IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant, Case No. SC95770

v. TFB File No. 98-01193-02

EDWARD H. WOHL,

Respondent.
_____/

INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited — Page No.

Rules Regulating The Florida Bar

Miscellaneous

PRELIMINARY STATEMENT

The complainant, The Florida Bar, is seeking review of a Report of Referee recommending an admonishment for minor misconduct and probation for one year conditioned upon successful completion of a practice and professionalism enhancement program with all attendant costs. Complaint will be referred to as The Florida Bar, or as the Bar. Edward Wohl, respondent, will be referred to as Respondent, or as Wohl throughout this brief. Wohl is seeking cross review of the Report of Referee.

References to the Report of Referee shall be by the symbol **RR** followed by the appropriate page number.

References to the transcript of the hearings before the Referee, shall be by the symbol **TR** followed by the date then the appropriate page number.

References to specific pleadings will be made by title.

STATEMENT OF THE CASE

On June 11, 1999, The Florida Bar filed a complaint against Edward Wohl alleging a violation of Rule 4-3.4(b) of the Rules Regulating The Florida Bar. Wohl filed appropriate responses through counsel. The matter was referred to a referee. On October 11, 1999, the referee granted a Motion to Abate the proceedings pending related civil litigation. In December 2000, the referee was advised that all of the related civil litigation was concluded. A hearing was scheduled for and held on October 11, 2001. The Report of Referee was rendered on October 24, 2001, finding that Wohl had violated Rule 4-3.4(b) and recommending the imposition of an admonishment for minor misconduct and probation conditioned upon completion of a practice and professionalism enhancement program.

The Florida Bar filed a timely Petition to Review the referee's recommendation of discipline. Wohl filed a timely Cross Petition to Review both the referee's findings and his recommendation of discipline.

STATEMENT OF THE FACTS

The Florida Bar adopts the findings of the referee as set out in his Report of Referee. Those findings are reprinted below for the reader's ease:

The Florida Bar alleges that 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 by Wohl's client, Bruce Winston, and Ms. Kathleen Kerr. There are two basic issues. The first is whether the agreement offers an inducement to a witness. Assuming that the answer to the first question is yes, the second issue is whether Wohl made the offer either directly or indirectly.

Does the Agreement offer an inducement to a witness?

Background

Wohl represented Bruce Winston in conjunction with the administration of his mother's estate and related litigation. (Respondent's Answer para. 2). Bruce Winston (Bruce) was one of two son's of Harry Winston, the famous jeweler. Bruce and his brother, Ronald Winston (Ronald), were engaged in a bitter dispute over the estate and the family business. Bruce alleged that Ronald, while managing the family diamond business, engaged in diversion of assets, self-dealing, and mismanagement of the business.

In the course of preparing for litigation against Ronald, Bruce sought allies. He contacted Kathleen Kerr (Kerr). Kerr had been an employee of HWI, the Winston family diamond business. (Bar Exhibit 9 - Kerr Declaration, para. 4 -- 10). Kerr had an insider's knowledge of HWI and also had personally delivered a ruby diamond necklace to someone in Europe at Ronald's request. (Bar Exhibit 9, para. 24 -- 28). A ruby diamond necklace was missing from Edna Winston's Estate. Kerr did not want to get involved and feared reprisal from Ronald. She contacted attorneys from the New York firm of Beldock Levine and Hoffmann LLP and instructed them to negotiate an agreement with Bruce and his attorneys that would 1) keep her from having to testify, 2) indemnify her from any lawsuit Ronald may file against her, and 3) compensate her. (Bar Exhibit 9, para. 28).

Although Wohl was lead counsel for Bruce and had represented him in a variety of matters since the mid-1970's, both he and Bruce associated with other counsel to handle a variety of litigation issues. David Boies and Robert Silver, both of Cravath, Swaine & Moore at the time, were hired by Bruce to negotiate with Kerr's attorneys. (Trial Testimony of Wohl). Bar Exhibit 8, which includes drafts, notes, and correspondence related to the agreement, and Respondent's Exhibits 5 and 6 show that Wohl was involved in negotiating the wording of the agreement.

