IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

Case No.: SC 95,770

EDWARD H. WOHL,

TFB File No.: 98-01,193(02)

Respondent.
_____/

RESPONDENT'S INITIAL BRIEF
ON CROSS APPEAL AND ANSWER BRIEF

John A. Weiss
WEISS & ETKIN
Attorney Number 0185229
2937 B-2 Kerry Forest Parkway
Tallahassee, Florida 32309
(850) 893-5854
COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

EDWARD H. WOHL, Appellee/Cross-Appellant, will be referred to as either Respondent or Mr. Wohl throughout this brief. His exhibits will be designated by the symbol "RX", followed by the appropriate number. Respondent's Exhibit 1 had 11 tabs. They will be referred to as Respondent's Exhibit 1.1 for the first tab, 1.2 for the second tab, etc. Exhibit 2, Respondent's Motion to Abate with attachments, will be

referred to as such followed by the letter designation of the attachment. For example, the first exhibit will be 2.A.

Appellant/Cross-Appellee, The Florida Bar, will be referred to as such or as the Bar. The Bar submitted one exhibit into evidence. It had ten tabs and will be designated BX 1.1, 1.2, etc.

Reference to transcript of the final hearing shall be by the symbol "TR" followed by the appropriate page number. The Report of Referee shall be referred to as "RR" with a reference to the appropriate page number.

JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Article V, Section 15 of the Constitution of the State of Florida.

STATEMENT OF THE CASE AND FACTS

The Bar's statement of facts is taken from the Report of Referee. That report needs to be supplemented to some extent.

The ruby diamond necklace referred to on pages three and five of the Referee's Report was a matter that was not discovered until after the agreement was signed. Mr. Wohl first learned of that incident during his interviews with Ms. Kerr in September. The

referee's use of the word "confirmed" on page five of his report is incorrect; neither Mr. Wohl nor any of the lawyers drafting the agreement knew about the necklace until after the agreement was signed.

The referee does not make clear on page five of his report that the information that Mr. Wohl forwarded to Mr. Mikos, the successor and personal representative to the Edna Winston estate, was not sent to him until 15 to 18 months after the agreement was signed. RX 1.11.

While the referee was correct in his assertion on page three of his report that Mr. Wohl was involved in the preparation of the wording of the agreement, he does not point out that Mr. Wohl's participation was minimal. The bulk of the documentation in the Bar's exhibit 1.6 does not involve Mr. Wohl. None of the notes are in his handwriting. All of Mr. Wohl's comments were made to counsel actually negotiating the agreement.

The evidence is uncontradicted that Bruce Winston sought out Ms. Kerr and asked for her assistance independent of Mr. Wohl. TR 20, 107. Mr Wohl advised his client against using Ms. Kerr's services. TR 42.

The referee did not give proper emphasis to the fact that Mr. Wohl's original proposed agreement with Ms. Kerr was rejected by her lawyers and by Bruce's trial counsel. Mr. Wohl's proposed agreement was one to one and one half pages long and called for her to be paid a couple of hundred dollars per hour. TR 23, 24.

SUMMARY OF ARGUMENT

Disciplinary proceedings are remedial, not punitive, in nature. DeBock v. State, 512 So. 2d 164, 166 (Fla. 1987). Mr. Wohl appeals the referee's recommendation that he be disciplined with an admonishment, even though that is the lowest form of discipline available to be imposed. As an appropriate sanction, Mr. Wohl asks this Court to impose diversion to the Bar's Practice and Professionalism Enhancement Program (PPEP) pursuant to Rule 3-5.3 of the Rules of Discipline. This would be a remedial sanction; one that would correct any lapses on Mr. Wohl's part but would not saddle this lawyer of 34 years practice with a disciplinary mark on his record.

The referee specifically found that Mr. Wohl had no dishonest or selfish motive for his action. RR 12. He noted that Mr. Wohl had no prior disciplinary record despite having practiced law since 1968 (Mr. Wohl was admitted to the New York bar in that year, to The Florida Bar in 1974 and to the New Jersey bar in 1977. TR 99, 100). The referee also noted Mr. Wohl's cooperative attitude with the Bar and his sterling character and reputation.

It is clear that Mr. Wohl had a very minor role in the drafting of the August 29, 1996 agreement. He did not seek out Ms. Kerr, his client did so without his knowledge. Mr. Wohl did not know what information she possessed. The agreement that Mr. Wohl contemplated and which he drafted called for her to be paid a few hundred dollars per

hour. Mr. Wohl attended only one meeting, maybe two, during the three or four months that it took for the agreement to be negotiated and signed. He had absolutely no input into the dollar amounts discussed. The negotiations were conducted by experienced trial counsel and, other than occasional input, Mr. Wohl had little to do with the drafting of the agreement. The agreement specifically and unequivocally called for Ms. Kerr to consult with Bruce Winston and it was contemplated by all parties that she would never testify as a witness in any proceeding. All four of the trial lawyers drafting and negotiating the agreement thought it was proper.

