IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner/Complainant,

v.

MANUEL A. MACHIN,

Cross-Petitioner/Respondent,
_____/

Case No. 79,369
TFB Nos. 91-10,777(13C)
91-11,023(13C)

COMPLAINANT'S REPLY BRIEF AND BRIEF IN ANSWER TO CROSS PETITION

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SYMBOLS AND REFERENCES

In this Brief, the Petitioner, THE FLORIDA BAR, will be referred to as "The Bar". MANUEL A. MACHIN will be referred to as "Respondent." "FH/TR" will refer to the transcript of the Final Hearing held on September 9-10, 1992. "DH/TR" will refer to the transcript of the Disciplinary Hearing held on April 23, 1993. "RR" will refer to the Report of Referee dated July 20, 1993.

ARGUMENT

I

Respondent's brief in support of cross petition argues that Respondent should be found not guilty of conduct prejudicial to the administration of justice. The basis for Respondent's argument is his assertion that non-objection by the State and by the court renders his conduct ethical. The fact remains that Respondent offered on behalf of his client to set up a trust fund for the child of a murder victim in exchange for an agreement by the victim's family not to speak in aggravation at the sentencing. Respondent's stated purpose in proposing this arrangement was to enhance his client's chance of getting a better deal. (DH/TR 53,58). Respondent admitted in his testimony at the final hearing that, based on his previous experience with that particular judge, he knew that the plea might be rejected if the judge heard aggravating circumstances. (FH/TR 319, 340; DH/TR 50).

The offer was clearly made by Respondent in hope of obtaining less than the maximum sentence and for the purpose of preventing the court from exceeding the maximum guidelines sentence of twenty-two (22) years. The initial state attorney recommendation was for a sentence of fifteen (15) of the twenty-two (22) year maximum sentence. (DH/TR 50, FH/TR 142, 325). At the final sentencing on March 26, 1991, the court sentenced Respondent's client to the maximum guideline sentence of twenty-two (22) years. (R.'s Exhibit 4, p.53, 54; RR 8).

It appears that both the Respondent and the referee have confused silence on the part of both the state attorney's office and the court for acquiescence to or approval of the conditional offer of establishing the trust fund. At the initial sham plea hearing held on January 15, 1991, the Assistant State Attorney, Valenti, advised the court that a $10,000.00 trust fund was to be set up for the infant child of the victim. The court was not advised at this hearing that the trust fund was available only if the victim's family remained silent at the sentencing hearing. In fact, Respondent indicated to the court that he was in possession of a trust account check in the amount of $10,000.00 to be made out to the appropriate payee. (R.'s Exhibit 1, p.3-4). At the conclusion of the January 15, 1991 hearing, Mr. Valenti was arrested and charged with bribery in connection with the same case.

At the February 12, 1991 hearing, a genuine plea was entered by Respondent's client. The court emphasized that the nature of the plea was that of an "open plea." (R.'s Exhibit 3, p.7) When the plea was offered, there was no mention of a trust fund by the State, and none by the Respondent; clearly there was no mention of a trust fund in exchange for silence. (R.'s Exhibit 3, p.14) The court indicated that it could sentence Respondent's client for a period of up to twenty-two (22) years. A trust fund was mentioned only when the victim's mother, Mary Martinez, brought it to the court's attention. (R.'s Exhibit 3, p.18). The court thereafter questioned Respondent about the nature of the trust

fund and was advised at that point that the trust fund was available if the victim's family chose not to aggravate the defendant's sentence. (R.'s Exhibit 3, p.22). The court then indicated its intention to hear from everyone and to decide the sentence at the appropriate time. The court's failure to chastise Respondent for offering a trust fund in exchange for silence should not be interpreted as acquiescence, or as approval of such an offer. Even if the court had indicated approval of this offer, such approval would not render the conduct ethically permissible.

