IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner/Complainant, CASE NO: 79,369

v.

MANUEL A. MACHIN,

Cross-Petitioner/Respondent.

RESPONDENT'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF COUNTER-PETITION

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PRELIMINARY STATEMENT

The following abbreviations and symbols are used in this brief:

DH/TR	=	Transcript of Disciplinary Hearing held on April 23, 1993.
FH/TR	=	Transcript of Final Hearing held on September 9 - 10, 1992.
R. Ex.	=	Respondent's Exhibit
RR	=	Report of Referee

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts The Florida Bar's statement of the case.

Respondent restates the facts of this case as follows:

Beginning in June, 1990, Respondent, Manuel A. Machin, represented a client named Gonzalez in a criminal prosecution for murder and kidnapping. [FH/TR 95, 101]. At the time of the crimes, the kidnapping victim, Susan Schultz, was the murder victim's girlfriend and was pregnant with his son. [FH/TR 95, 101].

In January, 1991, the defendant negotiated a plea with the State Attorney's Office of the Thirteenth Judicial Circuit. [R. Ex. 1, pg. 6, 7]. The plea negotiations provided for the defendant to be sentenced pursuant to the applicable sentencing guidelines which provided for a maximum of twenty-two years and a recommendation by the state for a sentence of fifteen years. [DH/TR 50, FH/TR 142, 325]. As an essential consideration of the defendant's plea agreement, the State agreed not to introduce evidence nor to present argument in aggravation. [RR 6, DH/TR 51, FH/TR 142].

In January, 1991, Mr. Machin notified the Assistant State Attorney prosecuting the case and Ms. Shultz of the fact that the defendant's family was willing to establish a trust fund for the benefit of Ms. Schultz's child if the victim's family did not attempt to aggravate the sentence. [FH/TR 94-97, 314]. This fund was to be paid through the Victim's Assistance program which was going to work with a financial institution to set up the trust

account. [FH/TR 317].

At the time of this offer by the defense, the prosecuting attorney expressed no objection to the establishment of the trust fund nor to the condition that the family members of the victim refrain from speaking in aggravation. Furthermore, the Assistant State Attorney recommended to Ms. Shultz that she accept the benefit of the trust fund for her child. [FH/TR 119].

On January 15, 1991, the defendant appeared in open court. The assistant state attorney then advised the judge of the plea negotiations and also of the fact that the defendant was going to establish the trust fund for the benefit of the victim's child. [R. Ex. 1, pg. 3-5].

On February 12, 1991, the defendant again appeared in court. In open court Mr. Machin then reminded Ms. Shultz of the trust fund offer if no aggravating testimony was presented during sentencing. [R. Ex. 3, pg. 21; FH/TR 118]. On that date, Mr. Machin also explained to Judge Richard Lazzara, in the presence of the victim's family, the assistant state attorney, a Captain of the Sheriff's Office, and the Victim's Assistance Counselor, that the fund was available if the victim's family chose not to speak in aggravation of the sentence. [R. Ex. 3, pg. 18-22; FH/TR 118]. He also advised that it was his intention to arrange the trust fund through the "presentence investigation" so that everything was "above board"[1]. [R. Ex. 3, pg. 21].

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[1]The drafter of this brief suggests that the quoted language was erroneously used by Respondent to describe the Victim's Assistance Program. [See: FH/TR 317].

On March 26, 1991, the defendant was sentenced. The State Attorney's Office, pursuant to the plea agreement, presented no evidence and no argument in aggravation. [R. Ex. 4; RR 9]. Moreover, the State Attorney's Office made no objection to, nor did it suggest the appearance of any impropriety concerning the offer to establish the trust fund. [RR 9]. The judge did not prohibit or criticize the transaction, nor did he express concern that justice within his court would be prejudiced in any way by the offer. [R. Ex. 4; RR 10]. At that time, Judge Lazzara imposed the maximum prison sentence within the negotiated guideline parameters, despite the attempts by the victim's mother to aggravate the sentence. [R. Ex. 4 pg. 53, 54; RR 8]. Based on the attempts by the victim's family to aggravate the sentence, no trust fund was established for the benefit of the victim's child. [FH/TR 129, 342-343].

