

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Supreme Court Case No.: SC13-1362

vs.

The Florida Bar File No.: 2012-11, 128 (06A)

JEFFREY R. FULLER,

Respondent.

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On July 30, 2013, The Florida Bar filed its Complaint against Respondent. On January 30, 2014, a final hearing was held in this matter. All items properly filed including pleadings, exhibits in evidence and the Report of the Referee constitute the record in this case and are forwarded to the Supreme Court of Florida.¹

II. FINDINGS OF FACT

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

¹ The undersigned notes that neither party ordered transcripts of the proceeding.

FILED
JOHN A. TOMASINO
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CLERK, SUPREME COURT
BY _____

B. Narrative Summary Of Case.

The facts underlying this Complaint involve a divorce, and subsequent alimony payments. Respondent called the following witnesses to testify at the hearing: J. Scott Brasfield, Esq., of Brasfield, Fuller, Freeman, Goldis and Cash, P.A.; Gary E. Williams, Esq.; and Jeffrey Fuller, Respondent. The Florida Bar did not call any witnesses to testify at the hearing, but relied upon previous court orders that were admitted into evidence. The undersigned notes that he found all of the witnesses credible.

From 1977 to 2010, Respondent worked as an attorney at Brasfield, Fuller, Freeman, Goldis and Cash, P.A. In August 2005, Mr. Fuller's former wife, Nancy Dubay, filed for divorce. The family law court in Case No.: 05-010761-FD, in Pinellas County, Florida, ordered Respondent to pay Ms. Dubay permanent periodic alimony in the amount of \$4,500 per month. Respondent made monthly payments in the amount of \$4,500 from this time until September 2010.

In March 2010, Respondent was involuntarily terminated from his position at the law firm. The undersigned heard testimony from J. Scott Brasfield, Esq., who testified that Respondent was fired from the firm. Following this dismissal, Respondent opened an alternative dispute resolution practice. On August 31, 2010, Respondent filed a petition to modify the alimony award, citing his decreased income. Starting in September 2010, Respondent began making irregular alimony payments. Respondent testified that each month he paid Ms. Dubay an amount that he believed he could afford. When his business performed well, he paid her more, but when it performed badly, he paid her less or not at all.

By order dated September 16, 2011, the family law court denied Respondent's petition to modify the awarded alimony finding that the evidence did not satisfy the "permanency" element

required for a modification. The court also found Respondent in contempt. On or about October 4, 2011, the court issued a supplemental final judgment establishing alimony arrears in the amount of \$57,629.64; directing Respondent to pay \$4,500 monthly; and finding Respondent in contempt. The court sentenced Respondent to thirty (30) days of incarceration unless Respondent purged himself of his contempt by immediately paying Ms. Dubay \$29,700. Respondent paid Ms. Dubay the court ordered purge amount of \$29,700 and avoided incarceration.

By order dated November 1, 2011, the court established arrears of \$29,929.64 as of September 30, 2011; ordered interest to accrue; and ordered Respondent to pay Ms. Dubay \$4,500 the first day of each month through the Florida State Disbursement Unit. On or about November 2, 2011, Respondent filed a notice of appeal in Case No.: 2D11-5477, in the Second District Court of Appeal. By order dated November 17, 2011, the lower court again ordered Respondent to pay Ms. Dubay \$4,500 the first day of each month through the Florida State Disbursement Unit. Respondent continued to make irregular payments, the majority of which were significantly less than \$4,500 per month. On or about October 26, 2012, the Second District Court of Appeal affirmed the denial of Respondent's supplemental petition for modification in Case No.: 2D11-5477.

By order dated December 21, 2012, the lower court found that Respondent had been paying an average of \$1,000 per month; that Respondent's unpaid balance at that time was \$79,929.64; and that Respondent had the present ability to comply with the previously ordered provisions, but had failed to do so. The court also found Respondent in contempt. By order dated March 11, 2013, the court again found Respondent in contempt. The court stated that Respondent could purge the contempt by paying \$2,500 by April 8, 2013, and an additional \$1,500 by April 23, 2013.

By order dated May 22, 2013, the court found Respondent's total arrears in the amount of \$99,429.64, and awarded Ms. Dubay a money judgment in that amount. The court also found Respondent in contempt. By order dated June 7, 2013, the court amended its May 22, 2013 order and found total arrears of \$90,314.46, and awarded Ms. Dubay a money judgment in that amount. The court also found Respondent in contempt. Respondent continued to make irregular monthly alimony payments. Respondent did not pay the money judgment.

