IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC95770

v. TFB File No. 98-01193-02

EDWARD H. WOHL,

Respondent.
_____/

CROSS ANSWER AND REPLY BRIEF

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CROSS ANSWER

The Florida Bar, in its Initial Brief, sought to convince this Court to accept the referee's factual findings and to impose a 90 day suspension instead of the recommended admonishment for minor misconduct. The reasoning behind the Bar's position is that the recommended discipline is not consistent with prior cases decided by this Court and because a finding of minor misconduct in this case would set a dangerous precedent that would not deter other attorneys from entering into similar financial arrangements to pay witnesses enormous sums of money under the guise of consulting agreements.

The Referee's Facts Are Supported By The Record

Mr. Wohl asks this Court to set aside the referee's findings and recommendations. He states that the Report of Referee "needs to be supplemented to some extent" (Respondent's Cross Initial and Answer Brief, "RCIAB" p. 2). Mr. Wohl argues that the referee's findings regarding a certain ruby diamond necklace are flawed. While it is true that on the stand Mr. Wohl denied any knowledge of the ruby diamond necklace until after interviewing Ms. Kerr, other documentary evidence suggests that he, his client, and the other attorneys knew from the beginning that Ms. Kerr had some knowledge of Ronald Winston's misconduct. In Bar Exhibit 1.10, the declaration of Robert Silver, Mr. Silver states: "In March 1996, we learned that Kerr, a former HWI employee, was willing to

assist Bruce and his attorneys by helping to interpret the documents obtained in discovery and providing additional information about Ronald's misconduct." (Also quoted in RCIAB p. 14). The ultimate signed agreement states that part of Kerr's role included "identifying and recovering assets and damages related to and arising from the diversion of assets and other misconduct" from HWI, the Estate, and a family trust. (Bar Exhibit 1.1 - Agreement). This language concerning Kerr's knowledge of "diversion of assets and other misconduct" is also contained in the early drafts of the agreement. (See Bar Exhibit 1.6, Bates No. 1764, 1767, 1776, 1784, 1785, 1797, 1804, 1816, 1827, 1838, 1850, 1871, and 1883). Kerr herself believed that Bruce and his attorneys had reason to believe she had information about Ronald's misconduct. "I was concerned that Bruce was so sure that I possessed information about Ronald's misconduct at HWI that if I did not help him voluntarily, he would subpoena me." (Bar Exhibit 1.9, Declaration of Kerr, para. 27; See also para. 25 & 26). Finally, Mr. Wohl eventually relented at trial and agreed that someone had told him Kerr had information about Ronald's diversion of assets. (TR p. 27, Bar Exhibit 1.2 p. 3).

Based upon this evidence, the referee was entitled to find that Mr. Wohl and the others had reason to believe that Kerr had knowledge of Ronald's misconduct and that their reasons were "confirmed" after Mr. Wohl debriefed Kerr for six days. The referee considered and rejected Mr. Wohl's position. "Although Mr.

Wohl denied at trial that he knew Kerr possessed personal knowledge about misconduct at HWI, the documents clearly show that he knew or should have known." (RR p. 10). The referee's findings are supported by the record and therefore should not be overturned. The Florida Bar v. Spann, 682 So.2d 1070, 1073 (Fla. 1996).

Mr. Wohl also suggest on page 4 of his brief that Rule 4-3.4(b) was not violated because Kerr was not paid funds for testifying. Again, this is contrary to the factual findings made by the referee based upon the record. It is undisputed that Mr. Wohl and other attorneys negotiated an agreement between Bruce Winston and Kathleen Kerr. The terms of the agreement are clear: she was to provide up to 50 hours of "assistance" for a payment of $25,000 and a bonus between $100,000 to $1,000,000 depending upon the "usefulness of the information provided by Kerr." (Bar Exhibit 1.1, RR pp 3-4). Kerr was paid $25,000 after signing the agreement (Bar Exhibit 1.9, para. 39). But even if she had not been paid a single cent, the agreement would still violate the rule because the rule prohibits offering inducements to witnesses. And as the referee correctly pointed out, "an inducement is 'the act or process of persuading another to take a certain course of action.' No one could argue that the agreement did not present Kerr with a very persuasive reason to 'assist' Bruce and his attorneys." (RR p. 4). The referee also correctly found that Kerr was a witness. She was listed as a witness. (Bar Exhibit

1.1, Interrogatories). She was deposed as a witness. (Bar Exhibit 12). And most importantly, she possessed factual information about matters she had seen, heard and experienced while employed at HWI. (RR p. 8). At trial, Mr. Wohl conceded that one who views a traffic accident, even if never called to testify, is a witness. (TR pp. 58-59).