SUMMARY OF ARGUMENTS

The Referee's recommendation of guilt is unsupported by clear and convincing evidence that Respondent's conduct resulted in any prejudice to the administration of justice in the case of State of Florida v. Nelson Gonzalez. Conversely, the record evidence clearly establishes that neither the office of the State Attorney, the Hillsborough County Sheriff's Office, the office of Victim's Assistance, nor the presiding judge, objected to the proposed conduct or found it to be prejudicial to the administration of justice. Furthermore, Respondent acted at all times in a good faith belief that his conduct was legally and ethically appropriate; he openly disclosed the proposed trust fund to all; and he acted consistent with his duty to zealously and competently represent his client's interest. These facts support only a determination that Respondent is not guilty of misconduct and therefore the Referee's recommendation of guilt should be rejected.

However, should this Court determine that Respondent unintentionally violated the cited rules, an admonishment should be imposed as discipline. In view of the facts and circumstances present at the time of Respondent's conduct; his good faith intent and lack of a willful violation; in view of Respondent's reputation and his lack of prior discipline; and based upon the absence of any prejudice to the judicial system, an admonishment is the only discipline which is consistent with the Florida Standards For Imposing Lawyer Sanctions and which also serves the purposes of discipline without punishing Respondent.

ARGUMENT

THE OPEN DISCLOSURE BY A DEFENDANT'S ATTORNEY THAT THE DEFENDANT'S FAMILY WISHED TO ESTABLISH A LEGITIMATE TRUST FUND FOR THE BENEFIT OF A VICTIM'S CHILD, IN CONSIDERATION FOR THE VICTIM'S FAMILY AGREEING NOT TO ATTEMPT TO AGGRAVATE THE DEFENDANT'S SENTENCE PURSUANT TO PLEA NEGOTIATIONS, WITHOUT OBJECTION BY THE STATE OR THE COURT, IS NOT CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

The Preamble to our Rules of Professional Conduct states that "In the practice of law conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's . . . obligations to society and the legal profession". Preamble, Chapter 4, Rules Regulating The Florida Bar.

The preamble continues that such differing issues should be resolved by exercising professional and moral judgment guided by the basic principals underlying these rules. However, the rules provide only a framework within which the ethical lawyer should practice because no set of rules can anticipate or define every circumstance which may confront a lawyer. Therefore, the rules "Presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question". The rules further presuppose that whether discipline should be imposed depends on all circumstances, including the willfulness of the violation; the existence of previous violations and the extenuating circumstances. Preamble, Chapter 4, Rules Regulating The Florida Bar.

The undisputed facts presented by this case prove that Mr. Machin, during the representation of a criminal client, was

confronted with a unique circumstance which involved a possible conflicting responsibility between his duty to his client and to the court. Respondent's conduct must now be evaluated in terms of the facts and considerations existing at the time. The conduct of Respondent, Manuel Machin, when considered in light of all relevant facts and his responsibility to his client, was not prejudicial to the administration of justice as proscribed by Rules 3-4.3 and 4-8.4(d), Rules Regulating The Florida Bar.

The facts are that in 1990 and 1991, Respondent represented a criminal client charged with murder and kidnapping. [FH/TR 95 - 101]. At the time of the crimes, the kidnapping victim, Susan Schultz, was the murder victim's girlfriend and was pregnant with his child. [FH/TR 95 -101].

During the course of the representation, the family of the defendant notified Respondent that it was prepared to establish a trust fund for the benefit of the murder victim's new born child. The offer was to be conditional upon an agreement by the victim's family that they would not attempt to aggravate the sentence which had been negotiated by Respondent with the State of Florida. [FH/TR 94 - 97, 314].

The Respondent initially discussed this offer with the child's mother, Susan Schultz, and the assistant state attorney prosecuting the case. [FH/TR 94 - 97, 314]. Neither objected to the proposed trust fund and the assistant state attorney later recommended to Ms. Schultz that she accept the offer. [FH/TR 119].

