Keenan, Esquire
Florida Bar No. 334839

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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 January 20, 1994, unless otherwise noted.

Reference to Exhibits shall refer to exhibits admitted by Petitioner and Respondent during the final hearing held on January 20, 1994.

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.

On October 8, 1993, the BAR filed its Complaint charging TAYLOR with:

a. entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to the client. Rule of Professional Conduct 4-1.8(a);

b. providing financial assistance to a client in connection with pending or contemplated litigation. Rule of Professional Conduct 4-1.8(e) of the Rules Regulating The Florida Bar;

c. acquiring a property interest in a cause of action or the subject matter of litigation. Rule of Professional Conduct 4-1.8(i); and

d. violating the Rules of Professional Conduct. Rule of Professional Conduct 4-8.4(a).

The BAR'S charges were founded in two factual allegations contained in the Complaint. At Paragraph 11, the BAR alleged that:

> Mr. Gary [TAYLOR'S employer] testified ... that the respondent [TAYLOR] loaned Mrs. Barner [the "client"] $200.00 of [Mr. Gary's] firm's money <u>without</u> Mr. Gary's prior knowledge or consent. The funds were paid by a check drawn on the firm's bank account and signed by Mr. Gary.

At Paragraph 11, the BAR alleged that:

> During the period of time the respondent represented Mrs. Barner, both while he was employed by Mr. Searcy's law firm and Mr. Gary's law firm, he routinely advanced her small sums of his own money and used clothing for her son.

In his Report of February 4, 1994, the Referee found TAYLOR not guilty of violating Rule 4-1.8(a) and Rule 4-1.8(i), Rules of Professional Conduct, finding "that there is absolutely no evidence to support violations of these Rules." (emphasis added). The Referee also found TAYLOR not guilty of violating Rule 4-1.8(e), Rules of Professional Conduct, finding inter alia, "... Ms. Barner was already a client of the Gary firm. There was no evidence to suggest that she became a client as a result of promised loans or cash advancements. Furthermore, there was no evidence to establish that she maintained that relationship because of the money or used clothes." Despite having found that the BAR failed to present any evidence to support its charges against TAYLOR, the BAR nonetheless prosecutes this appeal.

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, the BAR erroneously states that the "evidence indicated that, but for Respondent's request to financially assist Ms. Barner, the Gary firm's $200.00 check would not have been issued." However, a review of the Referee's Report reveals that while TAYLOR made Mr. Gary aware of Ms. Barner's needs, Mr. Gary knew exactly what he was doing when he signed the check without condition of repayment because he was aware of Ms. Barner's needs for basic necessities. (See, Report of Referee, Finding of Fact 10). Further, contrary to the BAR'S Statement of Facts, there was no admissible evidence establishing that TAYLOR gave small amounts of "pocket money" to Ms. Barner at various times. Thus, TAYLOR is compelled to recite a thorough and accurate statement of facts as they were presented through the BAR'S only witness, Mr. Willie Gary.

Mr. Gary first met TAYLOR in November of 1991 when TAYLOR was offered employment with Mr. Gary's firm. (TR-32; ll. 9-10; TR-16; ll. 20-22). Prior to November of 1991, Mr. Gary had not been acquainted with TAYLOR. (TR-16; ll. 21-22). It is undisputed that when TAYLOR became associated with the Gary firm, Mary Barner, the mother of a severely brain damaged infant, Joseph, had chosen TAYLOR as her lawyer. (TR-32; ll. 12-19). This fact was confirmed at a hearing before Judge L.B. Vocelle on November 27, 1991 on the Gary firm's Motion for Substitution of

Counsel at which TAYLOR, Ms. Barner and Mr. Gary were present. (TR-33; l. 5 through TR-34; l. 11). Most significantly, as of the date of the hearing, there had been no discussions with TAYLOR or Ms. Barner concerning Mr. Gary or TAYLOR'S providing financial assistance to Ms. Barner. As Mr. Gary testified:

> Q. (Mr. Keenan): She had -- so I understand it, when you were there at the hearing arguing for her [Mary Barner's] right to choose Mr. Taylor and your law firm as her lawyer, she had already made that decision without any discussion of financial assistance; correct?
>
> A. (Mr. Gary): Yeah. Well, she flat out -- she always wanted Phil to be her lawyer. I think that was kind of clear. I really think in Mary's heart that's what she wanted.