Mr. Wohl also attempts to minimize his role in drafting the agreement and suggests that the referee did not properly emphasize his limited role in drafting the agreement. Such a suggestion is misguided. The referee specifically considered Mr. Wohl's participation in the formation of the agreement. (RR pp. 9-11). The referee pointed to the documentary evidence that established Mr. Wohl's participation in the drafting of the agreement. He noted that other attorneys were more involved and that Mr. Wohl relied on their advice. The referee also stated: "But even if Wohl were only minimally involved, he could not do through others what he could not do himself." (RR pp. 9-10, citing Rule 4-8.4(a)). Additionally, the referee stated that "While his knowledge and participation may be appropriate grounds for a finding of mitigation, these factors cannot eliminate his responsibility." (RR p.10).

Mr. Wohl dedicates a large portion of his brief to attacking Ronald Winston. While it is not the Bar's role to defend Ronald Winston, such attacks are unwarranted in this proceeding. The issue here is not whether Ronald engaged in

any misconduct, the issue is whether Mr. Wohl was involved in misconduct and, if so, what is the appropriate level of discipline for such misconduct. Does Mr. Wohl suggest that his misconduct was justified by the acts of Ronald? That it is permissible to violates the rules when an attorney is faced with an opponent who also bends the rules? Such flawed logic is dangerous and would lead to chaos if accepted.

But while Mr. Wohl's perceptions of Ronald do not excuse his conduct, it does help to explain it. Mr. Wohl and his team desperately needed the right tool to get inside of Ronald's team and break through his stonewalling tactics. In Kerr, they found the perfect chisel. Not only could she help them decipher countless documents, she had insider personal knowledge of Ronald's misconduct. They were willing to pay a witness to get back at Ronald. And so they did. After all, the business, the Estate, and the family trust were worth hundreds of millions of dollars. Their desire to help their client recoup millions while revealing Ronald as "the bad guy" is certainly a reason, but it is not an excuse.

Mr. Wohl also argues that the other lawyers drafting the agreement, who he relied on, were attempting to draft the agreement in compliance with New York's ethical rules. It remains to be seen whether New York disciplinary authorities agree that the agreement comports with their rules. But The Florida Bar suggests that the drafters were attempting the impossible. How do they draft an agreement that pays

a witness for her information but doesn't run afoul of the ethics rules? They tried their level best. They state that Kerr is not a witness but a consultant. But as the referee and Florida Circuit Judge Speiser found, Kerr "crossed the road from becoming a consultant to a witness. (RR p. 6-11, Bar Exhibit 1.5, p. 32). She is not offered a contingency fee but a "bonus" depending on the usefulness of her "information" after a "culmination event," which means that she gets paid a bonus only after Bruce succeeds by trial or settlement. She is not "contemplated" to be called as a witness. But no "representations are made herein by either party as to whether [Bruce] Winston will call Kerr as a witness or whether Kerr will testify if called." (Bar Exhibit 1.1, Agreement). By trying to draw too fine a line, Wohl and the other attorneys missed the mark completely. Kerr knew facts. She had personal knowledge of Ronald's activities and business dealings. She *witnessed* these events. They were paying her for this information. They paid her between $125,000 and $1,025,000 for her telling them what she knew. Once they confirmed her information was valuable, Mr. Wohl had her listed as a witness. The referee correctly found that Mr. Wohl violated Rule 4-3.4(b) based upon the evidence presented.

Diversion Is Inappropriate In This Case

Mr. Wohl also suggests that diversion to a practice and professionalism enhancement program would be the appropriate resolution to the case. Such a

result would not be appropriate. Diversion is not discipline. See Rule 3-5.3(i) ("Diversion into the practice and professionalism enhancement program shall not constitute a disciplinary sanction"). A referee may recommend diversion after the submission of evidence, but before a finding of guilt. The referee in this case had that opportunity and was presented with competing proposed Reports of Referee by each party. Much of Mr. Wohl's argument in his brief can be found in his proposed report. But the referee chose not to adopt those findings or accept the suggestion to refer the case to diversion. If the facts and reasoning offered by Mr. Wohl in his brief to convince this Court to alter the referee's findings and recommendations were considered and rejected by the referee, why should this Court accept them? This Court should not accept Mr. Wohl's arguments unless the record clearly contradicts the conclusions reached by the referee, Spann, 682 So.2d at 1073, or unless the recommended discipline has no reasonable basis in existing case law. The Florida Bar v. Vining, 707 So.2d 670, 673 (Fla. 1998). The burden rests upon Mr. Wohl to demonstrate these deficiencies in the referee's report. He has failed to meet that burden.

