IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

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

v.

PHILLIP H. TAYLOR,

Respondent.

_____/

COMPLAINANT'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 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 to the bar's initial brief (ROR-A-_____).

ARGUMENT

POINT I

CLEAR AND CONVINCING EVIDENCE SHOWS THAT THE RESPONDENT GAVE MONEY AND OTHER FINANCIAL ASSISTANCE TO HIS CLIENT IN CONNECTION WITH PENDING LITIGATION FOR LIVING EXPENSES; ACCORDINGLY, THE RESPONDENT HAS VIOLATED R.REGULATING FLA. BAR, 4-1.8(e).

It is undisputed that the respondent, Phillip H. Taylor, III, gave his client, Mary Barner, a check for $200, as well as other assistance in the form of used clothing and "pocket change" (ROR-A-2,3; T, pp. 24, 29). The bar's petition for review of this matter does not seek to further challenge the referee's findings of fact because the findings are consistent with relevant allegations contained in the bar's complaint and with the arguments offered by the bar at the final referee hearing.

Contrary to arguments asserted in the respondent's answer brief, the bar has never argued, for example, that the respondent's violation of Rule 4-1.8(e) required proof that Willie Gary was somehow duped or defrauded into issuing the $200 check to Ms. Barner. The rule simply does not contain such an element, and the bar has not offered proof in that regard. The evidence clearly shows that the respondent played a pivotal role in obtaining the check for Ms. Barner by essentially advocating her financial needs before Mr. Gary. Nor has the bar argued, for example, that providing financial assistance to a client is per se unethical. Rather, the bar has asserted that the respondent unethically gave financial assistance to Ms. Barner "in connection with pending or contemplated litigation." The bar asserts that the referee's

construction of the "in connection with" language of Rule 4-1.8(e) is too narrow and that a more expansive view would better serve the purpose behind the rule to prevent an attorney from unduly influencing a client (current or prospective) through financial largesse. Finally, the bar has not argued - and neither Rule 4-1.8(e) nor case law require the argument - that the respondent routinely gave financial assistance to Ms. Barner. To the contrary, the bar has argued that the evidence is clear and convincing that the respondent, on at least one occasion, gave Ms. Barner a $200 check, used clothing, and "pocket change."

The bar further replies to certain additional facts set forth in the respondent's statement of the case and statement of the facts. It is undisputed that the bar provided no evidence of the respondent's alleged violation of Rules 4-1.8(a) and 4-1.8(i) - allegations contained in the original complaint, but not later supported by competent evidence. Reference to the bar's failure to prove such allegations seems, at best, intended to cast the bar in the disparaging light of an oppressive disciplinary prosecutor. The respondent has failed to mention that the bar readily acknowledged it could not fairly substantiate such allegations under the clear and convincing evidentiary standard and, therefore, did not even argue the issue at final hearing of whether respondent violated Rules 4-1.8(a) and 4-1.8(i).

Also, the respondent's brief frequently states that the "clearly erroneous" standard of review for a referee's findings of fact has not been met; however, the bar is not arguing that the

referee's findings of fact should be overturned or in any manner reviewed, but is strictly arguing that the referee's application of Rule 4-1.8(e) to the record evidence was unduly narrow and not supported by The Florida Bar v. Wooten, 452 So. 2d 547 (Fla. 1984) and The Florida Bar v. Rogowski, 399 So. 2d 1390 (Fla. 1981). The bar referenced the currently pending case of The Florida Bar v. Gary, Case No. 82,525, to show that another referee had found ethical misconduct by Willie Gary for similar types of financial assistance, including the instance of the Gary firm's gift of $200 to Ms. Barner. Although the respondent has argued that reference to Case No. 82,525 is somehow violative of his due process rights, the case has been cited merely to provide the court with additional guidance on the application of Rule 4-1.8(e), not as a dispositive determination of the respondent's guilt in the instant case.

The main issue on appeal is whether the respondent's gift of money and other financial assistance to Ms. Barner was provided "in connection with pending or contemplated litigation," as required by Rule 4-1.8(e) before an ethical violation can be found. Assisting clients with their living expenses is not generally permitted, although neither the Model Code of Professional Conduct nor the Model Rules of Professional Conduct directly reference the advancement of living expenses. See Lawyers' Manual on Professional Conduct, (ABA/BNA) Sec. 51:803 (Nov. 25, 1987). A copy is appended. The majority of courts has determined that such assistance is prohibited. Id. As stated in both the initial and answer briefs, the primary reason given for this prohibition is the

concern that an attorney may be purchasing an interest in the outcome of litigation. A minority position in this regard is expressed in Louisiana State Bar Association v. Edwins, 329 So. 2d 437 (La. 1976), a decision heavily relied upon by the respondent to assert that there is no per se prohibition against providing financial assistance to a client.