The Agreement

The Agreement between Bruce and Kerr was executed on August 29, 1996. The agreement calls for Kerr to provide "assistance" to Bruce. Assistance is defined by the agreement to include knowledge, information, and expertise that may assist Bruce in preserving income-producing property, enhance the value of a trust and certain real property, and in identifying and recovering assets and damages related to and arising from the diversion of assets and other misconduct from and concerning HWI. Kerr was to provide 50 hours of such "assistance" for a payment of $25,000.00, and was eligible to receive a "bonus" of anywhere between $100,000.00 and $1,000,000.00, depending primarily on "the usefulness of the information provided by Kerr." The bonus was to be paid after a "Culmination Event", which basically required Bruce to receive some relief against Ronald by judgment, settlement, or sale of HWI assets. Additional hours of assistance were to be paid at $500.00 per hour over the bonus amount, after a culmination event. In the event Bruce and Kerr could not agree on the bonus amount, the agreement called for binding arbitration to decide the matter. Paragraph 4 of the agreement states:

> It is not now contemplated that [Bruce] Winston will call Kerr as a witness in the actions or otherwise. No representations are made herein by either party to the other as to whether Winston will call Kerr

> as a witness or whether Kerr will testify if called. Winston's obligations to pay Kerr the amounts set forth in paragraph 2 above shall remain effective regardless of whether or not Kerr testifies in either of the actions.

Other sections of the agreement provide for confidentiality of the information provided by Kerr, and an indemnification clause for her against lawsuits arising from her assistance to Bruce.

Inducement to a witness

According to Black's Law Dictionary (abridged 7th ed., Bryan A. Garner, Editor), an inducement is "The act or process of persuading another person 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. I find by clear and convincing evidence that the agreement provided an inducement to Kerr. Of course, the inquiry does not end there; one must determine whether the inducement was for her services as a witness.

After the agreement was signed Wohl and Kerr arranged a series of six day long sessions where Wohl questioned Kerr at length regarding a variety of issues regarding her knowledge of HWI and Ronald. She also produced documents from the time of her employment that she had kept at her home. During the course of these stenographically transcribed statements, Wohl confirmed that Kerr had gone

to Europe, at Ronald's direction, wearing a ruby-diamond necklace, which she covered with a scarf. Other information gave them reason to believe that this necklace was from Edna Winston's personal collection and had been taken and sold by Ronald. Wohl forwarded this information and Ms. Kerr's name to Mikos, the successor personal representative to the Edna Winston Estate. Mikos proceeded to list Kerr as a witness in the Estate proceedings then underway in the Broward County Circuit Court. (In Re: Estate of Edna Winston, Deceased, Seventeenth Judicial Circuit of Florida, Case No. 86-0421). Wohl did not disclose the agreement to Mikos, but tried to persuade him not to call her. (Bar Exhibit 2 -- Wohl's Response to The Florida Bar, p. 5). Wohl then decided "it would be useful for Bruce to have Ronald believe that Bruce might call Kerr as a witness in the Florida proceeding, because Kerr had knowledge 'related to the sale of [two] items of jewelry' mentioned by Kerr in her interview pursuant to the agreement." (Id.). He then asked local counsel to list Kerr as a witness in response to certain interrogatories propounded in the Florida Estate proceedings. Again, he did not disclose to local counsel that Kerr had entered into an agreement. The Answers to Interrogatories list Kerr in response to Questions 3 and 5. (Respondent's Exhibit 11). Kerr was subsequently deposed by Ronald's attorneys on December 12,

1997, where they discovered that Kerr had been paid by Bruce to "consult" with Wohl. (Bar Exhibit 12 -- Kerr's 12/12/97 Deposition p.22).