Throughout the course of the representation, Respondent

continued to make disclosure of this offer to the State Attorney's Office, including discussions with the Chief Assistant and Felony Bureau Chief. [FH/TR 333]. He also made disclosure to a captain of the Sheriff's Office which had investigated the case. [FH/TR 333]. The Victim's Assistance representative responsible for counseling Susan Schultz was also aware of the offer. [FH/TR 324, 337; R. Ex. 5]. Respondent also made complete disclosure, in open court, with all relevant parties present, to the judge presiding over the case. This disclosure included the necessary condition that the victim's family agree not to attempt to aggravate the sentence. [FH/TR 118; R. Ex. 3].

At no time between the initial disclosure in January, 1991 and the defendant's sentencing on March 26, 1991, did any assistant state attorney, law enforcement representative, Victim's Assistance representative, or the judge, object to the proposed trust fund or even question the propriety of the offer. [R. Ex. 3; R. Ex. 5; FH/TR 338, 344].

Respondent recognized and appreciated the potential legal and ethical issues involved in such a proposal. Therefore, he engaged in legal research to determine the existence of any authority which might prohibit such a proposal. [DH/TR 44, 45]. He found there to be no legal or ethical precedent which prohibited this offer or otherwise indicated that such was not an appropriate course of action. [DH/TR 45].

Additionally, at the time of these events, Respondent knew that similar procedures involving payments by defendants for

purposes unrelated to statutory restitution had often been elements of negotiated pleas and were an acceptable practice within the criminal justice system of The Thirteenth Judicial Circuit. [RR 10; FH/TR 321 - 323, 370 - 377]. Based upon this generally accepted practice within his legal community and absent any prohibiting legal authority, Respondent made a good faith and reasonable decision to present the offer on behalf of his client. His actions were never intended to improperly mislead the court or to otherwise prejudice the judicial proceeding. [DH/TR 44]. Respondent's actions were consistent with his moral, ethical, and legal duty to represent his client to the best of his ability and in a manner consistent with the client's interests. [DH/TR 45; Rule 4-3.1, Comment]. His actions were never intended to be a "buy off" or "buy out" of any kind. [FH/TR 152]. Such conduct is consistent with an attorney resolving conflicting responsibilities based upon sound professional and moral judgment. Such conduct is inconsistent with a violation of either Rule 3-4.3 or 4-8.4(d).

Moreover, The Florida Bar failed to sustain its burden by proving clearly and convincingly that Respondent's actions were in fact prejudicial to the administration of justice. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970) and Florida Standards For Imposing Lawyer Sanctions, section 1.3. At the trial of this case no evidence of any nature was introduced by The Florida Bar tending to prove that Respondent's conduct was prejudicial to the administration of justice. To the contrary, the record evidence proves only that the presiding judge, the Honorable Richard

Lazzara, did not prohibit or criticize the offered trust fund. [R. Ex. 4]. The Referee also found that "the judge was made aware of the quid pro quo of money for silence and did not chastise Mr. Machin" and at the sentencing the judge indicated he would not allow this issue to influence him in sentencing the defendant. [RR 10]. Furthermore, the Referee found that no actual prejudice resulted to the administration of justice. [RR 8; R. Ex. 4].

Based upon these findings and absent any evidence indicating that the presiding judge was influenced or the state prejudiced by the offer, The Florida Bar did not sustain its burden of proof. Therefore, the recommendation by the Referee that Respondent be found guilty is clearly erroneous and should be rejected.

Finally, it should be noted that the recommendation of this Referee is substantially influenced by a concern that similar conduct was previously implemented within Respondent's legal community and that such practices result in an unequal advantage for those with financial resources. [RR 9, 10]. Such a consideration, which reflects upon the policies, procedures, and administration of justice throughout an entire judicial circuit, should not serve as a basis for determining the guilt of Respondent in this disciplinary proceeding. Any such concern by the Referee as to the inappropriateness of accepted plea negotiation procedures is more appropriately addressed by the adoption of procedural rules by this Court, by legislation, or by amendment to our Rules of Discipline. To now, in retrospect, impose discipline upon Respondent where, as the Referee acknowledges, his conduct was

understandable under the circumstances, is fundamentally unfair and unjust. The effect of such a decision is to discipline only Respondent, despite the uncontroverted fact that both the state attorney's office and the presiding judge tacitly approved his conduct.