(TR-34 l. 20 through TR-35; l.2)

Ms. Barner was a single, black mother. (TR-41; ll. 7-10). Her infant son Joseph, was the victim of medical malpractice which had left him severely brain damaged, paralyzed and blind. (TR-41; ll. 11-18). Joseph required constant medical attention. (TR-41; ll. 19-21). Ms. Barner was poor. She had no home, lived with her mother, and Joseph's father provided no support, financially or otherwise. Although Ms. Barner was employed, part time, she did not earn enough to provide for basic necessities for herself and Joseph, not to mention Joseph's constant medical care. (TR-24; ll. 10-23). As Mr. Gary stated:

> I knew she had a scrappy job at best; and she was kind of carrying the burden on her own.

(TR-42; ll. 5-6).

After Mr. Gary had hired TAYLOR and after Ms. Barner had retained Mr. Gary's firm and TAYLOR, and after the hearing on November 27, 1991 on the Motion for Substitution of Counsel, TAYLOR informed Mr. Gary of a procedure which had been established by Ms. Barner's prior law firm, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., under which she was loaned $600.00 per month by a subsidiary of the firm, Palm Beach Medical Consultants. Mr. Gary knew that the $600.00 given to Ms. Barner by her prior firm was a loan and that Ms. Barner had executed a Promissory Note. (TR-20; ll. 20 through TR 21; l. 2; TR-35; l. 14 through TR-36; l. 13). When questioned by TAYLOR, Mr. Gary told TAYLOR that his firm did not have a similar procedure and that he was unwilling to make such a loan to Ms. Barner although he had the financial ability to do so. (TR-36; ll. 14-23; TR-21; l. 16 through TR 22; l. 8).

Although TAYLOR had informed Mr. Gary of Ms. Barner's dire financial conditions, Mr. Gary, prior to advancing any monies to Ms. Barner, had also met with Ms. Barner and independently confirmed her needs. As Mr. Gary testified, the one time he did meet with Ms. Barner, he travelled with her to see her baby which she had to take with her to work at a job which paid her almost nothing because she had no one to watch Joseph. (TR-24; ll. 19-23).

In this context, Mr. Gary learned that Ms. Barner was faced with an emergency which required her baby to be hospitalized. It was a life and death situation. (TR-22; ll. 16-17; TR-24; ll.

10-12). As Mr. Gary testified:

> ...Mary just needed some help. She just needed some help.

(TR-24; ll.23-24). Mr. Gary, knowing first hand of Ms. Barner's dire financial circumstances, advanced Ms. Barner $200.00 on a check written on his law firm account which he signed. As Mr. Gary testified, he was well aware of the check's purpose. (TR-43; ll. 2-3). TAYLOR did not dupe or defraud Mr. Gary into writing the check nor did TAYLOR cause a check to be issued without Mr. Gary's knowledge or consent. (TR-43; ll. 1-24). The check was not issued to and did not act to induce Ms. Barner to retain Mr. Gary's firm or TAYLOR, and it was not issued and did not create an interest in the outcome of the case. (TR-40; ll.10-14).

Mr. Gary further testified that he had no personal or direct knowledge of TAYLOR advancing any monies to Ms. Barner. TR-44; ll. 7-17); (TR-23; ll. 15-18). Although Mr. Gary recalls TAYLOR informing him of used clothes being given to Ms. Barner for Joseph, it is uncertain as to whether the clothes came from TAYLOR, his wife or some other source. (TR-23; ll. 20 through TR-24; l. 3).

Although Ms. Barner and TAYLOR were present in Court at the final hearing (TR-4; ll. 9-16), the BAR called no witness other than Mr. Gary in support of its case nor did the BAR offer any further evidence in support of its charges.

SUMMARY OF ARGUMENT

I. The BAR presented no evidence that TAYLOR loaned Ms. Barner $200.00 of Mr. Gary's firm's money without Mr. Gary's knowledge or consent. The BAR presented no evidence that TAYLOR routinely advanced Ms. Barner small sums of his own money and used clothes for her son. The BAR presented no evidence that the $200.00 check written by Mr. Gary to Ms. Barner was given in connection with pending or contemplated litigation, that it was given as a condition of representation or continued representation, or that it was given with the expectation of repayment. The BAR presented no evidence that TAYLOR entered into a business transaction or acquired an interest adverse to Ms. Barner's or acquired a proprietary interest in Ms. Barner or her son's case.