Rule 4-3.4(b), as explained by the comment to that rule, prohibits payment to "an occurrence witness...for testifying..." Ms. Kerr was paid no funds for testifying. It was never contemplated that she would be paid any funds for testifying. Accordingly, the rule was not violated.

Mr. Wohl testified that he was not aware that the agreement could conceivably be considered improper under either New York or Florida ethics rules. None of the experienced trial counsel negotiating the agreement ever mentioned any impropriety to him. The Florida rule prohibiting an inducement to a witness to testify truthfully was a relatively new rule, having been passed by this Court only eighteen months before negotiations with Ms. Kerr began and only twenty-two months before she signed the agreement. The rule change was necessitated by this Court's decision in Florida Bar v.

Cillo, 606 So.2d 1161 (Fla. 1992). In *Cillo,* the court ruled that it was not a violation of the Rules of Professional Conduct for a lawyer to pay a witness to tell the truth. Under the *Cillo* decision, Mr. Wohl's conduct was not even arguably improper. Diverting Mr. Wohl to the PPEP program for his unintentional, good faith violation of a new rule is the proper remedial action to take in this case.

The cases cited by the Bar are all instances of either attempts to sell testimony or to buy a witness's silence in lieu of their testifying. Neither situation is before this Court today.

POINT ON APPEAL

DIVERSION TO ETHICS SCHOOL IS APPROPRIATE FOR THIS INSTANCE OF ISOLATED CONDUCT WHEN THE RESPONDENT DID NOT INITIATE THE CONTACT THAT LED TO THE AGREEMENT, PLAYED A MINOR ROLE IN THE DRAFTING OF IT AND WHERE THE REFEREE FOUND NO DISHONEST OR SELFISH MOTIVE.

A. Respondent's Cross-Appeal.

Respondent asks this Court to reject the referee's recommendation that he be disciplined by an admonishment for minor misconduct with the condition that he attend ethics school. He asks this Court to substitute therefor diversion to the Bar's Practice and Professionalism Enhancement Program (PPEP) with the requirement that he attend ethics school without a disciplinary order on his record. If the rule was, indeed, violated, it was a good-faith, unintentional violation in 1996 of the (then) new language in Rule 4-3.4(b). Disciplining Mr. Wohl for such conduct, particularly when he was such a minor player in the negotiation of the agreement at issue, is simply not just. Saddling this lawyer of 34 years practice, and who has never been found guilty of any ethical impropriety, is not warranted. Diversion to ethics school will accomplish the remedial effect that disciplinary proceedings are designed to accomplish. See, DeBock v. State , 512 So.2d 164, 166 (Fla. 1987) in which this Court stated:

> Bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts.

The Florida Bar alleges that Mr. Wohl has violated Rule 4-3.4(b) of The Rules Regulating The Florida Bar, which states, in pertinent part, that "A lawyer shall not . . . offer an inducement to a witness." The factual basis for the allegation comes from an agreement signed on August 29, 1996, almost six years ago, by Mr. Wohl's client, Bruce Winston, and Ms. Kathleen Kerr (the Agreement).

Mr. Wohl has represented Bruce Winston in various matters since the late 1970s. TR 36. At some point in time he began representing Bruce Winston in connection with bitter litigation in New York between Bruce and his brother, Ronald Winston, pertaining to the ownership and operation of Harry Winston, Inc. (HWI), a famous jewelry business. As he usually did in matters outside of Mr. Wohl's area of expertise (probate and tax matters TR 57), Mr. Wohl immediately associated experienced trial counsel to represent Bruce in court. Ultimately, David Boies and Robert Silver, both of whom are well-respected trial counsel in New York, began representing Bruce. TR 36, RX 1.8.

Mr. Wohl also represented Bruce in proceedings in Florida relating to the administration of the estate of the brothers' mother, Edna Winston. As he did in New York, Mr. Wohl associated experienced trial counsel to assist him. Here, it was Samuel Smith, a past president of The Florida Bar and a lawyer of impeccable credentials.

