IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PHILLIP H. TAYLOR,

Respondent.

_____/

Case No. 82,526
[TFB Case No. 93-30,902(19A)]

COMPLAINANT'S AMENDED INITIAL BRIEF

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SYMBOLS AND REFERENCES

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

The transcript of the final hearing held on January 20, 1994, shall be referred to as "T," followed by the cited page number.

The Report of Referee, dated February 4, 1994, shall be referred to as "ROR," followed by the referenced page number(s) of the Appendix, attached (ROR-A-____).

STATEMENT OF THE CASE

The Nineteenth Judicial Circuit Grievance Committee "A" voted to find probable cause on July 21, 1993. The Florida Bar filed its complaint on October 8, 1993. The referee was appointed under order of this court dated October 21, 1993.

The final hearing was held on January 20, 1994. The referee, Judge Scott M. Kenney, issued his report on February 4, 1994, in which he recommended the respondent be found not guilty of charges that he unethically provided financial assistance to a client in connection with litigation. The board of governors considered the report at its February, 1994, meeting and voted to appeal the referee's conclusions of law and recommendation of not guilty. The bar served its Petition for Review on March 1, 1994.

STATEMENT OF THE FACTS

The bar does not take issue with the referee's findings of fact. Unless otherwise noted, the following facts are derived from the Report of Referee.

The respondent, Phillip H. Taylor, joined the law firm of Gary, Williams, Parenti, Finney & Taylor (hereinafter referred to as the Gary firm) in November, 1991, after resigning as an associate from the law firm of Searcy, Denney, Scarola, Barnhardt & Shipley (hereinafter referred to as the Searcy firm). While employed at the Searcy firm, respondent represented one of the Searcy firm's clients, Mary Barner, and her minor son, Joseph Burkes. Ms. Barner was pursuing a medical malpractice claim on behalf of her son.

When respondent left the Searcy firm in November, 1991, Ms. Barner decided that she wanted respondent and the Gary firm to continue legal representation of her son's medical malpractice claim. The Searcy firm objected to the substituted representation of the Gary firm.

Soon after arriving at the Gary firm, respondent informed Willie Gary, senior partner of the Gary firm, that Ms. Barner and her son were indigent and had been receiving financial assistance in the form of a $600 per month loan from the Searcy firm's medical consulting group. The loan was subject to the terms of a promissory note and security agreement, and loan repayment was to be made from the proceeds received in the underlying medical malpractice litigation. Willie Gary informed respondent that the

Gary firm did not have a financial assistance program similar to that of the Searcy firm's medical consulting group, and that the Gary firm would not continue payments to Ms. Barner and her son.

Despite Willie Gary's statement that the Gary firm would not continue providing financial assistance to Ms. Barner and her son, Willie Gary signed a firm operating account check in the amount of $200 payable to Ms. Barner. The purpose of the check was to assist Ms. Barner with her basic living expenses. The evidence indicated that, but for respondent's request to financially assist Ms. Barner, the Gary firm's $200 check would not have been issued.

The Gary firm's check to Ms. Barner apparently was not a loan. There was no agreement, pledge or expectation of repayment out of any settlement or recovery from the underlying medical malpractice litigation. There was no evidence that the check was for the purpose of influencing Ms. Barner to continue her legal representation with respondent or the Gary firm.

Other evidence revealed that respondent also provided additional assistance to Ms. Barner and her son. On at least one occasion respondent gave Ms. Barner used clothing belonging to respondent's son. Moreover, hearsay testimony indicated that respondent gave small amounts of "pocket money" to Ms. Barner at various times.

SUMMARY OF ARGUMENT

The respondent improperly gave money and other financial assistance to his clients, Mary Barner and her minor son, while working at the Gary firm. The clear language of Rule 4-1.8(e), Rules Reg. Fla. Bar, prohibits giving financial assistance to clients in connection with litigation, except that a lawyer may advance litigation expenses which may be contingent upon the outcome of litigation. A lawyer may also simply pay such expenses for an indigent client without contingent reimbursement. The money and other financial assistance provided to the indigent Ms. Barner was not for court costs and litigation expenses, but rather, was for living expenses.