Most jurisdictions have held that advances for living expenses are unethical. See, e.g., Lawyers' Manual on Professional Conduct, (ABA/BNA) Sec. 51:804 (Nov. 25, 1987), a copy of which is appended. In In re Carroll, 602 P.2d 461 (Ariz. 1979), the court held that an attorney's advance of $100 and use of a pickup truck violated the rule against financial assistance. In In re Stewart, 589 P.2d 886 (Ariz. 1979), an attorney was suspended for one year for advancing $215 to an unemployed client for living expenses. Although the instant case did not involve an advance, but rather involved various gifts, the rationale of Rule 4-1.8(e)(2), concerning indigent clients, does not state a requirement for repayment. However, the respondent's answer brief repeatedly emphasizes that he did not provide a loan to Ms. Barner, thereby implying that the absence of a repayment requirement somehow renders ethical the financial assistance provided.

Wooten and Rogowski, supra, support the bar's contention that the respondent should be disciplined for his financial assistance to Ms. Barner. The respondent's answer brief argues that, because Ms. Barner was not required to repay the $200 check, she is distinguishable from the client in Wooten, who was required to

repay the attorney's loan; however, Ms. Barner was indigent and the respondent's behavior is implicated by Rule 4-1.8(e)(2), which does not make repayment of financial assistance an element of misconduct. The respondent further attempts to distinguish Rogowski on the basis that other disciplinary violations, unrelated to advances to his client, resulted in the attorney's discipline. However, Rogowski clearly states that the attorney's financial assistance to his client in violation of Disciplinary Rule 5-103(B) was part of the disciplinary violations found by the referee:

> The referee found that respondent improperly advanced funds from his client trust account to two clients in excess of the amount they had on deposit at the time of the advances. The advances of funds were made in connection with contemplated or pending litigation and were not provided for the expenses of litigation or for any expense authorized by the Code of Professional Responsibility, Disciplinary Rule 5-103(B). Rogowski at 1390.

The bar's initial brief mentioned that the exact nature of the advances made in Rogowski was not specified in the opinion, but that, nonetheless, such expenses were determined not to be in compliance with requirements of the rule.

Finally, this court recently considered a proposed amendment to Rule 4-1.8(e). See The Florida Bar re: Amendments to Rules Regulating The Florida Bar - Rule 4-1.8(e), 19 Fla. L. Weekly S210 (Fla. April 21, 1994). The proposed amendment sought to allow a personal injury lawyer to assist a client in obtaining a third-party loan for ordinary living expenses such as food, clothing, shelter, and transportation. The court denied the proposed rule amendment on the basis that it would violate both subsections of Rule 4-1.8 and create possible conflicts of interest. This court

further cited Wooten, supra, and The Florida Bar v. Dawson, 318 So. 2d 385 (Fla. 1975), and affirmed the axiom that lawyers should not be encouraged or allowed to do indirectly what they cannot do directly.

POINT II

THE SUPREME COURT OF FLORIDA MAY IMPOSE THE APPROPRIATE LEVEL OF DISCIPLINE FOR UNETHICALLY PROVIDING FINANCIAL AND OTHER ASSISTANCE TO A CLIENT.

The bar opposes the respondent's argument that this matter should be remanded to the referee for a hearing on matters of aggravation and mitigation if respondent is found guilty. The Florida Bar v. Pearce, 19 Fla. L. Weekly S87 (Fla. Feb. 10, 1994) held that this court makes final determinations of discipline. This court has heard other matters involving respondent which are closely related to the instant record and is empowered to render the appropriate discipline based upon the existing record. Remanding this particular case for a determination of discipline would not enhance fairness to society or to the respondent. See Pearce, supra.

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.

Respectfully submitted,

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By: _____
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Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Reply 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 23RD day of May, 1994.

JAMES W. KEETER
Bar Counsel

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APPENDIX TO COMPLAINANT'S REPLY BRIEF

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champerty and maintenance. *See Van Gieson v. Magoon,* 20 Hawaii 146 (1910); *Wildey v. Crane,* 30 NW 327 (Mich 1886); *Smits v. Hogan,* 77 P 390 (Wash 1904).

The terms "costs" and "expenses," although technically not synonymous, together refer to most of the financial charges directly associated with litigation. "Costs" are the charges that by statute a party may recover upon winning the litigation. These usually include such items as filing fees, fees for service of process, and other disbursements that are taxable and includable in the judgment. *Sellers v. Johnson,* 719 P2d 476, 479 (OklaApp 1986).

