

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner/Complainant,

CASE NO: 79,369

v.

MANUEL A. MACHIN,

Cross-Petitioner/Respondent.

RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The following abbreviations and symbols are used in this brief:

FH/TR = Transcript of Final Hearing held on September
9 - 10, 1992.

R. Ex. = Respondent's Exhibit

RR = Report of Referee

ARGUMENT 1

The Referee has recommended that Respondent be found guilty for acting in a manner which prejudiced the administration of justice. The justice alleged to have been prejudiced was that administered by the Honorable Richard Lazzara in his capacity as presiding judge in a criminal prosecution. The Referee found and the Bar acknowledges, that Judge Lazzara did not object nor prohibit the establishment of the trust fund. [RR 10]. The Referee also found that the party which maintained an adverse interest, the State of Florida, also failed to object and, as the Bar states, initially tendered a plea inclusive of the payment of such trust funds. [R. Ex. 1, RR 9, 10].

In its Reply/Answer Brief the Bar suggests that both Respondent and the Referee are confused as to the meaning and effect of these failures to object to Respondent's offer to establish a trust fund by the state and the court. The Bar argues that these failures to object do not render Respondent's conduct ethical. The Bar also argues that even if the court had approved the trust fund, that fact would not have rendered the conduct ethically permissible. This argument is not persuasive because it is not necessary, nor has it been argued by Respondent, that the actions by the court and state rendered the subject conduct ethical. Instead, this approval of and/or acquiescence to Respondent's conduct simply proves that justice was not prejudiced.

More importantly, by disclosing his intentions to the state and presiding judge, Respondent insured that the administration of justice would not and could not be prejudiced by allowing for their

objections.

Moreover, it is not necessary that Respondent prove his conduct to have been ethical. To the contrary, it is essential to an affirmation of the recommendation of guilt that the record evidence prove, clearly and convincingly, that the conduct at issue was in fact prejudicial to the administration of justice. Here, the Referee found that no actual prejudice occurred. [RR 8]. Here also, the record clearly reflects that Respondent disclosed his intentions to the state and the presiding judge. [FH/TR 118]. This disclosure and the resulting acquiescence, insured that the administration of justice was not and could not be prejudiced. Therefore, the Referee's recommendation of guilt is unsupported by the record evidence, is inconsistent with the findings of fact and is erroneous.

Furthermore, the Complainant should not now be heard to take issue with the Referee's findings concerning the actions by the state and court. The Bar has not sought review of the Referee's findings of fact and to now challenge these findings by asserting that the Referee misconstrued the effect of the actions by the state and the court is procedurally inappropriate.

The facts of this case do not support the conclusion that unethical conduct existed without evidence of such prejudice having occurred. The facts here, as contrasted with those presented in The Florida Bar v. Carswell, 624 So.2d 259 (Fla. 1993), are not inherently evil or dishonest. Instead, the establishment of the trust fund, under all the existing relevant circumstances,

including the disclosure by Respondent and the acquiescence by the state and court, proves that Respondent and other reasonable persons did not consider the conduct to have been improper.

The Florida Bar also continues to rely upon this Court's decision in The Florida Bar v. Carswell, 624 So.2d 259 (Fla. 1993), to suggest that it need not prove that Respondent's conduct resulted in actual prejudice to the administration of justice. However, the holding of that case does not establish such a rule as a matter of law as the facts and violations of Carswell are significantly distinguishable from those at issue here.

Respondent Carswell was found to have instructed a witness to lie to FDLE investigators. He also threatened the witness to induce this false testimony. Based upon this conduct, Carswell was charged with a crime and entered a plea to the criminal violation of tampering with a witness. Additionally, the court in that case found the respondent's conduct to be "calculated and intentional". Based upon those facts, Carswell was determined to have committed acts in violation of numerous rules, including unlawful conduct; conduct that was criminal and which adversely reflected on his honesty, trustworthiness, or fitness; conduct involving dishonesty, fraud, deceit, or misrepresentation; and conduct that was prejudicial to the administration of justice.

Accordingly, both the facts and the determinations of guilt in Carswell significantly distinguish it from the facts and legal issues here. Such a decision does not obviate the legal necessity of the Bar proving clearly and convincingly that Respondent's

conduct resulted in prejudice to the administration of justice.

Clearly having failed to establish such prejudice, the recommendation of Respondent's guilt is erroneous and should be rejected by this Court.

ARGUMENT II

In support of its argument for the suspension of Respondent, the Bar suggests that the imposition of such discipline in this case will serve to send a message to all attorneys and the public that similar conduct will not be tolerated. This argument is similar to the Referee's expressed intent that this case serve as a vehicle for providing notice to criminal defense attorneys to reconsider offers to establish similar trust funds. However, the Referee, unlike the Bar, recognizes that notice to all criminal attorneys can also be accomplished by a public reprimand. [RR 10].

The Complainant cites, in support of suspension, The Florida Bar v. Colee, 533 So.2d 767 (Fla. 1988). There, this Court suspended an attorney for ninety (90) days based upon findings that the respondent attempted to sell for \$200,000.00 information to another lawyer which would have proven that a fraud had been perpetuated upon the lawyer's client and a court.

In that case, unlike here, the first attorney to learn of the respondent's conduct recognized it as a violation of a lawyer's duty to disclose a fraud to the court. Here, as has been recognized by the Referee, the converse reaction to Respondent's conduct occurred. Here, the assistant state attorneys approved and then acquiesced to Respondent's proposed conduct. Here, the Court also acquiesced and failed to prohibit Respondent's proposed conduct. [RR 10].

Therefore, the decision of Colee does not support the

imposition of a suspension for ninety days in this case. In fact, that case does not support the necessity of the imposition of any suspension here, based upon the distinguishable facts.

On the other hand, Colee serves to establish a maximum discipline to be imposed, absent mitigation. However, in view of the substantial mitigation and unusual circumstances involved here, contrasted with the egregious facts and lack of mitigation in Colee, that decision indicates that discipline significantly less than a ninety day suspension is appropriate for Respondent.


In view of this Court's prior decisions and the suitability of a public reprimand to provide notice to members of the Bar, the Referee's recommendation of a suspension should be rejected as being excessive and unfair. A public reprimand should be ordered if discipline is determined to be necessary.

CONCLUSION

Respondent's conduct did not prejudice the administration of justice. Respondent's conduct was not of such a nature as to be inherently contrary or prejudicial to justice. Therefore, absent evidence of actual prejudice or of actual potential prejudice, and in view of the open disclosure and acquiescence, the recommendation of guilt is erroneous.

The Referee's findings of fact and circumstances combined with the findings of mitigation indicate that even if Respondent's conduct is now, in retrospect, adjudged to have been inappropriate, the imposition of discipline is not warranted against this respondent. Should it be determined that an order of discipline is necessary to deter similar conduct, then a public reprimand is sufficient to serve that purpose. Any suspension is unfair to Respondent and serves only to needlessly punish an attorney who acted in the best interests of his client and without an intent to violate any rule.


Respectfully submitted,



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C E R T I F I C A T E O F S E R V I C E

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery this 8th day of February, 1994, to: Susan V. Bloemendaal, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607 and to The Honorable Susan F. Schaeffer, Criminal Court Complex, 5100 144th Avenue North, Room 320, Clearwater, Florida 34620.


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