Respondent's financial assistance to Ms. Barner was "in connection with" litigation. But for his legal representation of Ms. Barner and her son, respondent would not have learned of her need for financial assistance nor would he have been in a position to remain apprised of the ongoing financial needs of her family. Although the Report of Referee states that respondent's gifts to Ms. Barner and her son were not made "in connection with" litigation because there was no condition for repayment out of suit proceeds nor was an attorney-client relationship established or maintained as a result of such gifts, the bar submits Rule 4-1.8(e) should not be construed so narrowly.

Also, although the referee did not find evidence that respondent's gifts to Ms. Barner were a condition to continued representation, it is counter-intuitive to assume that such gifts

did not somehow favorably dispose Ms. Barner to keep respondent as her attorney, especially in light of her having followed him from law firm to law firm as his employment changed. Although, arguably, respondent's gifts to Ms. Barner were mainly intended for humanitarian purposes, the consequence of Ms. Barner's loyalty to respondent can, at least in part, reasonably be inferred from the circumstance of respondent's financial assistance.

The referee misapplied Florida case law and relied heavily on case law from other jurisdictions to determine the issue of financial assistance. There are important differences between the rules involved which serve to distinguish this case law. Florida case law and the Florida Standards for Imposing Lawyer Sanctions support a public reprimand of respondent upon consideration of the aggravating factors and respondent's cumulative misconduct in his representation of Ms. Barner.

ARGUMENT

POINT I

IT IS IMPROPER FOR AN ATTORNEY TO PROVIDE FINANCIAL AND OTHER ASSISTANCE TO A CLIENT THROUGH "GIFTS" OF MONEY AND TANGIBLE ITEMS FOR PURPOSES OTHER THAN COURT COSTS AND EXPENSES OF LITIGATION.

The Respondent improperly gave money and other financial assistance to his clients, Mary Barner and her son, while working for the Gary firm. Rule 4-1.8(e), Rules Regulating the Florida Bar, states:

> **(e) Financial Assistance to Client.** A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an **indigent client** may pay court costs and expenses of litigation on behalf of the client. [emphasis added]

It is undisputed that respondent, through a $200 check issued by the Gary firm, gave Ms. Barner financial assistance that was not for the purpose of paying the court costs and expenses of litigation (T 22). It is also undisputed that respondent gave Ms. Barner other small sums of money as well as tangible items of clothing while representing her and her minor son, Joseph Burkes (T 23).

This court, in The Florida Bar v. Wooten, 452 So.2d 547 (Fla. 1984), held that advancing funds to a client for maintenance and support of the client's family, to be repaid from the proceeds of the client's litigation, warranted a public reprimand. The ethics rule at issue in Wooten, supra, Disciplinary Rule 5-103(B) of the

former Code of Professional Responsibility, was substantially similar to the current Rule of Professional Conduct 4-1.8(e) and stated:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

The client in Wooten, supra, received over $20,000 from his attorney during a two year period, mostly for purposes of maintaining and supporting his family. Id. at 548. The client was required to repay this amount from the proceeds of his personal injury action, as evidenced by several promissory notes. Id. This court held that the lawyer violated Disciplinary Rule 5-103(B) by acquiring an interest in the client's litigation and ordered discipline consisting of a public reprimand and payment of costs. Id.

The ethical policy sought to be enforced by the Wooten decision was the prevention of a conflict of interest between the lawyer and client. If the client owes money to the lawyer and the source of repayment is from litigation proceeds, then the lawyer may be less than zealous and objective in obtaining the best possible legal result for the client. The lawyer may instead be tempted to better serve his or her own interest in repayment rather than to honor the fiduciary obligation owed to the client. However, the policy accepts this inherent conflict or tension if the

financial assistance is for the purpose of covering court costs and other expenses of litigation. Disciplinary Rule 5-103(B) did not allow financial assistance for a client's living expenses and Wooten, supra, makes it abundantly clear that such assistance is unethical.