Numerous courts found that Ronald had engaged in improprieties in both the New York and in the Florida proceedings. For example, on June 21, 1995, Circuit Judge William Clayton Johnson found in the Florida proceedings that Ronald Winston had perpetrated a fraud on Bruce and on the Court. In so doing, Judge Johnson made the following findings of fact:

> That [Ronald Winston's] misrepresentations and fraudulent concealment of the true facts prevented the Court from considering the issues now presented and prevented Bruce Winston from taking an adversarial position in presenting his position.
>
> * * *
>
> That as the result of the misrepresentations and the concealment of the true facts, defendant had effectively defeated Edna Vivian Winston's acknowledged desires, and misled plaintiff in such manner as to prevent him from protecting his interests, and has prevented this Court from protecting the assets of the ward's estate.

On page 15 of his order, Judge Johnson further stated that:

> This Court, taking its guidance from the Fourth District Court of Appeal finds that the actions of defendant, Ronald Winston, were intended to, and did in fact prevent, Bruce Winston, from presenting his position to this Court.

The Court also found on page 17 of its order that:

> This Court, however, found that there has been a fraud perpetrated by defendant upon the Court and upon plaintiff.

The Fourth District Court of Appeals vacated Judge Johnson's finding (although not on the merits) on December 18, 1996 after finding that Bruce's action to set aside the Court's prior decision was untimely. Copies of Judge Johnson's decision and the DCA's opinion were entered into evidence as Respondent's exhibit 2.C and 2.D respectively.

Ultimately, Ronald was removed as the Personal Representative of his mother's estate and was replaced by Florida lawyer Kenneth R. Mikos.

Ronald Winston's tactics in the New York litigation also incurred the umbrage of judges in that state. On August 4, 1995, Surrogate Judge Albert J. Emanuelli entered an order (RX.2.E.) in proceedings involving a trust set up by Harry Winston, father of Ronald and Bruce. In that Order, Surrogate Emanuelli granted a motion brought by two of Ronald's co-trustees asking the Court to: (1) reconsider an October 19, 1992 summary judgment in favor of Ronald Winston; (2) authorizing the co-trustees to sell the stock involved in litigation; and (3) suspending Ronald Winston's veto power over the actions of the other two trustees. The Court granted the trustees' motion in its entirety. In his report, Surrogate Emanuelli stated on page 17 that:

> However, for Ronald to conclude from these facts that Harry intended to vest absolute control of the family enterprise in him for the balance of his career and to subordinate Bruce's inheritance to this alleged dominant and paramount intention, even at the expense of depriving Bruce of the benefit and value of his "equal share" of the family fortune, is simply not supported by a reasonable construction and interpretation of the Will.

On page 22, the Surrogate noted that Ronald Winston is the only family member employed by the company. Ronald terminated Bruce's employment, thereby depriving Bruce of salary, pension, medical and other benefits. On the next page, the

Surrogate noted that it was not the father's "intent by the grant of this power [to the trustees] to enrich Ronald at Bruce's expense."

As David Boies stated in his response to the grievance filed against him by Ronald Winston in February, 1998:

> Ronald Winston [had] engaged in a concerted course of conduct designed to deprive Bruce Winston of access to facts concerning wrongdoing by Ronald Winston. RX 1.8, p. 3.

(Mr. Boies and the other four lawyers who were grieved by Ronald Winston first learned of the grievances filed against them, notwithstanding the fact that New York grievance proceedings are confidential, when they were contacted by reporters for The New York Post or by reading the article. (R.Ex.1.3). In October 1998, New York disciplinary authorities temporarily closed their files pending further court proceedings. (R.1.1 and 1.2). As of the date of final hearing, those proceedings were still closed.)

Ronald's tactics included frustrating Bruce's lawyers first in their obtaining documents and then, having once received them, in their analysis of them. Mr. Wohl testified that there were hundreds of documents received from Bruce which Bruce's litigation lawyers could not interpret.

It was in this atmosphere that in approximately March 1996, without Mr. Wohl's knowledge, Ms. Kerr was contacted directly by Bruce Winston. TR 20, 109. Ms.

Kerr has worked for HWI in various capacities for 14 years but was no longer working for them. In essence, Bruce sought Ms. Kerr's help in reviewing the documents received from HWI. Counsel for Bruce needed help understanding the structure of the numerous Winston companies and identifying the "hundreds and hundreds" of companies here and abroad that dealt with Winston. TR 20, 52, 107.

In paragraph 25 through 28 of her sworn declaration in the New York litigation brought against her by Ronald (BX 1.9) Ms. Kerr explained why she agreed to cooperate with Bruce. It is apparent that Ms. Kerr desperately did not want to testify in the litigation between the Winston brothers. HWI, controlled by Ronald, was the most powerful diamond business in New York, if not in the world. As she stated in paragraph 28 of her declaration:

> In short, my best option was to try to cooperate with Bruce and avoid having to testify publicly. But even this course was fraught with risk; as just noted, if Ronald somehow learned I was helping Bruce in this bitter personal dispute, or was even willing to come forward on a neutral basis to testify against him, I feared he would retaliate against me and my fledgling business. Therefore, I decided that any cooperation with Bruce should depend on the following conditions: (i) that I not be required to testify; (ii) that I be indemnified against any retaliatory lawsuit by Ronald; and (iii) that I be adequately compensated for my time and risk.

