IN THE SUPREME COURT OF FLORIDA
(before a Referee)

THE FLORIDA BAR,

Complainant,

vs. Case No. 79,369

MANUEL A. MACHIN,

Respondent.
_____/

REFEREE'S REPORT

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

Trial of the Issues: September 9 and 10, 1992
Determination of Discipline and Costs: April 23, 1993

The following attorneys appeared as counsel for the parties:

For the Florida Bar: Susan V. Bloemendaal, Attorney at Law

For the Respondent: Donald A. Smith, Attorney at Law

II. Findings of Fact as to Each Item of Misconduct of which the Respondent Is Charged: After considering all the pleadings, evidence, and written closing arguments, the Referee finds as follows:

As to Count I

1. As to Paragraphs 8 and 9 of the Bar's Complaint, no evidence of these allegations was introduced. Accordingly, the Referee grants Respondent's Motion to Dismiss which was made at the end of the Bar's case (T. 168) as to these two allegations.

2. As to the allegations contained in the rest of the factual paragraphs, the Referee finds as follows:

a. The only witness who alleges the actions/words by Respondent complained of in Count I, which would constitute unethical behavior, is Javier Abreau.

b. Mr. Abreau was very confused about much of what happened on the day in question, except for his allegations of wrongdoing on the part of Respondent (T. 43 - 90).

c. Respondent is not confused about what happened on the day in question and denied all the allegations made by Mr. Abreau. (T. 273 - 308, 344 - 359).

d. As to who was present when the conversation between Mr. Abreau and Mr. Machin took place, the witnesses vary:

> Mr. Machin: The Respondent remembers his client, Miguel Rivera, his client's girlfriend, JoAnna Cooly, and Carlton Hare, the father of a deponent being present when he talked to Mr. Abreau about his deposition (T. 357-359).
>
> Mr. Abreau: Mr. Abreau remembers Mr. Hare being present during the part of the conversation inside the state attorney's office and no one being present out by the elevators. (T. 46-47; 64-66).
>
> Mr. Rivera: Mr. Rivera remembers Ms. Cooly and Mr. Hare being present when Respondent talked to Mr. Abreau about his deposition (T.212,218-222).
>
> Ms. Cooly: Ms. Cooly remembers Mr. Hare, and Mr. Rivera being present when Respondent talked to Mr. Abreau about his deposition (T. 234,235).
>
> Mr. Hare: Mr. Hare remembers only himself, Mr. Abreau, and Respondent being present when Respondent talked to Mr. Abreau about his deposition (T. 251,259, 263). He does remember Ms. Cooly and Mr. Rivera coming in before he leaves (T. 251-252, 264).

e. Of the two participants to the conversation, and the three persons who possibly overheard the conversation, only Mr. Abreau relates the matters complained of in the Bar's Complaint.

> Mr. Abreau: Mr. Machin came up to him and told him his name and asked him if he was there for a deposition. He said yes and Machin asked him to step outside the state attorney's inner office, by the elevators. Machin told him not to say the stick was so big or to change the size of the stick and told him he shouldn't be a "chivato", a Spanish word for snitch. Machin talked to him in both English and Spanish (T.44-48, 84-85). Mr. Abreau does not remember Mr. Machin telling him what a deposition was all about, or that he should tell the truth, and can't remember if Machin told him to say he didn't remember something if he didn't (T. 75-78, 88-89).

Mr. Machin: In summary, Mr. Machin denies speaking to Mr. Abreau in Spanish at any time. (T. 306) He denies leaving the state attorney's inner office at any time. (T. 297, 300, 307) He denies saying anything about changing the size of a stick, or even discussing the stick except in the deposition itself. (T. 304) He denies using the word "chivato" or "snitch". (T. 306) He says he explained the deposition process to Mr. Abreau as he does to all witnesses he is going to depose, and as he told Mr. Eric Hare, and Ms. Cooly that day. (T. 301 - 304) There is nothing improper about what Respondent says he advised the witnesses.

Mr. Rivera: Mr. Machin introduced himself and told Mr. Abreau he was there to have his deposition taken. He should answer the questions to the best of his knowledge. And if he didn't remember something, to say he didn't remember (T. 218). He had said the same thing to his girlfriend before she testified (T. 217). Machin never said the word "chivato" (T. 219). Machin and Abreau never left the state attorney's inner office together (T. 221-222).