The relevant ethical rules have been amended since 1984, the year of the Wooten, supra, decision. Rule of Professional Conduct 4-1.8(e) is the applicable rule in this matter. It prohibits giving financial assistance to a client in connection with litigation, subject to two exceptions set forth in Rule 4-1.8(e)(1) and (2). These exceptions, unlike Disciplinary Rule 5-103(B), differentiate between indigent clients and other clients. The distinction is that for indigent clients, there is no obligation - or even suggestion - for repayment of the financial assistance to come from litigation proceeds. However, the type of financial assistance allowed, as in Disciplinary Rule 5-103(B), remains limited to payment of court costs and expenses of litigation and does not allow financial assistance for family maintenance, the type of assistance provided by respondent to Ms. Barner and the type specifically prohibited in Wooten, supra.

Respondent's financial assistance to Ms. Barner was "in connection with" contemplated or pending litigation. But for his legal representation of Ms. Barner and her son, respondent would not have learned of her need for financial assistance nor would he have been in a position to remain apprised of her ongoing maintenance expenses. Although the Report of Referee states that

respondent's gifts to Ms. Barner and her son were not made "in connection with" litigation because there was no condition for repayment out of suit proceeds nor was an attorney-client relationship established or maintained as a result of such gifts, (ROR-A-3), Rule 4-1.8(e) should not be construed so narrowly.

In The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981), this court held that a lawyer's advances of funds were made in connection with contemplated or pending litigation even though such advances were not provided for the expenses of litigation or for any other expense authorized by the Code of Professional Responsibility. As in Wooten, supra, Disciplinary Rule 5-103(B) was the pertinent ethical rule. Although Rogowski, supra, does not specify the exact nature of the advances made "in connection with" litigation, the decision states that they were not for the types of expenses explicitly stated in the rule (e.g., court costs, expenses of investigation, etc.). Id.

Although the advances in Rogowski, supra, were not for expenses authorized in Disciplinary Rule 5-103(B), the court found that such advances were nevertheless made "in connection with" contemplated or pending litigation. It is overly narrow to conclude, as does the Report of Referee in this matter, that advances are made "in connection with litigation" only when there is no condition for repayment out of suit proceeds or an attorney-client relationship is established or maintained as a result of such advances (ROR-A-3). Most importantly, such a conclusion is not supported by Rogowski, supra. Additionally, Rule 4-1.8(e)(2)

does not in any manner require an indigent client to repay authorized financial assistance. Hence, the Report of Referee has written a requirement into Rule 4-1.8(e)(2) that was not so intended.

Rule 4-1.8(e) also does not require an attorney-client relationship to be established or maintained as a result of the financial assistance in order for the assistance to be "in connection with litigation." Admittedly, one of the aims of the "in connection with" language in Rule 4-1.8(e), as inferentially discussed in the comments to the rule, is to prevent lawyers from buying lawsuits through financial assistance to clients, but the "in connection with" requirement would seem of greater ethical significance if its scope were broader than that suggested in the Report of Referee. Rather than limiting the scope of the "in connection with" requirement to consist of only those advances that result in the establishment or maintenance of an attorney-client relationship, such requirement would seem of far greater utility and application if its scope were broadly construed to include other advances that did not necessarily result in the establishment or maintenance of an attorney-client relationship.

Assuming arguendo that the Report of Referee requirement for a causal nexus between financial assistance and maintenance of an attorney-client relationship is necessary for Rule 4-1.8(e) to apply, while the evidence did not conclusively show that respondent's gifts to Ms. Barner met this requirement (ROR-A-3), it is counter-intuitive to assume that such gifts did not somehow

favorably dispose Ms. Barner to maintain respondent as her attorney. In fact, Ms. Barner followed respondent from the Searcy firm to the Gary firm and, ultimately, to his current firm of Montgomery & Larmoyeaux (T 16-20). Although, arguably, respondent's gifts to Ms. Barner were mainly intended for humanitarian purposes, the consequence of Ms. Barner's loyalty to respondent can, at least in part, reasonably be inferred from the circumstance of respondent's financial assistance.