Ms. Kerr left the negotiations to the agreement up to her lawyers at Beldock, Levine & Hoffman. The negotiations lasted from April until the end of August 1996. As noted earlier, the agreement was ultimately signed on August 29, 1996.

As Ms. Kerr stated in her declaration:

> 30. First, I understood from my discussions with Bruce and his wife that Bruce's attorneys had received a large number of documents in discovery and could not understand some of them. Their primary objective from my cooperation was to assist the attorneys to interpret these documents. . . .
>
> * * *
>
> 30. . . . I also understood that Bruce wanted to learn what I personally knew about Ronald's misconduct. I was not willing to discuss this until I had an agreement protecting me from testifying publicly. . . .
>
> * * *
>
> 32. Second, and related, my attorneys stressed throughout the negotiations that I did not want to be called as a witness. Although Bruce refused to agree to an absolute prohibition on my testimony, he and his attorneys did assure me that they had no intention to call me and that calling me was extremely unlikely. They also made clear that my compensation did not depend on whether I testified or the content of any testimony I gave.

Ms. Kerr's lawyers, Lawrence Levine and Brian Maas, in their response to Ronald's grievance against them in New York (RX 1.7) corroborated Ms. Kerr's statements. Both gentlemen are former Assistant U.S. Attorneys. On page three of

their response, they pointed out that the agreement unambiguously stated that Ms. "Kerr was hired as a consultant to provide investigative leads, not to testify" and that the agreement stated "that the parties did not expect Ms. Kerr to testify." As stated on page nine of that exhibit, the initial meeting occurred on May 14, 1996 at Mr. Boies' office. That meeting was attended by David Boies and Robert Silver and not by Mr. Wohl. On page 10 of that exhibit, it was once again emphasized that no one had any intention of calling Ms. Kerr as a witness but they refused to foreclose the possibility of her testifying "because of the impossibility of predicting all of the exigencies of litigation."

The response by David Boies to the grievance filed against him in New York was entered into evidence as Respondent's Exhibit 1.8. In his letter, Mr. Boies pointed out that payment to Ms. Kerr was not contingent upon her testifying and that it was not contemplated that she would testify.

Attached as Bar's Exhibit 1.10 is the declaration of Robert Silver, another trial lawyer representing Bruce. In paragraph 13 of that statement, Mr. Silver makes the following statement:

> 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. Kerr, however, insisted that she not be

> required to testify publicly and that her involvement not become known to Ronald; she feared that Ronald would retaliate against her.

In paragraph 16 of his statement, Mr. Silver pointed out that Bruce expected Ms. Kerr to help them "interpret documents already obtained during the Westchester and Florida proceedings . . . ." and to provide "additional information about Ronald's misconduct." Mr. Silver also stated the following:

> 20. Kerr was not intended to become a witness. Kerr and her attorneys insisted throughout the negotiations that she not be required to testify against Ronald. . . .
>
> * * *
>
> 21. Indeed, the nature of the agreement itself made it singularly unlikely that Kerr would testify at any trial. The payment provisions, including the bonus, would seriously damage her credibility and render useless any testimony she could give on behalf of Bruce.
>
> * * *
>
> 22. Thus, by entering into the agreement, we attempted to accommodate Kerr's desire to avoid public testimony, while at the same time fulfilling Bruce's need for assistance in pre-trial preparation. This arrangement would cause no damage to or interference with the trial process; any information Kerr provided could not be used at trial unless corroborated by admissible testimonial or documentary obtained from other sources. (e.s.)

The plain language of the Agreement indicated that it was intended by all of the parties concerned to be a consulting agreement. It was clear to all concerned that Ms. Kerr was not to be a witness in any of the Winston brothers litigation.

All four lawyers involved in the negotiations, Messrs Boies (RX 8), Silver (BX 10), Maas and Levine (RX 7), have stated that they drafted the agreement carefully to insure its compliance with New York rules of ethics, specifically DR 7-109(c) of the New York Code of Professional Responsibility. As Messrs Maas and Levine stated on page 3 of RX 1.7, the Kerr agreement comports with the rule because:

> • The agreement states unambiguously that Kerr was hired as a consultant to provide investigative leads, not to testify. See Agreement ¶ 4.
>
> • Kerr's bonus compensation under the Agreement is based solely on the usefulness of her investigative and consulting efforts. See Agreement ¶ 2(d).
>
> • The Agreement states that Kerr's bonus compensation does not depend in any way on whether Kerr testifies at all or on the content of any such testimony. See Agreement ¶ 4.
>
> • The Agreement states that the parties did not expect Kerr to testify. See Agreement ¶ 4.
>
> • The Agreement provides that any dispute as to the bonus due Kerr and MacKerr will be resolved by arbitration as to the utility of her consulting services. See Agreement ¶ 2(d).