The term "expenses" covers such charges as the "costs of investigation, expenses of medical examination, and the costs of obtaining and presenting evidence." DR 5-103(B). An expert witness' fee is an expense. *Bennett v. Home Insurance Co.,* 347 FSupp 451, 452 (SDFla 1972). So are the fees for legitimate travel related to litigation. *Superior Testers, Inc. v. Daneco Testers, Inc.,* 336 FSupp 37, 41 (EDLa 1971). Fees for the employment of associate counsel also have been held to be an expense for which lawyers may provide financial assistance. *Manzo v. Dullea,* 96 F2d 135, 137 (CA2 1938).

Medical Expenses

Although there is little case law on the subject, it has been held that advances of medical expenses should be limited to costs of diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis. *See* ABA Informal Opinion 1005 (Nov. 18, 1967); ABA Informal Opinion 664 (May 21, 1963). *But see Louisiana State Bar Association v. Edwins,* 329 So2d 437 (La 1976).

Bail

At least two ethics committees have discussed whether a lawyer may post bail for his client or act as an indemnitor on a litigation cost bond. In Oregon Ethics Opinion 436 (1981) and in California Ethics Opinion 1981-55 (1981), the posting of bail and the guaranteeing of the litigation bond were viewed as expenses of litigation that a lawyer may advance to a client. In both instances the committees required that the client remain ultimately liable for the undertaking. *But see* Rule 200-6 of the Local Rules of the U.S. District Court for the Western District of Texas, which prohibits a lawyer from advancing or providing "money or other thing of value for any cost, bail, attachment, or replevy bond taken in [that] Court."

Living Expenses

Assisting clients with their living expenses during litigation is not generally permitted, however. Although neither the Model Code nor the Model Rules make any direct reference to the advancement of living expenses, the majority of courts that have considered the question have decided that such assistance is prohibited. *E.g., Dombey, Tyler, Richards & Grieser v. Detroit, Toledo & Ironton Railroad Co.,* 351 F2d 121 (CA6 1965); *In re Carroll,* 602 P2d 461 (Ariz 1979); *Brown & Huseby, Inc. v. Chrietzberg,* 248 SE2d 631 (Ga 1978); *Attorney Grievance Commission of Maryland v. Engerman,* 424 A2d 362 (Md 1981); *In re Berlant,* 328 A2d 471 (Pa 1974); *In re Reaves,* 250 SE2d 329 (SC 1978). One of the reasons most often given for this prohibition is that such a loan represents the equivalent of "'purchasing an interest in the subject matter of the litigation that [the lawyer] is conducting.'" *In re Stewart,* 589 P2d 886, 888 (Ariz 1979), *quoting, Mahoning County Bar Association v. Ruffalo,* 199 NE2d 396, 398 (Ohio 1964); *The Florida Bar v. Wooten,* 452 So2d 547, 548, 1 Law.Man.Prof.Conduct 330 (Fla 1984).

DR 5-103(B) specifically prohibits any financial assistance during litigation

other than for the expenses of litigation, and then lists certain categories of permissible expenses. One court, interpreting this list as illustrative but not exclusive, concluded that DR 5-103(B) does not impose a per se prohibition on advances of living expenses "similarly necessary to permit the client his day in court." *Louisiana State Bar Association v. Edwins,* 329 So2d 437, 444-47 (La 1976). *See generally* Comment, *Loans to Clients for Living Expenses,* 55 Calif. L.Rev. 1419 (1967). Moreover, some older court decisions, issued prior to the adoption of the Model Code, permitted advancements of both court costs and living expenses so long as the client who received these advances remained ultimately liable for repayment regardless of the outcome of the client's case. *See Johnson v. Great Northern Railway Co.,* 151 NW 125 (Minn 1915); *In re Sizer,* 267 SW 922 (Mo 1924).

Some states permit the advancement of living expenses. *E.g.,* Alabama DR 5-103(B); Minnesota Rule of Professional Conduct 1.8(e)(3); Texas Formal Ethics Opinion 230 (1959).

See generally Developments in the Law — Conflicts of Interest in the Legal Profession, 94 Harv.L.Rev. 1244, 1288-89 (1981); Note, *Guaranteeing Loans to Clients Under Minnesota's Code of Professional Responsibility,* 66 Minn.L.Rev. 1091 (1982); Annotation, *Validity or Propriety of Arrangement by Which Lawyer Pays or Advances Expenses of Client,* 8 ALR3d 1155 (1966).

Client's Liability

The traditional view is that the client remains ultimately liable to the lawyer for any financial assistance. Model Code 5-103(B); *Schlosser v. Jurich,* 410 NE2d 257 (Ill 1980). However, courts have exhibited an increasing dissatisfaction with such a rigid rule, and Model Rule 1.8(e)(1) does not follow it, instead permitting repayment to be "contingent on the outcome" of the matter.