The Report of Referee cites State v. Dawson, 111 So.2d 427 (Fla. 1959) not being as on point, but instructive in holding that respondent should not be disciplined for providing small sums of money and other assistance to an **existing** indigent client such as Ms. Barner (ROR-A-4). However, a review of the facts in Dawson, supra, reveal that the lawyer was sanctioned for buying a client's business by agreeing in advance of representation to pay the client's bills. Id. at 430. Dawson, supra, did not involve providing financial assistance to existing clients, and the Dawson court specifically stated that it was not reaching the issue of whether a lawyer, **once legitimately employed**, was precluded from advancing sums incidental to the conduct of the client's business. Id. Accordingly, the referee's apparent reliance upon dicta in Dawson, supra, to determine respondent's guilt was misplaced.

The referee apparently also relied on Louisiana State Bar Assoc. v. Edwins, 329 So.2d 437 (La. 1976), in holding that respondent's financial assistance to Ms. Barner was not unethical (ROR-A-4). In Edwins, supra, the lawyer was disciplined for

solicitation but received no discipline for providing financial assistance to one client, Thomas, for medical and other living expenses. Id. at 446. The Edwins court stated that "the advances and guarantees here made [to Thomas] are, in our opinion, more akin to the authorized advance of 'expenses of litigation' than to the prohibited advances made with improper motive to buy representation of the client or by way of advertising to attract other clients." Id. The ethics rule at issue in Edwins, supra, was Disciplinary Rule 5-103(B). Although the court stated that the type of advances to client Thomas were arguably prevented by the letter of Disciplinary Rule 5-103(B), the court found that, under the circumstances shown, the rule was not violated because the client was an **existing** client and the expenses were for necessities. Id. at 445.

However, the ethics rule implicated in Edwins, supra, Disciplinary Rule 5-103(B), was materially different from Rule of Professional conduct 4-1.8(e) and required the client to remain liable for repayment of financial advances regardless of outcome of the case. Respondent's financial assistance to Ms. Barner was not conditioned upon repayment, but was essentially a gift (ROR-A-2). The rationale of requiring repayment suggests that a client will be less susceptible to the lawyer's financial control and influence if the lawyer and client know that, ultimately, the client pays. With unconditional financial assistance provided to an indigent client beyond the type of assistance expressly stated in Rule 4-1.8(e), it is reasonable to assume that the lawyer possesses an expanded

ability to control and influence the client through the unilateral generosity of the lawyer's comparatively deep pockets.

Importantly, the lawyer in Edwins, supra, was disciplined for providing financial assistance to another client, Selzer, because such assistance was made with the intention of keeping Selzer as a client. The record in this case clearly shows that Ms. Barner was represented by respondent while he practiced at the Searcy firm; that she followed him to the Gary firm in November 1991 and provided sworn statements in support of his representation at various hearings; and that she further followed respondent to his current firm, Montgomery & Larmoyeaux (T 16-20). Although no direct evidence was presented to show that Ms. Barner maintained her relationship with respondent because of his advances to her, (ROR-A-2), it is not unreasonable to conclude that the $200 check and other financial assistance delivered to Ms. Barner by respondent exerted at least some of the unilateral control against which Rule 4-1.8(e) was designed to prevent.

Willie Gary, respondent's former employer, has received a recommendation of discipline for the very acts of financial assistance committed by respondent. In The Florida Bar v. Gary, Case No. 82,525, the referee recommended a finding of minor misconduct to be administered by the president of The Florida Bar. Mr. Gary testified in connection with that case that he had signed the $200 check given to Ms. Barner by respondent; that he had made loans to clients in the past to help them meet living expenses during the pendency of lawsuits; and that none of the advances was

made with the intent of soliciting clients. Mr. Gary voluntarily disclosed the ethical violations and expressed remorse for his conduct. Mr. Gary has subsequently enacted policies at the his firm to prevent a reoccurrence of the violations. This case is still pending this court's final determination.

Finally, in Opinion 92-6 (March 1, 1993) of the Professional Ethics of The Florida Bar, the bar has determined that an attorney's involvement with a corporation formed for the purpose of loaning money to personal injury clients would be unethical. The opinion cited Opinion 75-24 which concluded that it would be improper for an attorney to make loans to the attorney's clients for living expenses on the condition that the attorney and client sign a loan agreement. The opinion further stated several practical problems to such a loan corporation. One problem is the potential conflict of interest between the attorney, who may seek to settle the case in order to pay off the loan, and the client, who would have little incentive to settle or even cooperate in pursuing the case if the loan amount was equal to the projected recovery. Although the respondent's financial assistance to Ms. Barner was not proven to be a loan, the tension of a possible conflict of interest could likely arise under circumstances similar to the instant case when a lawyer has extended financial assistance for which he or she is indirectly seeking repayment through the contingent fee award.