Accordingly, it is respectfully suggested that the clear and convincing evidence in this case is inconsistent with Respondent's violation of any Rule of Discipline. This Court should therefore reject the Referee's recommendation of guilt and enter an order finding Respondent not guilty.

ARGUMENT

THE REFEREE'S RECOMMENDED DISCIPLINE OF A NINETY DAY SUSPENSION IS EXCESSIVE AND UNJUSTIFIED IN VIEW OF THE CIRCUMSTANCES OF THIS CASE AND ALL MITIGATING FACTORS.

The Referee has recommended that Respondent be suspended for ninety days. This recommendation is based upon consideration of the relevant factors for discipline as set forth in The Florida Bar vs. Pahules and an application of the Standards For Imposing Lawyer Sanctions to the facts.

In The Florida Bar v. Pahules, 233 So.2d 130, at 132 (Fla. 1970) this Court stated that in determining appropriate discipline the following factors should be considered:

> "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations."

The suspension of Mr. Machin will be fundamentally unfair to him and to the public and is unnecessary to deter others from similar conduct. In view of Respondent's professional ability and his competent and zealous representation of his clients, a suspension will deny the public the services of a qualified lawyer. Additionally, a suspension will result in undue harshness because of the inherent effects of a suspension which include a cessation of his ability to earn income and adverse consequences to his

professional reputation.

On the other hand, the recommended suspension does nothing to encourage reformation. In other words, a suspension only serves to punish Respondent. Such a punishment is inconsistent with the teaching of this Court in Pahules and the subsequent holding of this Court in State v. DeBoch, 512 So.2d 164 (Fla. 1987) which eliminated any consideration of punishment as a purpose to be served by discipline.

Similarly, the need for a suspension to deter others is unsupported in the record, the referee report, and by the authorities cited by The Florida Bar. There is simply no evidence or cited authority which indicates that a suspension of Mr. Machin is necessary to deter others in view of the facts of this case. It is just as reasonable to conclude that the publication of an admonishment, providing notice to all members of the bar, will effectively deter others. Therefore, consistent with the purposes to be served by discipline, a suspension should not be ordered because alternative discipline will be equally effective.

In recommending discipline, the referee also considered the Standards For Imposing Lawyer Sanctions, one aggravating factor and several mitigating factors found to be present. Assuming arguendo that Respondent's conduct was proven by clear and convincing evidence to be improper, then the Standards are to be considered in determining appropriate discipline. Assuming arguendo that Respondent's conduct was prejudicial to the administration of justice, the applicable Standard sections were correctly determined

to be 6.0 - 6.13.

However, Standard 6.12 is not applicable and should not serve as the basis for a suspension in this case. Standard 6.1 provides that any recommended discipline is generally applicable absent aggravating or mitigating circumstances. Standard 6.12 provides that a suspension is appropriate when a lawyer engages in conduct which he knows to be improper. Therefore, only where a respondent knowingly commits misconduct and only where no mitigation exists, is a suspension appropriate.

Here, the Referee found, and the record supports, that Respondent acted without the benefit of any legal or ethical authority which prohibited his proposed conduct, despite his research efforts. [DH/TR 44, 45]. He also acted without objection to his proposed conduct by any government person or by the presiding judge. [FH/TR 324, 337; R. Ex. 3; R. Ex. 5]. Any objection or cautionary reaction would have placed him on notice to reconsider the offer or take other remedial action. This did not occur. It was also found by the Referee that it is understandable why Mr. Machin may have failed to recognize the impropriety of his acts based upon the permissible payments of money in the past within his legal community. [RR 10]. Therefore, the requisite knowledge or willfulness does not exist in this case to justify a suspension pursuant to Standard 6.12.