A great deal of effort was expended by Ronald's attorneys, to obtain a copy of the written contract and other related documents, and by Bruce's and Kerr's attorneys to oppose providing the information on grounds of work-product privilege. That litigation was the primary reason this disciplinary case was abated, pending resolution of those issues. Judges in both Florida and New York ordered Bruce to provide the agreement and certain other documents. Florida Circuit Judge Speiser categorized the agreement "for better or worse, my reading of it suggests it's a consulting agreement as opposed to an expert witness agreement." (Bar Exhibit 5, p. 35). He also found that Kerr "crossed the road from becoming a consultant to a witness" (Bar Exhibit 5, p. 32). New York Surrogate Emmanuelli was troubled by the agreement, stating, "Without opining on the validity of the Agreement or speculating on what circumstances or equities the court might consider if it were called upon to review the Agreement, it is sufficient for purposes of the motion and cross motion to note that the Agreement raises sufficient concern about the quality of evidence that Ronald should be entitled to depose, and obtain documents from, the persons most knowledgeable of the drafting, negotiation and execution of this Agreement and of similar agreements with other fact-gatherers."

(Bar Exhibit 7, p. 10) Judge Lewis Kaplan of the United States District Court for the Southern District of New York found the "arrangement between Kerr and Bruce troublesome indeed irrespective of whether it constituted a crime" and ordered production of certain documents relating to the agreement. (Bar Exhibit 9 -- Memorandum Opinion dated September 10, 1999, pp. 5--6). This referee respects the opinions of these jurists and, based on an independent review of the evidence, also finds that the agreement raises serious ethical issues.

Wohl's response is that, at the time the agreement was made, the parties did not have any intention to call Kerr as a witness and that even if she did testify, any payments she received were not dependant on her testimony. Wohl testified at length that he did not consider Kerr as a witness, despite the fact that he had her listed as a witness in response to interrogatories. Other attorneys who were involved in the drafting of the agreement made similar arguments. (Bar Exhibit 2 -- Responses to New York Disciplinary Committee on behalf of Levine and Mass, Exhibit 3 -- Response to New York Disciplinary Committee by Boies).

Kerr, under the circumstances presented here, could fall into one of three categories: 1) consultant, 2) expert witness, 3) fact witness. If Kerr was a consultant who merely reviewed documents and assisted the attorneys in understanding the information already collected, there is no ethical impropriety in

the agreement. Such agreements are common in medical malpractice actions, for example, where a nurse assists the attorneys in deciphering the medical records. The medico legal consultant assists the attorneys, but does not testify as an expert witness or as a fact witness. If Kerr was contracted to be either a fact or expert witness, the agreement presents a serious ethical breach for attorneys responsible for drafting such an agreement. Wohl and the other attorneys maintain that she was not contemplated to be a witness as stated in the agreement in paragraph 4. Certainly, Kerr did provide consulting assistance to Wohl. She also provided factual information that she had seen and heard and experienced while working at the family business. To continue the analogy discussed above, while it is permissible to hire a nurse to review medical records of a patient, it would be impermissible to hire the nurse that provided the care to engage in the same review. The nurse that assisted in the care of a patient, much like Kerr, would have factual information. To pay an individual who has personal knowledge of facts is to pay a witness, whether that person is intended to testify or not. To pay a nurse who treated a patient and provided consulting services a "bonus" depending on the usefulness of her services would be outrageous. Wohl testified at trial that to him a witness is one who testifies at a trial. On further questioning, he admitted that an individual who sees an accident is a witness to that accident, regardless of whether

or not that person ultimately testifies at trial. Black's Law Dictionary (abridged 7th ed., Bryan A. Garner, Editor) defines a witness as "1. One who sees, knows, or vouches for something . . . 2. One who gives testimony under oath or by affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit." Kerr personally had seen and knew the affairs of HWI and Ronald. The Agreement itself contemplated that she would assist in "identifying and recovering assets related to and arising from the diversion of assets and other misconduct." The agreement also required Kerr to answer questions posed by Bruce and his attorneys truthfully. She testified, under oath, at two depositions and provided an affidavit. (Bar Exhibits 4, 5, and 9).