In *In re Ruffalo,* 249 FSupp 432, 445 (NDOhio 1965), *rev'd on other grounds,* 390 U.S. 544 (1968), the court observed that a lawyer may provide financial assistance to a client even though the client's financial situtation will make it difficult or unlikely for the client to reimburse the lawyer. Likewise, *Louisiana State Bar Association v. Edwins,* 329 So2d 437, 446 (La 1976), supports the proposition that the client's right of access to the courts takes precedence over antichamperty strictures.

One commentator, pointing out that the Model Code recognizes contingent fees as one way for people to afford litigation, argued that the Code likewise should have allowed contingent cost arrangements. Lynch, *Ethical Rules in Flux: Advancing Costs of Litigation,* 7 Litigation 19, 20 (1981). In fact, some states whose ethics rules still are based on the Model Code permit lawyers to pay as well as simply advance client expenses. *See, e.g.,* California Rules of Professional Conduct Rule 5-104; District of Columbia Code of Professional Responsibility, DR 5-103(B).

The phrase "contingent on the outcome," which is used in Model Rule 1.8(e) to alleviate the traditional requirement that clients are always ultimately liable for any funds their lawyers advance them, is not specifically defined. It appears to contemplate both that advances will be taken out of any settlement or judgment and that repayment will not be necessary at all if the lawsuit is successful. One commentator has pointed out that the language does not even require an advance to be paid out of the recovery and therefore that it permits a defendant's lawyer to advance litigation expenses on the understanding that his client will be responsible for them only if the plaintiff's recovery is below a specified amount. C. Wolfram,

Modern Legal Ethics §9.2.3, at 508 n.84 (1986).

Oregon's DR 5-103(B) makes the client's duty to repay his lawyer contingent on his ability to pay.

Loans to Clients

Loans to clients that occur outside the litigation context are treated as any other business transaction with a client and tested for fairness according to the principles governing business transactions with clients. *See People v. Stineman,* 716 P2d 1079, 2 Law.Man. Prof.Conduct 32 (Colo 1986). For a more extended discussion of this topic see the chapter on Business Transactions With Clients behind this tab.

Class Actions

A lawyer may advance costs and expenses in class action suits in the same manner as any other lawsuit. However, special problems arise in this area, in part because the amount of costs and expenses associated with class actions is often so large and in part because there may be less certainty than in individual actions that the clients will be able to repay these costs and expenses. *See generally Developments in the Law — Class Actions,* 89 Harv. L.Rev. 1319, 1618-23 (1976); Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions,* 36 Business Lawyer 1667 (1981).

Nevertheless, courts operating under DR 5-103(A) generally permit lawyers to advance the costs and expenses of class actions so long as the clients remain ultimately liable for them, and the courts do so even while recognizing that the clients may be unable to meet this obligation. *See In re Mid-Atlanic Toyota Antitrust Litigation,* 93 FRD 485 (DMd 1982); *Sayre v. Abraham Linclon Federal Savings & Loan Association,* 65 FRD 379 (EDPa 1974); *Stavrides v. Mellon National Bank and Trust Company,* 60 FRD 634, 638 (WDPa 1973); *P.D.Q., Inc. of Miami v. Nissan Motor Corporation in U.S.A.,* 61 FRD 372 (DFla 1973). *See also* ABA Informal Ethics Opinions 1326 (1975) and 1283 (1973).

The problem is eased considerably under Model Rule 1.8(e), which specifically permits lawyers to advance funds the repayment of which is "contingent on the outcome."

Indigent Clients

Under ABA Model Rule 1.8(e)(2) a lawyer may assume the expenses of litigation without agreement for repayment when the client is indigent. *See also Shapley v. Bellows,* 4 NH 347, 355 (1828), in which the court observed: "[I]t is not uncommon that attornies [sic] commence actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause." *See also Williamson v. Vardeman,* 674 F2d 1211, 1212 (CA8 1982), which held it a violation of due process for state courts to compel private lawyers to pay legal expenses resulting from the representation of indigent defendants.

With respect to payment of litigation expenses by a legal services agency, *see* ABA Informal Opinion 1361 (June 3, 1976), and Connecticut Informal Opinion 83-12 (Apr. 14, 1983), which hold that a legal services agency may advance costs of litigation without holding the client ultimately liable therefor.

One jurisdiction that spoke to the question of indigency prior to the ABA's adoption of the Model Rules was the District of Columbia. D.C.'s DR 5-103(B) permits a lawyer to "pay, advance or guarantee the expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses of medical examination, and cost of obtaining and presenting evidence." This provision permits the lawyer who is representing an indigent client to become ultimately liable for

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