POINT II

THE APPROPRIATE DISCIPLINE FOR PROVIDING FINANCIAL AND OTHER ASSISTANCE TO A CLIENT IS A PUBLIC REPRIMAND AND PAYMENT OF COSTS WHERE THE ASSISTANCE WAS GIVEN FOR PURPOSES OTHER THAN COURT COSTS AND EXPENSES OF LITIGATION.

In Wooten, supra, the court held that a public reprimand was warranted where an attorney advanced funds for the maintenance and support of the client and the client's family. The court stated that it had repeatedly held that an attorney may not advance money to a client except for the reasonable expenses of litigation. Under the facts of Wooten, supra, the payment of a substantial portion of $20,000 for maintenance and support of the client was determined to be unethical and subjected the attorney to a public reprimand.

The discipline imposed in Rogowski, supra, was a sixty-day suspension where the attorney not only improperly advanced funds to the client, but also mishandled trust accounts and failed to timely prepare disbursement statements. The court held that the funds were advanced in connection with litigation, but that they were not provided for the expenses of litigation or for any other expense authorized by DR 5-103(B), supra.

In determining the appropriate level of discipline to be imposed, the factual circumstances of the particular case must be considered carefully. See, e.g. State v. Dawson, 111 So.2d 427, 431 (Fla. 1959). Also, the discipline imposed must serve three purposes: first, the discipline must be fair to society; second, the discipline must be fair to the attorney; and third, discipline

must be severe enough to deter others who may be prone to like conduct. The Florida Bar v. Pearce, 19 Fla.L.Weekly S87 (Fla. Feb. 10, 1994). Moreover, cumulative misconduct can be found when the misconduct occurs near in time to other offenses. The Florida Bar v. Golden, 566 So.2d 1286 (Fla. 1990).

Respondent has a prior disciplinary history arising out of the same underlying circumstances with Ms. Barner. In August, 1993, respondent received an admonishment from the Nineteenth Judicial Circuit Grievance Committee "A" for conduct involving ex parte communications with a court in connection with respondent's representation of Ms. Barner. Respondent's conduct of advancing money and other assistance to his personal injury client, Ms. Barner, reveals his tendency to skirt the rules to accomplish his professional goals. Such conduct also poses a potential injury to the integrity of the judicial system because such conduct essentially buys the loyalty of the client. The example of respondent's financial assistance to Ms. Barner increases the risk that others will pursue litigation with the respondent for the purpose of receiving his "gifts" and not so much for the purpose of remedying a meritorious claim.

Standard 7.3, Florida Standards for Imposing Lawyer Sanctions, provides as follows:

> 7.3 Public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client,the public, or the legal system.

On the sole basis of respondent's financial assistance to Ms.

Barner, imposed discipline should be a public reprimand and payment of costs. The purposes of discipline set forth in Pearce, supra, would be well-served by a public reprimand of respondent. The public would be notified of inappropriate conduct while the public would not be deprived of respondent's legal services; such punishment is fair to respondent because it encourages him the to reform his professional behavior; and, perhaps most importantly, a public reprimand would serve notice on other attorneys who may be prone or tempted to become involve in similar violations. But for sanctioning this type of financial assistance through a public reprimand, an attorney may be more inclined to provide financial assistance to a personal injury client who experiences financial hardship while the case is pending resolution. The attorney may be tempted to meet a client's ongoing expenses to reduce settlement pressures on the client for a lesser, yet reasonable, amount when the attorney expects a larger fee.