Respondent further argues that The Bar has failed to prove by clear and convincing evidence that there was any influence or prejudice as the result of Respondent's conduct. It is the Bar's position that a finding of actual prejudice in the client's case is not required in order to find Respondent guilty of conduct prejudicial to the administration of justice. In a case recently decided by this Court, The Florida Bar v. Carswell, 624 So. 2d 259 (Fla. 1993), an attorney was found guilty of conduct prejudicial to the administration of justice where the attorney tampered with the witness in an F.D.L.E. investigation, by instructing the witness to lie if questioned by F.D.L.E. investigators. There was no indication that actual prejudice to the administration of justice occurred in Carswell. Carswell was charged with witness tampering based on the conversation recorded by the police via a police body transmitter worn by the witness. Apparently, no false evidence was ever given by the witness in

the F.D.L.E. investigation. There was no finding by the referee that anyone was influenced or prejudiced by Carswell's conduct, yet this Court found Carswell guilty of conduct prejudicial to the administration of justice.

Clearly, any attempt to improperly influence the outcome of a judicial determination prejudices the administration of justice. The rule does not require that Respondent be successful in his attempt to improperly influence the outcome of his client's case.

II

Respondent maintains that the referee's recommended discipline of a ninety day suspension is excessive and unjustified in view of the circumstances and mitigating factors present in this case. In support of this argument, Respondent cites to The Florida Bar v. Pahules, 233 So. 2d 130, at 132 (Fla. 1970). The Pahules decision was also cited by this Court in Carswell in support of its decision to enhance the ninety (90) day recommended suspension to a suspension of one hundred and eighty (180) days. Specifically, this Court found in Carswell that a ninety (90) day suspension was "wholly insufficient to deter others who may be tempted to tamper with witnesses by inducing them to lie to law enforcement officers in an investigation." Carswell, at 508. Likewise, in the instant matter, the imposition of an admonishment, which Respondent argues is an appropriate discipline, would be wholly insufficient to deter others who might be tempted to engage in similar misconduct in hopes of obtaining a more favorable sentence for their clients.

Economic loss and embarrassment necessarily accompany any suspension. However, the interests of the public and the deterrent value of discipline must be balanced against the individual interests of an accused attorney. Discipline in this case will serve an important purpose by sending a message to attorneys and the public that buying silence will not be tolerated.

Respondent argues that Standard 6.12, Florida Standards for Imposing Lawyer Sanctions, is not applicable because Respondent was not aware that his conduct was improper. Respondent acknowledged he knew that his conduct was questionable; he claims he engaged in legal research to determine whether the conduct was prohibited. It is a sad commentary on his view of the practice of law that he thought it was permissible to buy silence, thereby denying the court access to information. Respondent clearly knew that material information, in the form of victim's statements in aggravation, would be withheld, and not be considered by the court in imposing an appropriate sentence on his client. Finally, in The Florida Bar v. Colee, 533 So. 2d 767 (Fla. 1988), this Court suspended an attorney for ninety (90) days despite the fact that there was no clearly delineated prohibition against the attorney's conduct.

Respondent's failure to appreciate the ethical impermissibility of his conduct should not be considered a mitigating factor; rather, it should be the basis for concern regarding Respondent's general fitness to practice law. Likewise, the lack of remorse exhibited by Respondent throughout these proceedings is further evidence of his inability to appreciate the ethical implications of his conduct. Respondent apparently fails to appreciate his ethical responsibility, not only to his client, but to the legal system, and to the legal profession.

An absence of previously decided cases does not justify the imposition of the minimal discipline argued by Respondent. Respondent's conduct was intentional and calculated to gain an advantage for his client. Monetary resources were to be exchanged for silence in the hopes of obtaining a more favorable sentence for Respondent's client. Respondent consciously chose to ignore the interests of justice, and place the interests of his client above the fair administration of justice.

CONCLUSION

Respondent's conduct is clearly violative of the rule prohibiting conduct prejudicial to the administration of justice. Whether or not actual prejudice occurred in the case in question, it is Respondent's attempt to interfere with the fair administration of justice that is prejudicial both to the administration of justice and the public's perception of the legal profession. An admonishment for such conduct is woefully insufficient. The appropriate discipline for Respondent's conduct is at least a six (6) month suspension.

WHEREFORE, The Florida Bar respectfully requests that this Court deny the Respondent's Counter-Petition, and grant the Bar's Petition to Disapprove the Referee's recommended discipline of a ninety (90) day suspension, and impose a discipline of a six (6) month suspension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Initial Brief has been delivered by Regular U. S. Mail to Donald A. Smith, Jr., Counsel for Respondent, at 109 Brush Street, Suite 150, Tampa, Florida, 33602, this 21st day of January, 1994.

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Assistant Staff Counsel