> • In the event of such an arbitration, the Agreement's terms bar the arbitration from either increasing or decreasing her compensation based on any testimony she gave or whether she refused to testify. See Agreement ¶ 2(d), 4.

Messrs. Maas and Levine further stated on the next page of their letter:

> DR 7-109(c) prohibits the payment of contingent compensation to witnesses as follows:
>
> > "A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case."
>
> The rule's prohibition on contingent compensation is designed to ensure that persons are not offered a financial stake in the outcome of the litigation in return for particular testimony. See Bergoff Detective Service, Inc. v. Walters, 239 App. Div. 439, 443-44b (1st Dept. 1933) (it is an agreed payment to a fact witness "to procure evidence not of facts as they exist, but of facts necessary to the success of the party litigant who contracted for their production, which vitiates the contract") (emphasis added). Thus, the rule has narrow application and, as we show in more detail below, is inapplicable to bonus compensation arrangements with trial preparation consultants who are not intended to testify.

Ms. Kerr's lawyers also pointed out that in New York State Ethics Opinion 668 (1994), the Ethics Committee held that:

> DR 7-109 has no bearing on instances, such as the one at hand, where an individual is to be retained, not necessarily

> as a testifying witness, but as an assistant in the fact-finding process. RX 1.7 p. 16; RX 2.B.

Messrs Maas and Levine go on to quote opinion 668 on page 16 of their letter as follows:

> Nothing in the Code of Professional Responsibility proscribes a lawyer from recommending that a client contract with a lay person on a contingent fee basis so long as . . . . (3) the contingent fee is not payable for the testimony of the lay person or agency, DR 7-109(c)(1)-(3).

David Boies's letter to the New York disciplinary authorities, RX 1.8, emphasized his belief that the payment to Ms. Kerr was proper. He said:

> The Agreement does not provide for any payment to Ms. Kerr contingent either upon whether Ms. Kerr testified, or upon the content of any testimony that Ms. Kerr might provide. Indeed, the Agreement expressly provides that Ms. Kerr's compensation for time and expert services is not contingent either on whether she did testify or on the content of any testimony she provided. See Agreement ¶ 4. ("Winston's obligation to pay the amount set forth in paragraph 2 above shall remain effective regardless of whether or not Kerr testifies in either of the Actions.") Because it references the entirety of Section 2 of the Agreement, this prohibition of contingent representation applies with respect to every possible element of Ms. Kerr's entitlement to compensation, including the bonus element emphasized by Mr. Winston. The express terms of the Agreement thus themselves preclude the form of compensation addressed by the Disciplinary Rule (Rule 7-109(c)) on which Ronald Winston relies to support his present complaint.

Note that Mr. Boies corroborated Mr. Wohl's testimony that Ronald Winston "engaged in a concerted course of conduct to deprive Bruce Winston of access to facts concerning wrongdoing by Ronald Winston." RX 1.8, p. 3.

Mr. Wohl did not participate in the negotiation of the agreement. He had no input into the dollar amounts arrived at TR 73. He did not attend the May 14, 1996 meeting. RX 1.7, p. 9. He attended one, maybe two, meetings in total. TR 1045 While drafts of the agreement were provided to him, and he made some editorial comments, it is clear from reviewing the documentation that he was not a significant player in the negotiation of the agreement. Very little of the material contained in BX 1.6 involved Mr. Wohl. The many notes contained in that exhibit were not in Mr. Wohl's handwriting. TR 71. Many of the letters back and forth between the lawyers for Bruce and Ms. Kerr were not even copied to Mr. Wohl. In fact, material decisions were made in the negotiations without any input from Mr. Wohl. See, for example, R. Ex. 1.5, paragraph 4, in which Mr. Wohl notes that he "was unaware that we had agreed not to record or transcribe any statements of Kerr." BX 1.6 contains a letter from Thomas Roberts to Messrs Boies and Silver dated July 16, 1996, a copy of which was sent to Mr. Wohl, in which he references a telephone conversation that morning which did not include Mr. Wohl. That was typical.