Ms. Cooly: Mr. Machin told her about the deposition and how to conduct herself (T. 238-239). She heard Machin talk to Abreau -- totally in English -- and he explained the same thing to him that he had to her (T. 240-241). Machin and Abreau did not leave the inner state attorney's office (T. 242-243, 245-246).

Mr. Hare: He was at the State Attorney's office because his son was a deponent. (T. 248). He witnessed the entire conversation between Machin and Abreau (T. 253-254). He never saw Machin and Abreau leave the inner office and go out into the elevator room (T. 254). The conversation he heard was the same as he had heard between his son and Machin -- describing what would transpire in the deposition (T. 254-255, 260-261).

f. There is no doubt there are interests and biases among the witnesses.

Mr. Abreau: Mr. Abreau does not like Machin's client and has had problems with him (T. 59).

Mr. Rivera: Mr. Rivera is Respondent's client and in addition to representing him in the murder trial, Respondent was representing him almost right

up to the time of this trial on other matters. He owes Mr. Machin $25,000.00 (T. 223-224).

Ms. Cooly: Ms. Cooly is Mr. Rivera's fiancee (T. 231).

Mr. Machin: Mr. Machin could lose his license to practice law if the allegations in Count I are true.

Mr. Hare: All attorneys concede that Mr. Hare is a totally unbiased witness. His testimony does not match with Mr. Abreau's.

There is some corroboration for Mr. Abreau's testimony by the fact that he told his boss, Scott Cameron, about Mr. Machin's use of the word "chivato" immediately after his deposition, and sought his advice on what to do (T. 164). He also reported some impropriety, although not exactly the same as is alleged in the Bar's complaint, to the state attorney's office on the Monday after his deposition (T. 13, 16-17).

As an aside, having been a criminal defense lawyer for over ten years, this referee doubts the size of the stick was critical to the defense or to the state in this case. Either a two-foot 4 x 4 or a two-foot 2 x 2 would support the state's theory of the case. The defense was one of self defense and/or who hit the victim. The size of the board/stick would not be critical to either defense (See testimony of state attorney George Bedell and defense attorney Manuel Machin). Actually, it was a 2 x 2 that was introduced at the trial -- not a 4 x 4 (T. 24-25, 279-280). No one else except Mr. Abreau testified at the trial to a 4 x 4 being used, but a 2 x 2. Accordingly, it is hard to imagine a defense lawyer would jeopardize his license for testimony that really didn't matter to his defense, and which was very easy to dispute.

As to Count II

The basic facts of this count are not in dispute. They are as follows:

1) Respondent represented Nelson Gonzalez who was charged with Murder in the First Degree for killing Samuel Sierra, and kidnapping Susan Schultz.

2) Susan Schultz was a witness to the murder and a victim of the kidnapping charge. She was carrying the unborn child of the victim Sierra. (Note: There was some thought by the defendant that Ms. Schultz might be carrying his baby, but that has not been established, nor does it matter to this case.)

3) At various times the Respondent offered Ms. Schultz, on

behalf of his client, to set up a trust fund for the child in various amounts of money from $10,000 to $30,000.

4) The trust fund would be made available only if Ms. Schultz and the victim's family did not speak in aggravation at the defendant's sentencing.

5) The victim's family did speak in aggravation at the sentencing, and the trust fund was never set up.

(Note: Since the facts are not in dispute, there is no need to refer to transcript page numbers)

III. Recommendation as to whether or not the Respondent should be Found Guilty:

As to Count I

The burden on the Bar is to prove its complaint by clear and convincing evidence. Because of the Respondent's complete and unequivocal denial of the allegations, and the corroboration of his testimony by three witnesses, one of whom has absolutely no known bias or interest in the outcome of this case, the Bar has failed to meet its burden of proof as to Count I of the Complaint. Accordingly, the Respondent should be found not guilty of Count I of the Bar's complaint.

As to Count II

The Bar contends Respondent's actions violated Rules 3 - 4.3, 4 - 3.4(f), and 4 - 8.4(d). The Respondent contends he violated no Rules by his admitted conduct.

As to Rule 3 - 4.3, the Referee finds only that portion of the Rule relating to conduct prejudicial to the administration of justice has been violated. As to Rule 4 - 3.4(f), the Referee finds no violation since the other "party" would be the State of Florida and Respondent did not request Ms. Schultz or the victim Sierra's family refrain from giving relevant information to the State of Florida, only to the Court, which was not a "party." As to Rule 4 - 8.4(d), the Referee finds Respondent's conduct was prejudicial to the administration of justice.