Also troubling is the "bonus" provision of an amount between $100,000.00 and $1,000,000.00 depending upon the usefulness of the information provided by Kerr to enable Bruce "to recover assets and/or damages by settlement and/or judgment." Kerr's ability to actually receive a bonus only arises if Bruce is successful in reaching a "culmination event." The culmination event was an artful way to draft a contingency agreement. Paragraph 2(e) of the agreement puts a cap on the potential bonus of 10% of Bruce's recovery. Kerr would only get paid a bonus if Bruce was successful at recovering from his litigation. These provisions

go to the very heart of the evil sought to be avoided by the Rule: the temptation of a witness to color his or her testimony.

Conclusion

Therefore, I find by clear and convincing evidence that Kerr was a witness to the matters being litigated by Bruce and Ronald and that the agreement offered that witness an inducement that went far beyond reasonable expenses incurred by the witness in attending or testifying at proceedings and reasonable compensation to reimburse the witness for the loss of compensation incurred by the witness by reason of preparing for, attending, or testifying at proceedings.

Did Wohl offer an inducement to a witness?

Having found that the agreement did indeed offer an inducement to a witness, I must determine whether and to what extent Wohl was involved in the misconduct. Wohl participated in at least one in-person meeting where the agreement was discussed. Wohl wrote to the other attorneys involved and suggested changes as reflected in his letters dated June 25, 1996, July 17, 1996, and August 22, 1996. (Bar Exhibit 7, Bates number 1863; Respondent Exhibits 5 and 6, respectively). Wohl also received drafts from the other attorneys (See Eg. Bar Exhibit 6, Bates number 1870) and engaged in telephone conversations with them regarding the agreement. (Bar Exhibit 6, Bates number 1784).

While the documentary evidence suggests Wohl was, indeed, involved in the drafting and negotiation of the agreement, other letters within Bar Exhibit 6 were not sent to Wohl. Wohl also testified that Kerr's attorneys and Bruce's other attorneys handled most of the negotiation.[1] But even if Wohl were only minimally involved, he could not do through others what he could not do himself. See Rule 4-8.4(a), Rules Regulating The Florida Bar ("A lawyer shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

Wohl also testified that he relied on the advice of the experienced litigators hired by Bruce to negotiate this agreement. He was unaware of any ethical improprieties that may be involved in such contracts. While his knowledge and participation may be appropriate grounds for a finding of mitigation, these factors cannot eliminate his responsibility. As stated above, he could not designate or delegate his ethical responsibilities to another. Additionally, Wohl is charged with knowing the ethical rules of The Florida Bar. Rule 3-4.1, Rules Regulating The Florida Bar ("Every member of The Florida Bar . . . is charged with notice and held to know the provisions of this rule and the standards of ethical conduct prescribed

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[1] Wohl is the only attorney involved in representing any of the parties who is a member of The Florida Bar.

by this court"). Moreover, as described above, Wohl made the decision to inform Mikos, the successor personal representative, of information possessed by Kerr. Wohl then made the decision to list Kerr as a witness in the Florida estate proceedings. And most importantly, the various drafts of the agreement, including the ultimate signed agreement, all reflect that Bruce was paying Kerr for information about "diversion of assets and other misconduct." Such information, if proven through Kerr or otherwise, would have been beneficial and helpful to Bruce and therefore to his attorneys and Kerr herself. Although 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.

Conclusion

I find by clear and convincing evidence that Wohl participated in the formation and negotiation of the agreement between Kerr and Bruce. By his participation, Wohl offered an inducement to a witness in violation of Rule 4-3.4(b), Rules of Professional Conduct.

SUMMARY OF ARGUMENT

The Court should reject the referee's recommended discipline because the recommendation is contrary to existing case law and because paying witnesses for testimony, under any circumstances, casts doubt on the entire system of justice.