The agreement between Ms. Kerr and Bruce came to light when she was listed as a witness in the Florida probate proceedings 15 months after the Agreement was signed. The personal representative of Ms. Winston's estate, Kenneth Mikos, listed Ms. Kerr as a witness to testify about jewelry missing from the mother's estate. The information regarding the necklace did not come to light until after the Agreement was signed. Mr. Mikos did not know about the agreement at the time. When Mr. Wohl was unable to persuade Mr. Mikos to delete Ms. Kerr as a witness, he and Florida trial counsel, Sam Smith (the latter of whom did not know about the agreement either) listed Ms. Kerr as a witness in their interrogatories because they were listing all witnesses listed by Mr. Mikos. When questioned, Ms. Kerr truthfully revealed the existence of the agreement. Once the Courts ruled that it was not protected by the attorney-client privilege or work-product, it was turned over to Ronald's lawyers. As feared, Ronald promptly sued Ms. Kerr. He also filed the grievances in New York and the one at issue before this referee.

Other than being deposed in the Florida proceedings, Ms. Kerr has never testified. All of the litigation involving Bruce, Ronald, HWI and Kathleen Kerr was settled in December 2000. Ultimately, Ronald paid Bruce $54 million and there is no litigation pending.

There are no factual disputes of any significance in this case. Mr. Wohl argues that he did not violate Rule 4-3.4(b) by offering an inducement to a witness who was to testify. The comment to that rule clarifies the language of the rule when it specifies that the prescribed conduct is the payment of "an occurrence witness fee for testifying . . . ."

The Preamble to the Rules of Professional Conduct notes that they "are rules of reason." The Preamble also points that:

> 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 in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

Rule 4-3.4 (b) was amended on October 20, 1994, less than two years prior to the agreement being negotiated. Prior to that date it was only improper to pay a witness to testify falsely or offer an inducement prohibited by law. If the agreement had been signed before October 20, 1994, there would be no issue before this Court regarding the propriety of Mr. Wohl's conduct.

The October 20, 1994 rule amendment was the result of the Supreme Court's decision in The Florida Bar v. Cillo, 606 So.2d 1161 (Fla. 1992). In *Cillo* the Court pointed out that it was not improper at that time for a lawyer to pay a witness to tell the truth. The Court then directed the drafting of a new rule. That new rule is the one before the Court today.

The evidence is conclusive that all parties to Ms. Kerr's agreement contemplated that she would not be called as a witness. See e.g., RX 1.7 and 1.8, BX 1.9 and 1.10. The lawyers negotiating the agreement, Messrs. Levine and Maas on her side and Messrs. Boies and Silver on Bruce's side so intended. Ms. Kerr so intended. All four lawyers were experienced litigators and all four believed that Ms. Kerr was being brought on board solely as a consultant and that their conduct comported with the ethical precepts governing them. Mr. Wohl's minor role in the negotiation of the Agreement in New York in the period April through August 1996 should not subject him to discipline in Florida in April 2002.

The fact that nobody intended Ms. Kerr to testify removes this case from the confines of Rule 4-3.4(b). That rule only precludes an "inducement to a witness." The comment defines that phrase, however, by pointing out that the impropriety is paying "an occurrence witness any fee for testifying." Ms. Kerr was not an "occurrence witness." Even if she was, she was not paid for "testifying." She clearly

did not fall under the definition of witness quoted from Black's on page ten of the Bar's brief as "one who gives testimony under oath or affirmation."

It is significant that it was not Mr. Wohl who sought out Ms. Kerr as a consultant. It was Bruce Winston. TR 20, 107. Bruce's lawyers needed help in reviewing and analyzing numerous documents obtained from HWI. TR 20, 52, 107. It was for that reason, not to testify, that she was brought on board. At the time that Ms. Kerr signed the agreement, it was unknown to Mr. Wohl and Bruce's lawyers just what information she could provide to them. TR 21-23. She was expected to interpret documents and to provide leads, not to testify. The parties all stated that the provision in the agreement relating to the possibility that she would testify was only inserted to insure that nobody could claim that she was paid for not testifying.

No judges involved in the civil litigation have specifically found that the agreement was improper. Florida Circuit Judge Mark A. Speiser stated that his reading of the agreement "suggests it's a consulting agreement as opposed to an expert witness agreement." (B. Ex. 5, pg. 35).

New York Surrogate Judge Emanuelli pointed out that "the Agreement does not appear on its face to run afoul of the restrictions set forth in the [New York] Code of Professional Responsibility DR 7-109(c)." (B. Ex. 7, pg. 6). As Judge Emanuelli noted, "there is no ethical impropriety in paying an individual for pre-trial fact-finding

. . . ." While Judge Kaplan in New York found the agreement "troublesome", he did not find it to be illegal or improper.