The reasons for the Referee's finding the Respondent's conduct was prejudicial to the administration of justice are as follows:

The fair and proper administration of criminal justice requires that rich and poor defendants be treated as equally as is possible. To allow a wealthy defendant to buy silence at the sentencing from a victim's family, and thus a lesser sentence, while the poor defendant is unable to buy the same silence, and thus receives a longer sentence for the same crime cannot be

countenanced under any circumstance. A lawyer who deliberately participates in a scheme such as that proposed by Respondent prejudices the administration of justice.

The State may well agree not to speak in aggravation at a defendant's sentencing in exchange for a plea of guilty to the charge or to a lesser charge, but we could never allow the state attorney to make his/her decision not to speak in aggravation because he/she was paid by a defendant not to speak. The same applies to victims. The law gives them the right to be heard at sentencing or not, as they desire. But we must never let their decision rest on the payment of a sum of money, unrelated to legal and permissible restitution. A lawyer who tries to buy a victim's silence at sentencing prejudices the administration of justice.

It has not been suggested nor could it be that the victims' child was legally entitled to any restitution. Thus the quid pro quo was money the victims' child was not entitled to in exchange for the living victim and the deceased victim's family not speaking in aggravation at the defendant's sentencing. To allow this quid pro quo of money for silence strikes at the very heart of the fair and equal administration of justice. Hush money of the sort offered in this case cannot ever be allowed in the criminal justice system. A lawyer who offers such money has prejudiced the administration of justice.

If we turned things around and Ms. Schultz or the victim's family insisted the defendant pay them money for their silence, they most likely would be charged with extortion. In this very case, the knowledge that $30,000.00 was available caused one Assistant State Attorney, John Valenti, to allegedly insist on receiving some of it for his "deal" that resulted in a "sham" plea, and another defense attorney, Charles Corces, to allegedly become a middleman in the bribery conspiracy. These two attorneys have been charged with crimes. (T. 326-333) While it was determined by the Hillsborough State Attorney's Office that Respondent committed no crime by his offer (T. 150) and the Referee agrees that it has not been proved that Respondent committed any crime, this in no way minimizes the sinister by-products his offer of money produced in this case.

Just imagine what Mrs. Martinez, the victim's mother, must think of the criminal justice system in Florida. First, she was advised a sham plea was taking place so the Assistant State Attorney prosecuting her son's murderer could be arrested for taking a bribe. After the sham plea, she was told that if she wanted her son's child to have a sizable trust fund, she could not speak out against her son's murderer at his sentencing. She was not happy about any of this nor should she have been. She has undoubtedly told many in her home state of New York that the Florida criminal justice system is little short of corrupt.

Respondent appears to equate paying money in his representation of criminal clients and civil clients (T. 364 - 365). He says it is permissible for a client to pay money in a civil case for a botched operation and to insist on silence in return. He says he and others practicing in his county tie money to results in criminal cases. (T. 321-323, 365, 370-371, 373-377) He believes the payment of money is the same in both courts ("All it is is changing criminal courts for civil courts." T.365). Respondent gives many disturbing examples of where money has been paid in criminal cases by himself or others, with the consent of the state (T. 321-323, 365, 370-371, 373-377). What appears to be lacking is Respondent's understanding of the difference in criminal and civil cases. Civil litigation involves private interests, and those private parties to the litigation can agree to most any resolution they want. Money can be paid to the plaintiff and the defendant can insist on silence to settle that civil suit. But criminal cases involve public interests. The defendant cannot, for example, pay the victim money and have the victim drop the charges. Only the state attorney can drop the charges. The victim is not a party to the criminal case, only a witness. The people of the State of Florida are the "plaintiffs" in a criminal case and their interests in seeing justice prevail must not be thwarted by money, unrelated to proper restitution, or proper fines, being paid or offered. The fact that this may have occurred in other cases in Respondent's community does not make it any less egregious.

The attorneys in this case indicated they could find no precedent to cite to the Referee for the allegations raised in Count II of the Bar's complaint. Assuming this is accurate, let this case set the precedent. Zealous representation of one's criminal clients is admirable and expected by the Rules regulating the Florida Bar. An attempt to get a favorable result for a criminal client by offering money to buy silence in order to get this favorable result such as was done in this case must not be permitted under the Rules. It clearly involves conduct prejudicial to the administration of justice.