By order dated October 3, 2013, the court found Respondent in contempt for his continued and ongoing failure to pay the alimony payments. By opinion dated November 22, 2013, the Second District Court of Appeal affirmed the trial court's December 21, 2012 order finding Respondent in contempt. However, the Second District Court of Appeal also held that there was no evidence in the record that Respondent was purposely shielding his income, and reversed the trial court's order to the extent that it ruled that Respondent had done so. *Fuller v. Fuller*, 129 So. 3d 394, 396 (Fla. 2d DCA 2013). By order dated December 16, 2013, the trial court again found Respondent in contempt for failure to pay the full alimony. The court also ruled that, as an ongoing purge, Respondent shall pay Ms. Dubay one half of the funds collected as remuneration for his professional services.

On February 4, 2014, Ms. Dubay again filed a motion for a finding of contempt seeking Respondent's incarceration. On February 5, 2014, the court denied the motion, and ruled that Ms. Dubay "failed to establish the Former Husband's willful contempt or Former Husband's present ability to pay a purge."

As of the date of this Report, Respondent's \$4,500 monthly alimony obligation has never been modified. As of the date of this Report, Respondent owes Ms. Dubay approximately \$100,000 in unpaid alimony and interest.

III. RECOMMENDATIONS AS TO GUILT.

The Bar has the burden of establishing by clear and convincing evidence that Respondent violated Rules 3-4.3, 4-3.4(c), 4-8.4(a), and 4-8.4(d), Rules Regulating the Florida Bar. *See The Florida Bar v. Burke*, 578 So. 2d 1099, 1102 (Fla. 1991); *The Florida Bar v. Hooper*, 509 So. 2d 289, 291 (Fla. 1987); *The Florida Bar v. Rayman*, 238 So. 2d 594, 597 (Fla. 1970). Here, the undersigned does not believe that the Bar has done so. Rather, the undersigned notes that the family law court, in its February 5, 2014 order, found that Ms. Dubay had not established that Respondent was in willful contempt or that he had the present ability to pay a purge amount. The burden of proof for civil contempt is preponderance of the evidence. *Braisted v. State*, 614 So. 2d 639, 640 (Fla. 4th DCA 1993). As stated above, the burden of proof for disciplinary matters such as this is clear and convincing evidence. “‘Clear and convincing evidence’ is an intermediate standard of proof, more than the ‘preponderance of the evidence’ standard used in most civil cases, and less than the ‘beyond a reasonable doubt’ standard used in criminal cases.” *Smith v. Department of Health & Rehabilitative Services*, 522 So. 2d 956, 958 (Fla. 1st DCA 1988) (citing *State v. Graham*, 240 So. 2d 486 (Fla. 2d DCA 1970)). If the trial court could not find Respondent guilty of willful contempt by a preponderance of the evidence, the undersigned does not believe that the Bar has established by clear and convincing evidence that Respondent is in violation of Rules 3-4.3, 4-3.4(c), 4-8.4(a), and 4-8.4(d), Rules Regulating the Florida Bar.

I recommend that Respondent be found not guilty of violating the following Rules Regulating The Florida Bar:

3-4.3 Misconduct and Minor Misconduct;

4-3.4(c) Fairness to Opposing Party and Counsel: A lawyer shall not knowingly disobey an obligation under the rules of a tribunal...;

4-8.4(a) Misconduct: A lawyer shall not violate or attempt to violate the Rules of Professional Conduct; and

4-8.4(d) Misconduct: A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice...

IV. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

Each party submitted its statement of costs. *See* Index to Pleadings. The undersigned finds that, pursuant to Rule 3-7.6(q)(4), Rules Regulating The Florida Bar, there was a justiciable issue of law and fact and therefore denies the Respondent's costs. Accordingly, it is recommended that both parties bear their own costs.

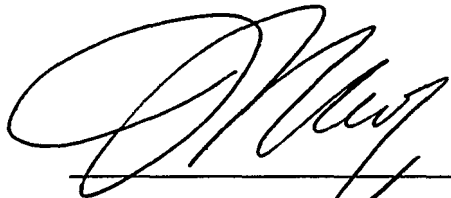
Dated this 25th day of March, 2014.



Honorable Mark R. Wolfe, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. Mail to KENNETH LAWRENCE MARVIN, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; LEONARD EVANS CLARK, Bar Counsel, The Florida Bar, Tampa Branch Office, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607-1496; and JEFFREY R. FULLER, Alternative Dispute Resolution, Post Office Box 47668, Saint Petersburg, Florida 33743-7668, on this 25th day of March, 2014.



Honorable Mark R. Wolfe, Referee

Original To:

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