The Bar would have this Court impose discipline for an event that happened 15 months after the agreement was executed, i.e., Ms. Kerr being listed as a witness in Florida in November 1997 (RX 1.11). Ms. Kerr was listed after Mr. Wohl learned information that he did not know at the time the agreement was negotiated by others and signed. Specifically, he learned about the missing necklace that was to be the subject of Ms. Kerr's Florida testimony only after he interviewed her after August 29, 1996. This hindsight analysis contradicts the language in the Preamble to the Rules of Professional Conduct that the "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 preamble also notes that the decision whether discipline should be imposed for a violation, depends on all of the circumstances involved. They include willfulness and extenuating factors as well as whether there have been previous violations. This philosophy is consistent with the Florida Supreme Court's pronouncement in DeBock v. State, 512 So.2d 164, 166 (Fla. 1987) that:

> bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts.

Disciplining Mr. Wohl for conduct that occurred in 1996 and which, in hindsight, turned out to be arguably improper, would be punitive and not remedial. Mr. Wohl has practiced law for 33 years without discipline and is clearly not a threat to the public.

Mr. Wohl's conduct should not be viewed in a vacuum. All of the circumstances surrounding the execution of the agreement are factors to weigh in deciding if Mr. Wohl's conduct warrants discipline: (1) Ronald's scorched earth and improper tactics; (2) the fact that the New York lawyers negotiating the agreement believed in good faith that it was not improper; (3) the fact that Mr. Wohl initially drafted a two page agreement calling for payment purely on an hourly basis and that other lawyers rejected that vehicle; (4) the fact that Ms. Kerr and all involved understood that the Agreement was for consultation and that she was not to testify; (5) Mr. Wohl's limited participation in the negotiations of the agreement; (6) the fact that he had nothing to do with bringing Ms. Kerr into the fold as a consultant; (7) the fact that he did not know what information she possessed at the time the agreement was signed; (8) the fact that the rule the Bar is prosecuting Mr. Wohl for violating was less than two years old at the time the agreement was signed; (9) the fact that Ms. Kerr was listed as a witness in Florida by Mr. Mikos initially and that Mr. Wohl listed her as a reaction to Mr. Mikos's act; and, finally, (10) the fact that Mr. Wohl has

practiced law 34 years without difficulty and is a respected lawyer in his community. After considering the purpose of discipline, i.e., protection of the public, one must conclude that a disciplinary sanction is not warranted.

B. Addressing the Bar's Appeal.

The Bar would have this Court suspend Mr. Wohl for ninety days for conduct that was not the result of a dishonest or improper motive and in which Mr. Wohl was a minor player. Clearly, the Bar's focus is punitive. How could suspending this lawyer of 34 years practice, with no prior disciplinary history, for conduct that he did not initiate or substantially participate in, be said to be anything other than punishment? It is not necessary for the protection of the public in any way, shape or form.

The Bar summarizes its position on page 14 of its brief. There it states that this Court should reject the referee's recommended discipline "because paying witnesses for testimony..." is improper. No place in the record is there any hint that Ms. Kerr was paid to testify. All of the parties to this transaction state exactly the opposite. It was never contemplated that she would be a trial witness. She was listed as a witness fifteen months later by Mr. Wohl and his co-counsel only as a reaction to her being listed as a witness by the personal representative of the Winston brothers' mother's estate. Up until that time, nobody contemplated her testifying.

The cases cited by The Florida Bar are not even close to the instant action. Florida Bar v. Jackson, 497 So.2d 935 (Fla. 1986) (which was under the old Code of Professional Responsibility and did not involve Rule 4-3.4(b)), involved a blatant attempt by a lawyer to sell the testimony of two occurrence witnesses. Unlike Ms. Kerr, the witnesses in *Jackson* were specifically contemplated to be trial witnesses. They would only testify, however, if they were paid. There is no doubt that Mr. Jackson was trying to subvert the fact-finding process. If the witnesses were not paid, they would not come forward to testify. In Ms. Kerr's case, she was not supposed to testify under any circumstances. Her role was not that of a trial witness, but as an individual to help Bruce Winston's lawyers interpret the reams of documentation provided to them and to give them leads for other testimony. Unlike Mr. Jackson's clients, she was not offering to sell her testimony. She was selling her services as a consultant.

The second case cited by The Florida Bar, Florida Bar v. Machin, 635 So.2d 938 (Fla. 1994) also resulted in a 90 day suspension. *Machin* was exactly the opposite of *Jackson*. Mr. Machin offered $30,000 to insure that the minor child of the victim in a criminal case would not testify at Mr. Machin's client's sentencing hearing. Clearly, the funds paid in *Machin* were to buy the silence of the testimony of the witness whose statements at sentencing would be devastating to his client. As

was true in *Jackson*, the witness in *Machin* was specifically contemplated *ab initio* to testify, Ms. Kerr was not demanding payment to testify. She was not demanding payment for her silence. She was demanding payment for her assistance. She was mortally terrified of what Ronald Winston would do to her if he found out that she was assisting his brother, Bruce. (In fact, as she suspected, shortly after he found out that she was assisting Bruce, he sued her). Her role, as contemplated in the summer of 1996, was limited to out of court assistance.