Respondent argues he should be found not guilty of Count II because he made his offer openly to other members of the criminal justice system who did not find his offer offensive. Whether he made his offer openly or clandestinely, and whether or not others thought his offer was in violation of the Rules governing Florida attorneys may have some bearing on the discipline which should be imposed, but it has no effect on whether or not he is guilty of conduct which was prejudicial to the administration of justice.

IV. Recommendation to Disciplinary Measures to Be Applied:

The Referee recommends the Respondent be suspended from the practice of law for a period of ninety (90) days and pay costs attendant herewith.

V. Reasons for Recommended Discipline

At a separate hearing held on April 23, 1993, the Bar recommended Respondent be suspended from the practice of law for a period of not less than six months (T. 90, 112). Respondent recommended that a private reprimand, now known as an admonishment, be imposed (T. 106).

The Referee considered all the matters suggested in Florida's Standards for Imposing Lawyer Sanctions.

As to the general factors, the Referee finds as follows:

1) The duty violated. This has previously been discussed. Mr. Machin engaged in conduct that was prejudicial to the administration of justice.

2) The lawyer's mental state. Mr. Machin intentionally offered money for a trust fund for the victims' child in exchange for a victim and the deceased victim's family members not speaking in aggravation at the time of his client's sentencing. The attorney did not clearly know his conduct was unethical, nor did he clearly know he was violating any Rules, but he knew there may be a problem with the offer, else why would he have researched it. (Sentencing Transcript - ST 31,44-45). Having researched the issue, and finding no prohibition, the attorney made his offer. His conduct cannot be described as negligent, but intentional, althought without a clear knowledge of that conduct being a violation of the Rules.

3) Potential or actual injury caused by the lawyer's misconduct. There was no actual injury caused by the lawyer's misconduct, but the potential injury would have been the judge giving a lighter sentence than what was given, after hearing the victims speak in aggravation. Respondent admitted at the sentencing hearing that it was his objective and his client's hope that he would be sentenced within the permissible downward guideline range of 7 - 12 years or at the very least within the guideline range of 12 - 17 years, and not within the permissible upward departure guideline range of 17 - 22 years (ST 52 - 53). Respondent also admitted his and his client's fear that the judge would give him a more severe sentence, or maybe reject the plea negotiation entirely, if the victims spoke in aggravation at sentencing (T. 319, 364, 366 - 367; ST 52 - 54). After hearing all relevant evidence, including victim aggravation, the sentencing judge gave the defendant the maximum sentence he could have given him without rejecting the plea bargain, 22 years.

One of society's interests in criminal proceedings is that proper sentences be imposed, taking into consideration all relevant evidence, including victim impact statements. If the victims had taken money in exchange for silence, the public may potentially

have been deprived of a proper sentence for this defendant for his crime.

4) The existence of aggravating or mitigating factors.

Aggravating Factors

a) Refusal to acknowledge wrongful nature of conduct. Throughout these proceedings, Respondent has denied any wrongdoing. The proceedings were bifurcated and after the Referee found Respondent guilty of Count II, Mr. Machin testified at the sentencing hearing. He still attempted to defend his conduct, and only after the Referee attempted to get respondent to acknowledge wrongdoing did Respondent finally say, "I don't foresee any likelihood that I would ever involve myself in that type activity again because the cost far outweighs any benefits that were derived from it." (ST 58 - 59). This is not the type acknowledgement of wrongful conduct the Referee was seeking. Mr. Machin still does not see or acknowledge that his conduct was wrong.

Mitigating Factors

a) Absence of a prior disciplinary record. It was not controverted that Mr. Machin has not previously been disciplined.

b) Character or Reputation. While there is some dispute regarding the Respondent's reputation in the legal community for ethical behavior, (ST 13 - 14, 23, 29, 62, 71) he clearly has a reputation of being a zealous advocate for his clients. He works hard for his clients and obtains good results. There was no dispute that he is a good family man to his wife and children. He is a good church member. He makes many worthwhile contributions to his family, his church and his community.