The impropriety of a suspension is further established by the existence of the several significant mitigating factors and the absence of aggravation. The Referee found several mitigating

factors which included the fact that Mr. Machin, a member of The Florida Bar since 1983, has no disciplinary record; that he has good character and reputation; and that there was "disclosure and/or tacit approval by others prior to the Bar's complaint". [RR 9, 10, 11]. More specifically, the referee found Respondent to be a zealous advocate for his clients who works hard for them and obtains good results. It was also found that he is a good family man and church member who has made significant contributions to his family, church and community. [RR 10].

Additionally, it is suggested that the referee failed to attach sufficient significance to these important factors. The Referee's finding that Respondent made disclosure and received the tacit approval of both the government and the presiding judge is of paramount importance because it clearly proves that neither Respondent, nor any person associated with this judicial system, considered the conduct to be unethical at the time of his acts. This uncontroverted factor differentiates this case from all others and is therefore of extreme significance as mitigation.

These facts prove Respondent to be a lawyer who possesses all the characteristics and attributes of one who is unlikely to again fail to discharge his duty to the legal system, the public, or the profession. Therefore, he is a lawyer who should be given the benefit of every doubt and can be expected to benefit from the most minimal discipline.

This absence of knowledge and these mitigating factors prove that Respondent may have acted negligently or from an error in

judgment. Such a negligent error in judgment causes either Standard 6.13 or 6.14 to be applicable. Based upon the fact that the plea agreement required no aggravation, even the potential prejudice of Respondent's conduct was minimal. Therefore, Standard 6.14 should be applied and an admonishment entered if discipline is ordered.

Also, in considering the need for discipline and the severity of discipline to be imposed, the Referee and this Court should consider the duty found to have been violated; the lawyer's mental state at the time of his actions; and the injury or potential injury caused by the conduct. Fla. Standards For Imposing Lawyer Sanctions, preamble.

In this case, the evidence establishes that this Respondent was faced with a clear responsibility to his client and possibly a conflicting responsibility to the judicial system. He made a good faith and conscious effort to resolve the conflict by researching the issue. Then, at all times he made disclosure in an effort to be "above board". [R. Ex. 3, pg. 21]. Furthermore, the offer was never intended to be a "buy out" or "buy off" and this was made known to the child's mother. [FH/TR 152]. Therefore, his mental state was that of one who believed his conduct to be appropriate and consistent with his duty to his client and the court. His conduct was clearly not knowing or willfully a violation.

Also, the uncontroverted evidence establishes that no prejudice resulted to the administration of justice in this case. No evidence was introduced or even tendered to suggest that the

administration of justice within the court of the Honorable Richard Lazzara was prejudiced or potentially prejudiced by this offer.

Therefore, any duty violated was the direct result of the obligation owed by Respondent to another contemporaneous duty. Respondent's mental state was characterized by good faith and open disclosure and no prejudice resulted. Therefore, an evaluation of these basic principals of discipline require the imposition of the most minimal discipline.

As a singular factor of aggravation the referee determined that Respondent was not remorseful. This conclusion resulted from Respondent's testimony to the effect that he would never again engage in similar activity because the adverse effects out weighed the benefits. [DH/TR 58 - 59]. Although Respondent did not satisfactorily admit that his acts were unethical or prejudicial to the administration of justice, he did candidly admit his conduct and his responsibility for his actions. He also acknowledged the concerns of the Referee and indicated his commitment to avoiding similar conduct in the future. [DH/TR 55, 58 -59].

As this Court has recognized, it is not uncommon for reasonable people to disagree with a court's ruling and such disagreement is not evidence of malice. The Florida Bar v. Vernell, 520 So.2d 564 (Fla. 1988). Logically, it follows then that Respondent's respectful failure to completely adopt the Referee's characterization of his conduct as improper is not necessarily evidence of a lack of remorse. In fact, the issue of impropriety remains to be determined by this Court and the facts

clearly show that reasonable persons can differ on the answer! Therefore, this difference of opinion was erroneously considered as aggravation by the Referee.