The case cited by The Florida Bar that is most analogous to the situation at hand, even though it, too, is different, is Florida Bar v. Cillo, 606 So.2d 1161 (Fla. 1992). As stated on page 18 of the Bar's brief, the only part of *Cillo* relevant to the case at bar is that he offered money to a complainant in a grievance proceeding to withdraw his bar complaint. This Court refused to discipline Mr. Cillo because Rule 4-3.4(b) did not prohibit inducements to a witness to tell the truth. There is absolutely no evidence before this Court to indicate that anybody, *anybody*, ever suggested to Ms. Kerr that she give anything other than completely truthful information.

In arguing for a 90 day suspension, the Bar completely disregards the referee's finding that Mr. Wohl had no "dishonest or selfish motive" for his action. It completely disregards that he has practiced law for 34 years without any blemish on his record. It completely disregards the fact that he has cooperated wholeheartedly

with the Bar throughout these proceedings and that he has a sterling reputation among his peers.

The Bar also points to Golden Door Jewelry Creations, Inc., v. Lloyd's Underwriters Non-Marine Association, 865 F.Supp. 1516 (S.D.Fla.1994), affirmed in part, 117 F. 3d 1328 (11th Circuit 1997). Citing Florida Bar v. Jackson, but without any reference to Florida Bar v. Cillo, the Federal Court found Lloyd's payment to fact witnesses was improper. As was true in *Jackson* and *Machin*, the two witnesses at issue in *Lloyd's* were specifically contemplated to be witnesses at trial. Of the $750,000 paid by Lloyd's, $120,000 was paid to the two fact/occurrence witnesses.

Finally, the Bar points to In Re Robinson, 151 A.D. 589, 600, 136 N.Y.S. 548, 556 (1912) as support for its argument for suspension. *Robinson* is clearly not applicable to the case at bar. The attorney in that case paid hundreds of witnesses, ostensibly railroad employees, payment for testifying in hundreds of trials over a period in excess of a decade. Rather than being an isolated instance, as it true in the case at bar, *Robinson* involved a corporate plan to pay witnesses for favorable testimony.

In arguing for suspension, the Bar is ignoring the fact that trial lawyers of impeccable credentials honestly believed that the arrangement with Ms. Kerr was

proper. They, not Mr. Wohl, were the driving forces in negotiating the August 1996 agreement. Mr. Wohl's initial agreement was one and one-half pages long and called for compensation in the neighborhood of a couple of hundred of dollars per hour for actual time spent. TR 23. He even suggested that Bruce not hire her. TR 41, 42.

The trial lawyers prepared the ultimate agreement and negotiated the dollar amounts contained in it. They all agreed with Ms. Kerr that it was not contemplated that she would be a witness and that she would be paid only for truthful consultation. Finally, they all agreed that the clause that states that she was not prohibited from testifying was put in there to insure that nobody could say her silence was being purchased. The fact that experienced trial counsel believed that there was no impropriety with the agreement, while not a defense to a violation of the Florida Rules, certainly should militate against a Draconian discipline being meted out. Mr. Wohl's lapse was inadvertent. He did not realize that Bar rules were being violated. He certainly understands that the Bar and this Court's referee feel that the agreement violated Rule 4-3.4(b). There obviously will be no repetition of this conduct. There is no need to discipline him. A day at ethics school, coupled with the gravity of these proceedings, will accomplish the "remedial" goal of disciplinary proceedings.

CONCLUSION

This Court should reject the referee's recommendation that Respondent be disciplined by the imposition of an admonishment for minor misconduct. Instead, this Court should enter an order diverting Mr. Wohl to ethics school for one day pursuant to the Bar's Practice and Professionalism Enhancement Program. The Bar's demand that Mr. Wohl be suspended for 90 days should be rejected as overly harsh and unwarranted.

Respectfully Submitted,

WEISS & ETKIN

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John A. Weiss
Attorney Number 0185229
2937 Kerry Forest Parkway
Suite B-2
Tallahassee, Florida 32309
(850) 893-5854
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of Respondent's Corrected Initial Brief were delivered by hand to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927 and that copies were sent to Edward Iturralde, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and to John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 15th day of April, 2002.

_____
John A. Weiss

CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that Respondent's Corrected Initial Brief is submitted in 14 point proportionately spaced Times New Roman, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

_____
John A. Weiss