II. In the event that the Referee's findings and recommendation of not guilty are not affirmed, the issue of discipline should be remanded to the Referee for consideration. Pursuant to the direction from the Referee, evidence of mitigation and discipline was not presented. Instead, the Referee stated that, in the event he found it necessary, he would hold a subsequent hearing to take evidence on the issues of mitigation and discipline.

ARGUMENT

I. TAYLOR DID NOT PROVIDE FINANCIAL ASSISTANCE TO MARY BARNER IN CONNECTION WITH CONTEMPLATED OR PENDING LITIGATION.

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 they are clearly erroneous and 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 support 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 - providing assistance to a client irrespective of whether it is in connection with contemplated or pending litigation is per se unethical and subject to discipline. Although 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, absent some condition of repayment from suit proceeds or establishment/maintenance of the attorney/client relationship as a result of the assistance, the providing of minimal assistance does not render an attorney subject to discipline.

Initially, it must be noted that the Referee found that there was no evidence to establish that TAYLOR violated Rule 4-1.8(a) or Rule 4-1.8(i), Rules Regulating The Florida Bar. In its brief, the BAR makes no argument to suggest that the Referee was in error with respect to his findings and recommendations as to these Rules. Consequently, the Referee's findings and recommendations should be accepted and affirmed with respect to TAYLOR'S alleged violation of these Rules.

Similarly, a review of the record, the transcript of the proceedings before the Referee, the Referee's Report and the BAR'S brief, demonstrates that the BAR failed to present any evidence (a) that TAYLOR loaned Ms. Barner $200.00 of Mr. Gary's firm's money without his prior knowledge or consent (BAR Complaint, Paragraph 10); or (b) that TAYLOR routinely advanced Ms. Barner small sums of his own monies or used clothing for her son (BAR'S Complaint, Paragraph 11). As Mr. Gary testified, he issued a $200.00 check to Ms. Barner which he signed on his firm's account knowing that Ms. Barner needed help because her son had to be hospitalized. Mr. Gary issued the check with full knowledge of its purpose and because he knew it was the right

thing to do. Mr. Gary testified that TAYLOR neither duped nor defrauded him into signing the check nor was it issued without his prior knowledge or consent. Mr. Gary's testimony is clear, convincing and uncontradicted on this point.

Mr. Gary also testified that TAYLOR may have told him that Taylor "gave her some of his kid's clothes to her child or some clothes of his wife's or some of his clothes or something." Mr. Gary did not testify that TAYLOR routinely gave Ms. Barner used clothing. As importantly, Mr. Gary had no knowledge that TAYLOR ever advanced any of his own monies to Ms. Barner, routinely or otherwise. Other than Mr. Gary's testimony, the BAR presented no further evidence to prove the allegations in its Complaint. As a result of the BAR'S failure to prove by clear and convincing evidence the charges made against TAYLOR, the Referee's findings of fact and recommendations must be accepted and affirmed by this Court.

Despite failing to present any evidence that TAYLOR gave Ms. Barner $200.00 of Mr. Gary's firm's money without Mr. Gary's consent or knowledge or that TAYLOR routinely or otherwise advanced Ms. Barner sums of his own money or used clothing, the BAR, engaging in perhaps theoretical debate, argues that this Court should now eliminate the "in connection with pending or contemplated litigation" requirement of Rule 4-1.8(e), Rules of Professional Conduct, and thus, make all financial assistance to clients ethically impermissible. The BAR cites no case law or legal authority to support this proposition. None exists.

The ethical concerns surrounding the prohibition against attorneys advancing monies or providing financial assistance to clients have consistently focused upon preventing attorneys from inducing clients to retain them by promising them monies or financial assistance and preventing attorneys from acquiring an interest in their clients' causes of action. State v. Dawson, 111 So.2d 427 (Fla. 1969); Louisiana State Bar Association v. Edwins, 329 So.2d 437 (La. 1976); In Re: Ruffalo, 249 F.Supp. 432 (N.D. Ohio 1965). Neither Rule 4-1.8(e) nor any prior decision of this Court or other courts construing the ethical goal of the Rule have held that advancing sums or providing financial assistance to a client, irrespective of the amount of the advancement or the purpose, is per se an ethical violation. As this Court stated in State v. Dawson, supra, 11 So.2d at 430:

> We are not here holding that, once legitimately employed, a lawyer is precluded from advancing sums incidental to the conduct of the client's business provided that promises of such advances were not conditions to obtaining employment.

Contrary to the BAR'S misstatement, this Court has addressed the exact issue currently before the Court.