Mr. Wohl premises his argument that diversion is the appropriate result based, in part, upon the Court's holding in DeBock v. State, 512 So.2d 164, 166 (Fla. 1987). DeBock was not a disciplinary case, but a criminal case that determined that an attorney could not continue to claim a Fifth Amendment

privilege, after having been granted immunity by prosecutors, based upon his potential exposure to discipline, because disciplinary proceedings are remedial, not penal. The Court in DeBock based its decision on prior holdings in The Florida Bar v. Massfeller, 170 So.2d 834 (Fla. 1964) and Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla. 1978). Both cases held that statutory grants of immunity by executive officers do not extend to attorney discipline because the judicial branch has exclusive jurisdiction over the conduct of attorneys. All three Florida opinions cited an opinion by Judge Cardozo. In Re Rouss, 221 N.Y. 81, 116 N.E. 782 (N.Y. 1917). Cardozo stated:

> Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment.

In Re Rouss, 221 N.Y. at 85 (citations omitted).

Therefore disbarment, and presumably all the lesser sanctions, are not punishment, rather it is a re-examination of fitness. To take Mr. Wohl's position, that either a suspension or the referee's recommended admonishment, conditioned upon completion of the same practice and professional enhancement program

suggested by Mr. Wohl, is punitive and not remedial, inevitably takes one to the proposition that any discipline is punitive.

Attorney discipline is not designed to be punitive, rather its goals are to protect the public, rehabilitate the offender, and deter others from similar misconduct. The Florida Bar v. Temmer 753 So.2d 555, 561(Fla. 1999). Those are remedial goals – the goals seek to remedy the situation and prevent them from occurring in the future. In Temmer, this Court specifically rejected Respondent's argument that a suspension was punishment and therefore inappropriate under the holding of DeBock. The Court stated:

> Finally, in urging that the Bar's primary motivation in seeking a ninety-one- day suspension is to simply punish her, Temmer cites DeBock v. State, 512 So.2d 164, 167 (Fla.1987), for the proposition that "bar discipline exists to protect the public, and not to 'punish' the lawyer." However, protection of the public, encouragement of reformation and rehabilitation, and deterrence of like conduct from other attorneys are additionally urged by the Bar here, and are all recognized objectives of attorney discipline. See, e.g., The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla.1983). Additionally, as opposed to being regarded as punishment, a ninety-one-day suspension requiring proof of rehabilitation would ultimately be in Temmer's best interests. . . . Moreover, . . . an increased suspension in the present case provides consistency with existing standards and caselaw. *See* Fla. Stds. Imposing Law. Sancs. 1.3 (standards are designed to promote "consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions").

Temmer 753 So.2d at 561.

The reasoning of Temmer applies perfectly in this case. Neither a suspension nor admonishment is a punishment, rather they further the goals of

protection, reformation, and deterrence. A suspension of ninety days is consistent with case law. See The Florida Bar v. Jackson, 490 So.2d 935 (Fla. 1986) (90 day suspension appropriate for seeking $50,000 payment in exchange for client's testimony); The Florida Bar v. Machin, 635 So.2d 938 (Fla. 1994) (90 day suspension for offering to create $30,000 trust to benefit victim's minor child in exchange for victim's silence at sentencing hearing). A suspension is also the appropriate discipline pursuant to the Standards for Imposing Lawyer Sanctions. The referee correctly identified Standard 6.32 as the applicable standard. That standard states: "Suspension is appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of a legal proceeding." And a suspension would clearly deter other attorneys from negotiating similar agreements to pay witnesses. Diversion would not have that deterrent effect. And an admonishment would not adequately reflect the appropriate severity of the offense. The offense of paying fact witnesses casts dark aspersions on the very heart of the judicial process.

Mr. Wohl has simply failed to meet his burden on review to show that the referee's findings are unsupported by the record. He has also failed to cite any case that supports the proposition that his client should not be disciplined but

rather, sent to a diversionary program. This Court should not grant Mr. Wohl the relief he seeks.

REPLY

The Florida Bar asks the Court to closely examine the cases cited by the referee and in the Bar's Initial Brief. Such a review would reveal that the similarities in Jackson and Machin outweigh the distinguishing facts addressed by Mr. Wohl in his brief. In both of those cases, this Court suspended the attorney for ninety days for misconduct similar to Mr. Wohl's.

CONCLUSION

The referee's factual findings are supported by competent, substantial evidence and should not be overturned. Mr. Wohl did not meet his burden to demonstrate that the referee's findings were unsupported by the record. Mr. Wohl also failed to demonstrate that the discipline recommended by the referee is inconsistent with prior case law and with the standards. On the other hand, the Bar has provided the Court with controlling precedent involving payments to witnesses were the attorneys involved received 90 day suspensions. The relevant standard for imposing lawyer discipline also calls for a suspension. The Court should accept the referee's factual findings but reject the recommended discipline of admonishment and impose a suspension of ninety days.

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Answer Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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Edward Iturralde

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Cross Answer and Reply Brief regarding Supreme Court Case No. Case No. SC95770 (TFB File No. 1998-01193-02) has been mailed by certified mail # 7000 1670 0012 8614 7464, return receipt requested, to John A. Weiss, Counsel for Respondent, at his record Bar address of 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, Florida 32308-6825, on this _____ day of May 2002.

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