The Florida Bar also takes issue with the discipline recommended by the Referee by requesting enhancement to a suspension of six months. To support this request, it cites three decisions of this Court, but acknowledges that no prior decision disciplined an attorney for the conduct at issue here.

Respondent suggests that such an absence of precedent is significant not only to the issue of guilt, but also to the necessity of discipline in this case. Respondent also suggests that the cases relied upon by the bar do not support the imposition of a six month suspension because of the dissimilarity of facts and determinations of guilt.

In The Florida Bar v. Whitfield, 435 So.2d 833 (Fla. 1983), the respondent was found guilty of conduct prejudicial to the administration of justice based upon misconduct which caused direct prejudice to a criminal investigation by the state. He was also found guilty, based upon a separate transaction, of conduct involving dishonesty, fraud, deceit or misrepresentation. This resulted in a suspension of six months.

In that case, prejudice was proven to have occurred. It was not proven here. In that case there was additional misconduct involving dishonesty. No such conduct exist here. Moreover, no mitigation was found on behalf of respondent Whitfield. Significant mitigation exists here. Therefore, this decision does

not serve to support The Florida Bar's requested discipline.

Next, the Complainant cites the case of The Florida Bar v. Carswell, 18 F.L.W. 507 (Fla. 1993). In that case, the respondent was found to have tampered with a witness. He was also charged with a crime for that conduct and pled nolo contendere to that misdemeanor crime. Based upon those facts, he was found guilty of several ethical violations, including criminal conduct; dishonesty; and conduct prejudicial to the administration of justice.

The facts at issue here are significantly different than those at issue in Carswell. The conduct there involved a crime. Here, it is uncontroverted that Respondent's conduct was not illegal and such a determination was even reached by the office of the state attorney. [RR 6; FH/TR 150]. Therefore, in view of the significantly different facts, the criminal nature of those facts, and the several ethical violations by respondent Carswell, that decision does not require the imposition of a six month suspension in this case.

The Complainant also cites, apparently in support of its request for enhanced discipline, the case of The Florida Bar v. Colee, 533 So.2d 767 (Fla. 1988). However, that respondent was suspended for ninety days, despite the absence of any findings of mitigation and despite this Court's determination that the respondent's violation had been "flagrant".

In the case sub judice, Respondent's proposed conduct was fully disclosed and was met with no objection or criticism. In Colee, the conduct was kept secret by the respondent and the

attorney first learning of the misconduct recognized its impropriety and made disclosure. Additionally, the conduct of Colee was designed to be withheld not only from the court but from the parties as well. Here, Respondent clearly revealed his offer to all parties. Furthermore, the information at issue here was, by the terms of the plea agreement, not to be presented by the state, regardless of the establishment of the trust fund.

Based on the obvious unethical nature of Colee's misconduct, the wrongful intent of Colee, and the absence of any mitigation, that decision establishes no precedent relevant to this case.

Accordingly, in view of the purposes to be served by discipline, the clear evidence of the unique circumstances involved in this case, the existence of significant and important mitigating circumstances, and the existence of no aggravation, the imposition of an admonishment should be the maximum discipline imposed in this case.

CONCLUSION

Respondent's conduct, evaluated in terms of all the circumstances existing at the time and based upon Respondent's good faith belief that his conduct was in his client's interest, clearly supports a determination that Respondent is not guilty of misconduct. Should this Court determine that discipline is necessary, then the significant mitigation and the facts unique to this case and to this Respondent require only an order of admonishment. Any suspension will serve no useful purpose and will unjustly punish Respondent for conduct not clearly proven to be prejudicial to the administration of justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery this 29th day of December, 1993, to Susan V. Bloemendaal, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607 and by U. S. Mail delivery this 29th day of December, 1993 to The Honorable Susan F. Schaeffer, Criminal Court Complex, 5100 144th Avenue North, Room 320, Clearwater, Florida 34620.

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