Similarly, in Louisiana State Bar Association v. Edwins, supra, the Louisiana Supreme Court, in construing a disciplinary rule substantively similar to Rule 4-1.8(e), Rules of Professional Conduct, refused to discipline an attorney who advanced approximately $2,700.00 to a client for expenses such as living expenses, car notes and medical attention. At the time of the advances, the evidence established that the clients subsisted

at poverty level. In refusing to discipline the attorney, the court held:

> Nevertheless, under the circumstances here shown, we are unwilling to hold that the spirit or the intent of the disciplinary rule is violated by the advance or the guaranty by a lawyer to a client (who has already retained him) of minimal living expenses, of minor sums necessary to prevent foreclosure, or of necessary medical treatment.
>
> ...
>
> If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity or physical need, be forced to settle his claim for an inadequate amount.
>
> ...
>
> At least under the circumstances here shown, the spirit and intent of the canon ethical consideration involved is similarly not a violation of professional conduct subject to disciplinary penalty. It is more akin to the permitted advance of expenses of litigation than to the prohibited advances to purchase an interest in a lawsuit or to induce a client to retain the lawyer.

Louisiana State Bar Association v. Edwins, supra, 329 So.2d at 445-47.

In the case for review, the uncontroverted and only evidence adduced before the Referee establishes that Ms. Barner had already retained TAYLOR and Mr. Gary's law firm prior to there being any discussion or actual advancement of monies to Ms. Barner (TR-34; l. 14 through TR-35; l. 2); that Ms. Barner was

faced with a life and death emergency requiring her brain damaged son to be hospitalized while being represented by TAYLOR and Mr. Gary's firm (TR-22; ll. 15-19); TR-24; ll. 10-23); that Ms. Barner was a single, black mother of a severely brain damaged infant living at the poverty level (TR-24; ll. 10-24; TR-40; l. 25 through TR-42; 1.6); and that a $200.00 check was written by Mr. Gary in response to Ms. Barner's son's medical emergency and not to create an interest in the case or to have Ms. Barner retain TAYLOR or Mr. Gary's firm. (TR-40; ll. 10-14). Contrary to the conjectural argument of the BAR, there is simply no evidence to support, suggest or infer that Mr. Gary's $200.00 check or some used clothing provided by TAYLOR "favorably disposed Ms. Barner to keep Respondent as her attorney" or that TAYLOR "exerted at least some of the unilateral control against which Rule 4-1.8(e) was designed to prevent." The issuance of the $200.00 check by Mr. Gary and TAYLOR'S giving of some used clothing to Ms. Barner for her son do not violate the intent and spirit of the ethical considerations behind the rule with which TAYLOR was charged.

The BAR relies upon The Florida Bar v. Wooten, 452 So.2d 547 (Fla. 1984) and The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981), to support rejection of the Referee's findings of fact and recommendation. Both cases are distinguishable and, in fact, when applied to the facts in the case before this Court for review, mandate acceptance and affirmance by the Court of the Referee's report.

In Wooten, an attorney, over a two year period, advanced the client $20,000.00 for medical bills, maintenance and support of the client and his family. The majority of the monies advanced were secured by promissory notes and were to be repaid from the proceeds of the client's personal injury action and workman's compensation claim. In rejecting the findings and recommendation of the Referee, this Court specifically found:

> The referee's findings that the Respondent did not acquire an interest in his client's litigation is clearly erroneous. The mere fact that Respondent advanced more than $20,000.00, which was not connected with the expenses of litigation and which was to be repaid from the proceeds of the litigation, is sufficient evidence of Respondent's acquisition of an interest in the client's litigation.

The Florida Bar v. Wooten, supra, 452 So.2d at 548.

In the case under review, there is simply no evidence that Mr. Gary's $200.00 check or the item of used clothing were to be repaid by Ms. Barner from the proceeds of the litigation or otherwise or to support a conclusion that TAYLOR acquired an interest in Ms. Barner's litigation. As importantly, the reasoning in Wooten, with its special attention to the amount of the loans, the evidence of promissory notes and the repayment of the monies being secured by the proceeds of litigation evidences that there is no per se prohibition against providing financial assistance to a client.