In addition to the injury posed to the judicial system by respondent's financial assistance to Ms. Barner, respondent's prior history of misconduct further supports a public reprimand. Applicable Standard 9.2 aggravating factors also must be considered. Aggravating factors implicated in this case are 9.22(a), prior disciplinary offenses, and 9.22(c) a pattern of misconduct. Further, none of the mitigating factors present in Mr. Gary's case are present here. For example, Mr. Gary was found to have no dishonest or selfish motive. He brought the improper advances to the bar's attention because he recognized there was a

problem. He then took steps to ensure that such advances were never again made by his law firm. Respondent, on the other hand, has steadfastly maintained throughout this proceeding that his financial assistance to Ms. Barner was strictly an act of kindness and charity and that he should not be disciplined (T 60,61, 65). Such lack of understanding concerning the greater policy prohibition against other than narrowly excepted financial assistance to a client, coupled with respondent's lack of remorse, warrant a public reprimand with payment of costs.

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 public reprimand and payment of costs, currently totalling $1,030.12.

Respectfully submitted,

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BY: _____
JAMES W. KEETER
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing initial brief and appendix have been furnished by Airborne Express Overnight 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 30th day of March, 1994.

JAMES W. KEETER
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 82,526
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APPENDIX TO COMPLAINANT'S INITIAL BRIEF

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Case No. 82,526
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THE FLORIDA BAR

Complainant,

v.

PHILLIP H. TAYLOR

Respondent.

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, a hearing was held on January 20, 1994.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: James W. Keeter, Bar Counsel

For The Respondent: G. Michael Keenan, Esquire

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:

1. Respondent became a member of the law firm of Gary, Williams, Parenti, Finney & Taylor ("Gary firm") in November, 1991, after resigning as an associate attorney with the law firm of Searcy, Denney, Scarola, Barnhardt & Shipley ("Searcy firm").

2. Prior to Respondent's resignation, one of the Searcy firm's clients had been Mary Barner, who was pursuing a medical malpractice claim on behalf of her minor child.

3. As an associate lawyer at the Searcy firm, part of Respondent's duties included working on Ms. Barner's case.

4. When Respondent became a member of the Gary firm, Ms. Barner apparently decided that she wanted the Respondent and the Gary Firm to represent her and her child.

5. Although the Searcy firm raised an objection to such substituted representation, the Gary firm and Respondent began to represent Ms. Barner and her child.

6. Around this same time, Respondent spoke with Willie Gary (senior partner in the Gary firm) and advised him that Ms. Barner was indigent. Furthermore, he advised Mr. Gary that the Searcy firm's "medical group"[1] had been loaning Ms. Barner $600.00 per month pursuant to the terms of a promissory note and security agreement. Repayment was to come from the proceeds of the lawsuit. There is no evidence to suggest that Respondent was involved with this so-called "medical group."[2]

7. In any event, Respondent inquired as to whether the Gary firm had a similar "program" and whether the Gary firm would be in a position to continue such monthly support to Ms. Barner.

8. Mr. Gary advised Respondent that the Gary firm had no equivalent to the Searcy firm's medical group and that he had ethical concerns about regular monthly payments to any client. Thus, he advised Respondent that the Gary firm would not continue the payments to Ms. Barner.

9. Nonetheless, at some point during the Gary firm's representation of Ms. Barner (the exact date is unclear), Mr. Gary signed a check payable to Ms. Barner on the Gary firm's account (not its trust account), in the amount of $200.00. It was issued to help Ms. Barner pay for some basic necessities. Contrary to Respondent's arguments, the evidence did establish that Mr. Gary would not have issued the check, but for, Respondent's representations as to Ms. Barner's needs. Although that payment has been referred to as a "loan", the clear and convincing evidence in this case did not establish any pledge, agreement or expectation of repayment from any settlement or trial recovery in this case. Furthermore, the evidence did not establish that it was given as a condition for continued representation of Ms. Barner by Respondent and the Gary firm.

10. Nor did the clear and convincing evidence establish that Respondent made the "loan" to Ms. Barner without Mr. Gary's prior knowledge and consent (Paragraph 10 of the Bar's Complaint). Mr. Gary testified that he knew exactly what he was doing and that he signed the check because of Ms. Barner's need for basic necessities and without any condition of repayment.

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[1]The evidence is unclear, but apparently the Searcy firm's "medical group" is a subsidiary or related corporation to the Searcy firm.

[2]Furthermore, I have not been appointed to consider the ethical propriety of such a practice.