c) Disclosure and/or tacit approval by others prior to the Bar's complaint. This is not listed, per se, as a mitigating factor, but it should be considered mitigating in this particular case. Throughout the hearings, it is clear that many persons in the system had the opportunity to express to Mr. Machin that his offer was improper. None did, except the victim's mother. (T. 312 - 313, 315 - 321, 333 - 334, 337 - 339, 368 - 370; ST 43 - 50; Respondent's Exhibits introduced into evidence). There is some dispute as to whether full disclosure, i.e. silence for money was explained. Assistant State Attorney Valenti clearly knew. In the sham plea, no one spoke in aggravation, which was to be part of the deal for the trust fund. (Respondent's Exhibit 1). As to Assistant State Attorney John Skye, Mr. Machin says he told him about the entire deal (T 369 - 370) and Mr. Skye is not sure if or when he knew it all. (T. 140 -152) But, one thing is clear, both Mr. Skye and Mrs. Martinez remember her approaching Mr. Skye after Mr. Machin approached Ms. Schultz in court on February 12, 1991, and reminded her about the trust fund and the family's not speaking in aggravation. (T. 123 -126, 147 - 149). Mr. Skye had the

opportunity to advise the court of his displeasure, disagreement, outrage, etc. with Mr. Machin's actions, but did nothing. It was Mrs. Martinez who advised the court when the hearing on February 12, 1991, was almost concluded. (Respondent's Exhibit 3) Mr. Machin says he told Mr. Skye's superiors at the State Attorney's Office and law enforcement about his offer. They did nothing. The victim witness counselor apparently knew and did nothing (T. 324, 337; Respondent's Exhibit 5). The judge was made aware of the quid pro quo of money for silence and did not chastise Mr. Machin in open court except to say he would hear from everyone at the sentencing and decide the sentence and restitution (Respondent's Exhibit 3). At the actual sentencing, however, the judge indicated he would not allow this issue to influence him in any way as to the sentence he would impose, and did not want it discussed further. (Respondent's Exhibit 4 and the Referee's complete transcript of Respondent's Exhibit 4 (pp 29 - 30).

This Referee found some of Respondent's testimony regarding money matters astonishing. (T. 321 - 323, 365, 370 - 371, 373 - 377). However, his testimony about these matters is uncontroverted. This Referee would caution others practicing in Respondent's community that both the Bar and this Referee may find some of these alleged payments and requests for payments, as well as the offer of payment in this case, prejudicial to the administration of justice. However, since payments of money, apparently unrelated to restitution or legal fines have been permitted in the past, this Referee can reluctantly understand why Respondent may have misunderstood the impropriety of his offer of money in this case. If the Supreme Court agrees that Respondent's conduct is prejudicial to the administration of justice and suspends Respondent from the practice of law, or issues a public reprimand, all attorneys practicing criminal law will be on notice.

The Referee did not consider the following to be mitigating although asked to do so by Respondent.

1) Absence of a dishonest or selfish motive.

2) Remorse.

It would be naive to think a criminal defense attorney would not benefit from a favorable sentence for a defendant. Over 90% of criminal cases result in a plea of guilty or no contest. This is how a criminal defense attorney gets new clients -- good results -- not just from a trial, but from a plea as well. While this motive may not have been a driving force in Respondent's actions (and thus it was not considered an aggravating factor), this certainly cannot be ignored. It is not a mitigating factor.

This Referee believes Respondent's refusal to acknowledge the wrongful nature of his conduct is an aggravating factor for the reasons stated above. If the Respondent showed any remorse for his

conduct, it was not apparent to this Referee.

The Respondent is 35 years old and has been a member of the Florida Bar since 1983. This is neither aggravating nor mitigating.

In light of the Florida Standards for Imposing Lawyer Sanctions, Section 6.1, dealing with conduct that is prejudicial to the administration of justice, a suspension is the least severe sanction which is suggested for Respondent's intentional conduct. In further considering the aggravation and mitigation found, and the purposes for discipline cited in The Florida Bar V. Pahules, 233 So.2d 130 (Fla. 1970), this Referee feels a suspension must be recommended. However, a ninety-day suspension will satisfy the Pahules purposes, and yet give full credit to the Respondent for the mitigation found to exist in his case.

VI Statement of Costs and Manner in which Costs Should be Taxed

The Bar and Respondent have agreed to the following costs:

1.	Administrative Costs (Rule 3-7.6(K)(1))	$ 500.00
2.	Bar Staff Expenses	104.73
3.	Court Reporter Fees	2,096.66
		$2,701.39

The Referee recommends these costs be assessed entirely against Respondent. See The Florida Bar v. Miele, 605 So.2d 866 (Fla. 1992).

DONE AND ORDERED this 20th day of July, 1992.

SUSAN F. SCHAEFFER, REFEREE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above report of referee has been served by Mail on Susan V. Bluemendaal, Assistant Staff Counsel, The Florida Bar; Donald A. Smith, Jr., Attorney for Respondent; and John T. Berry, Staff Counsel, The Florida Bar, this 20th day of July, 1992.

SUSAN F. SCHAEFFER, REFEREE