In Rogowski, an attorney was disciplined, not merely for advancing funds to a client but also for (a) improperly advancing funds from his client's trust account to two clients in excess of

the amount on deposit at the time of the advance; (b) permitting the balance in his trust accounts to be less than the outstanding trust liabilities on six occasions from 1975 to 1979; and (c) handling a contingency fee case without preparing the required disbursement statement or other suitable record evidencing receipts and expenditures. In Rogowski, the Bar and this Court's focus was on the attorney's negligent handling of his trust account. No facts were reported as to the nature, amount or purpose of the monies advanced to the clients nor does it appear that the finding and discipline imposed upon the attorney were based upon the advances made. Unlike Rogowski, TAYLOR is not charged with mishandling his trust account monies or any other ethical violations. Rogowski, while instructive, is inapposite to the case at bar.

The BAR also cites to ethical Opinion No. 92-6 (March 1, 1993), to support rejection of the Referee's report. The Opinion, while not binding, is also distinguishable. TAYLOR did not form a corporation for the purpose of loaning monies to Ms. Barner or other clients as did his prior law firm, Searcy, Denney, Scarola, Barnhart & Shipley, and there is no evidence that TAYLOR routinely or otherwise referred a client to a loan company or that he actively participated in loan transactions. As the BAR admitted during closing argument, "[The ethical opinion is] not on point in this case because there is no evidence that there was a loan." (TR-56; ll.3-5)

Lastly, the BAR impermissibly attempts to argue that since a

Referee in a separate and unrelated case found minor misconduct against Mr. Gary, the Referee's report in this case should be rejected. Notwithstanding apparent due process concerns, the BAR's reference to Mr. Gary's case, as described in its brief, is clearly distinguishable from the facts present here. Apparently, Mr. Gary was charged with making loans to his clients in the past to help with living expenses during the pendency of lawsuits. There is absolutely no evidence in this case that TAYLOR ever made a loan to Ms. Barner or any other client. It is not known whether the charges against Mr. Gary were the same as against TAYLOR. The BAR did not argue or even allude to Mr. Gary's case during the hearing before the Referee in the TAYLOR case. It is not even clear from the BAR'S brief whether Mr. Gary consented to the finding of minor misconduct or whether it was entered after a full evidentiary hearing and based upon factual findings made by a Referee. Moreover, the Referee's recommendation is not yet final as the BAR admits. The case against Mr. Gary provides no support for the BAR'S position in this case. If TAYLOR is to be held answerable for some conduct of Mr. Gary in Case No. 82,525, constitutional due process requires that he be afforded an opportunity to examine the charges against him, respond to same, and confront and examine his accusers and witnesses. Mr. Gary's testimony before the Referee in this case demonstrates that the Referee's findings of fact and recommendation of not guilty must be approved and affirmed.

II. DISCIPLINE-REMAND.

During the final hearing of this action, the Court ruled and directed that, in the event that it were necessary, it would conduct an additional hearing to handle the issues of mitigation and discipline. (TR-81; ll. 4-6). 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, 599 So.2d 116 (Fla. 1992). 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 and recommendation of not guilty to be rejected, TAYLOR, as well as the BAR, should be afforded an opportunity to present evidence of mitigation and appropriate discipline, if any, to be imposed.

CONCLUSION

The Referee's findings and recommendations that TAYLOR did not violate Rule 4-1.8(a) and 4-1.8(i), Rules of Professional Conduct, must be accepted and affirmed. The BAR presented no evidence to establish that TAYLOR violated these Rules of Professional Conduct.

Likewise, the Referee's recommendations and findings that TAYLOR did not violate Rule 4-1.8(e), Rules of Professional Conduct, must be accepted and affirmed. The BAR failed to present evidence that TAYLOR issued a check to Ms. Barner from Mr. Gary's firm without his knowledge and consent. The BAR failed to present evidence that TAYLOR routinely advanced Ms. Barner sums of his own money or used clothes for her son. The BAR failed to present any evidence that TAYLOR gave assistance to Ms. Barner to induce her to retain him as her attorney. The BAR failed to present evidence establishing that TAYLOR acquired an interest in Ms. Barner's cause of action. The BAR failed to prove that TAYLOR provided financial assistance to Ms. Barner in connection with pending or contemplated litigation. TAYLOR'S conduct did not violate Rule 4-1.8(e).

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 9th day of May, 1994.

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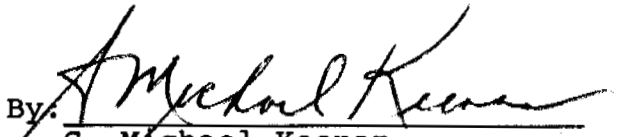
By: 
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