11. There was also evidence tending to establish that Respondent did give Ms. Barner used clothing for her child. However, there was no evidence to suggest an expectation of repayment. Nor did the evidence suggest that it was given as a condition for his continued representation.

12. There was also evidence indicating that, at various times, Respondent may have given Ms. Barner some "pocket-money." However, that was hearsay testimony from Mr. Gary, which even given the liberal application of evidentiary rules in these proceedings, does not rise to the level of clear and convincing evidence.[3] Furthermore, there was no evidence even tending to suggest that any "pocket-money" advances were made with the expectation of reimbursement from case recoveries or as a condition for his continued representation.

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

The Florida Bar has essentially charged Respondent with violating three provisions of Florida's Rules Of Professional Conduct (the fourth charge (Rule 4-8.4(a) is based upon violations of the three underlying Rules).

As to the charges under Rules 4-1.8(a) and 4-1.8(i), I recommend that Respondent be found not guilty.

The reason for my recommendation is that there is absolutely no evidence to support violations of these Rules.

As to Rule 4-1.8(e), I recommend that Respondent be found not guilty.

The reasons for my recommendation are necessarily more extensive, since both parties agree there is no Florida case "on point" and the evidence could be applied to support a broad application of that Rule.

Rule 4-1.8(e) essentially says that an attorney may not provide financial assistance to a client in connection with pending (or contemplated) litigation. It seems to me the key phrase in that Rule is "in connection with."

Absent some kind of condition for repayment from suit proceeds or establishment/ maintenance of the attorney/client relationship as a result of the assistance, I simply do not believe

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[3]Opening statements are not evidence.

it is appropriate to sanction lawyers who provide used clothing for a client's child or persuade the senior partner in the law firm to issue a single check for $200.00 for an indigent client's necessities I agree with Louisiana State Bar Association v. Edwins, 329 So. 2d 437 (La. 1976). State v. Dawson, 111 So. 2d 427 (Fla. 1959), is not on point, but is also instructive.

In this case 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.

IV. Recommendation As To Disciplinary Measures to Be Applied:

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

V. Past History And Past Record:

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

VI. Statement Of Costs And Manner In Which Costs Should Be Taxed:

The Florida Bar has not submitted an Affidavit of Costs as of this date. However, having found the Respondent not guilty, I recommend that costs not be charged to the Respondent.

DATED this 4th day of February, 1994.

SCOTT M. KENNEY, REFEREE

Copies To:
SEE ATTACHED MAILING LIST

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a conformed copy of the foregoing has been furnished via first class, postage prepaid mail to each of the above-stated attorneys or pro se parties, at the address listed for them on the attached mailing list, this 4th day of Feb, 1994.

Judicial Assistant

The Florida Bar v Phillip H. Taylor

Case No. 92-31,232 (19A)

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OPINION 92-6
March 1, 1993

An attorney's involvement with a proposed corporation that would loan money to claimants in personal injury matters would be unethical. Under the proposed plan, in order to ensure repayment of the loan from the recovery the attorney and the client would sign a trust declaration by which the attorney would become a trustee for benefit of the loan company.

RPC: 4-1.7, 4-1.8(e), 4-3.7(a), 4-8.4(a)
CPR: DR 5-103(B)
Opinion: 75-24
Case: *The Florida Bar v. McAtee*, 601 So.2d 1199 (Fla. 1992)

The inquiring attorney previously received an informal staff opinion concerning the inquiry presented below. At the inquirer's request, the Committee reviewed the staff opinion. Following the Committee's affirmance of the staff opinion, the inquirer petitioned for Board of Governors review. The Board approved the result reached in the staff opinion, but directed that the Committee render an advisory opinion to provide guidance to the practicing bar.

The inquiring attorney states that his client is considering forming a corporation that would loan money to claimants in personal injury matters. The loans would be made pursuant to the following arrangement:

(1) In consideration of the proceeds of the loan, the personal injury claimant would execute and deliver to the lender an interest-bearing promissory note.

(2) In addition to the execution and delivery of the promissory note, the personal injury claimant would execute a trust declaration by which his or her lawyer would become a trustee for the benefit of the lender.

(3) The personal injury claimant's lawyer would sign the trust declaration, thereby accepting responsibility for repayment to the lender of the loan out of the proceeds of the personal injury claim.

(4) The personal injury claimant's lawyer would receive no pecuniary compensation from any source for his or her service as trustee.

(5) The personal injury claimant's lawyer would advance none of his or her funds, either directly or indirectly, to his or her client.

(6) The ownership and management of the lender would be completely independent of the personal injury claimant's lawyer.

The inquiring attorney has asked whether the participation of the personal injury claimant's lawyer in the proposed financing arrangement would be ethically permissible. For the reasons expressed below, the Committee is of the opinion that an attorney's participation in this financing arrangement would be unethical.

In Opinion 75-24 we concluded that it would be improper for an attorney to participate in an arrangement in which a lender would agree to make loans to the attorney's clients for living expenses on the condition that attorney and client sign an agreement that the loan would be repaid from the settlement proceeds. Although Opinion 75-24 was decided under the former Code of Professional Responsibility, for purposes of this inquiry former DR 5-103(B) and present Rule 4-1.8(e) are substantially similar. Rule 4-1.8(e) provides:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

In reality, an attorney who routinely refers clients to a loan company and actively participates in the loan transactions would be providing financial assistance to those clients. Such conduct would be unethical even though the attorney would be providing financial assistance indirectly rather than directly. An attorney may not violate the Rules of Professional Conduct through the acts of another. Rule 4-8.4(a). Therefore, if the loan proceeds were used for anything other than "court costs and expenses of litigation," the attorney would be acting unethically by participating in the proposed financing arrangement.

Other practical problems exist. For example, in some cases a client might stand to receive no cash from a recovery because the client's entire share of the expected recovery proceeds had been "advanced" by, and thus was owed to, the loan company. Upon realizing that no cash would be forthcoming, the client could decide to cease cooperating with the attorney or simply to forego pursuing the matter. In such a situation, the fact that the client's share of the expected recovery already had been received by the client could adversely affect the relationship between attorney and client. The attorney's interest would be served by settlement of the case, yet the client might have little incentive to settle or even to cooperate in pursuing the case.

An attorney's involvement in the loan process to the extent contemplated by the proposed arrangement also would raise the issue of the attorney's duty to arrange for financing on the most advantageous terms available for the client. Would the attorney be obligated to "shop" the client's case to various loan companies in order to obtain the best deal? Must the attorney counsel the client on how much money the client should borrow?

Additional ethical concerns could arise as a result of the attorney's participation in the proposed arrangement. It is apparent that, in the event of a dispute between the client and the loan company, the attorney would be placed squarely in the middle. A principal purpose underlying Rule 4-1.8(e) is to prevent unnecessary conflict between attorney and client. In the view of the Committee, an attorney's involvement in the proposed financing arrangement would serve only to increase the likelihood of such conflict. Furthermore, the attorney's extensive involvement in the loan process could result in the attorney being ethically precluded from representing the client in litigation resulting from the dispute—for example, Rule 4-3.7(a) would prohibit the attorney from representing the client in the litigation if the attorney would be a necessary witness on the client's behalf.

Finally, under existing ethics rules a potential conflict of interest would be present if an attorney acted to protect the lender's interest by agreeing to act as trustee for benefit of the lender. See *The Florida Bar v. McAtee*, 601 So.2d 1199 (Fla. 1992), and Rule 4-1.7. Attorney McAtee was disciplined for representing a personal injury client while, without that client's knowledge or consent, simultaneously representing the medical provider that had filed a notice of lien against the personal injury client's recovery. Although such conflicts often can be waived by the affected clients, it is evident that our statement in Opinion 75-24 seems especially applicable to the financing arrangement proposed by the inquiring attorney:

> Where the lawyer initiates the loan by recommending his client to the loan company, it seems to us that he is inherently representing to the loan company that the client's claim is meritorious. It becomes unclear whether the lawyer is acting for the client or the loan company.

In closing, it is noted that the Committee's opinion is directed at the financing arrangement presented by the inquiring attorney; we have not been asked, nor do we attempt, to provide an opinion concerning ethically proper use of "letters of protection" in personal injury cases.