ARGUMENT

STANDARD ON REVIEW

In attorney disciplinary proceedings, a referee's findings of fact enjoy a presumption of correctness that will be upheld unless the challenging party can show that the facts are unsupported by the evidence in the record, or are clearly erroneous. The Florida Bar v. Cox, 718 So.2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983). Moreover, the Court will not re-weigh the evidence and substitute its judgment for that of the referee if there is competent substantial evidence to support the referee's findings. The Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992). Further, "[t]he party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings, or that the record evidence clearly contradicts the conclusions." The Florida Bar v. Spann, 682 So.2d 1070, 1073 (Fla. 1996). Similarly, Rule 3-7.7(c)(5), Rules Regulating The Florida Bar, states: *"Burden*. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful, or unjustified." While the referee's fact findings are presumptively correct and should not be overturned unless clearly erroneous or lacking evidentiary support, The Florida Bar v. Vining,

707 So.2d 670, 672 (Fla. 1998), the referee's recommended discipline is afforded a broader scope of review. This Court has stated, however, that a recommended discipline will not be second-guessed "so long as that discipline has a reasonable basis in existing case law." Vining at 673 (quoting The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997)). The Florida Bar intends to show that the recommended discipline in this case is not supported by existing case law.

ISSUE I

SHOULD THIS COURT IMPOSE AN ADMONISHMENT FOR MINOR MISCONDUCT ON AN ATTORNEY WHO ASSISTED IN DRAFTING AN AGREEMENT TO PAY A WITNESS $25,000 WITH A POSSIBLE BONUS OF ANYWHERE BETWEEN $100,000 TO $1,000,000, CONDITIONED UPON THE USEFULNESS OF THE INFORMATION AND SUCCESSFUL RESULTS, WHEN THIS COURT HAS PREVIOUSLY HELD THAT SIMILAR CONDUCT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND WARRANTS A SUSPENSION FOR NINETY DAYS?

This Court should not accept the referee's recommended discipline as it is not supported by existing case law. In Florida, there are three disciplinary cases that directly address the ethical propriety of paying witnesses. All three were considered by the referee as indicated in his Report. (RR pp. 12 - 14). Despite his consideration of this precedent, the referee's recommended discipline is inconsistent with these cases.

The earliest of these cases is The Florida Bar v. Jackson, 490 So.2d 935 (Fla. 1986). Jackson sought a payment of $50,000 for his clients from a New York attorney in exchange for testimony from Jackson's clients in a pending New York case. From the opinion, it is clear that no payments were actually made, but it is unclear whether Jackson's clients ever testified. The referee, and this Court, found that such conduct was prejudicial to the administration of justice. While the Supreme Court was unanimous in condemning Jackson's conduct, the Court split four to three in imposing discipline. The majority, in an opinion written by Justice Barkett, agreed with the referee that a 90 day suspension with automatic reinstatement was the appropriate discipline. The dissenters, led by Justice Ehrlich, believed that such misconduct warranted a showing of rehabilitation prior to reinstatement, and therefore would have suspended Jackson for at least 91 days. Interestingly, both opinions used the same quote from the referee to support their divergent positions. They quoted:

> [T]he very heart of the judicial system lies in the integrity of the participants. . . . Justice must not be bought or sold. Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of testimony before the courts of justice. It is clear that the actions of the respondent in attempting to obtain compensation for his clients . . .violates the very essence of the integrity of the judicial system and the disciplinary rule and code of professional responsibility, the integration rules of the Florida Bar and the oath of his office.

Jackson at 936 - 937.

The agreement that Wohl assisted in drafting between Bruce Winston and Kathleen Kerr carries the same taint of impropriety that her testimony was procured; that justice was bought and sold – at a hefty price.

Jackson's proposed discipline began as a private reprimand, which has been modified and renamed under the new rules as an admonishment for minor misconduct. A local grievance committee had recommended a private reprimand, but that recommendation was rejected by the Board of Governors, the referee, and ultimately, The Supreme Court of Florida. Similarly, this Court should reject the recommendation of an admonishment for minor misconduct and impose a 90 day suspension.

The next case considered by the referee was The Florida Bar v. Cillo, 606 So.2d 1161 (Fla. 1992). Cillo was accused of engaging in a variety of misdeeds. The only relevant one for purposes of this discussion is the allegation that he paid money to induce a client to sign statements withdrawing his bar complaint. Cillo's client had alleged that he had paid $10,000 for representation in a criminal case and that Cillo failed to perform services. The record before the referee clearly established that Cillo had not been retained or paid any funds at all and that the allegation was a fabrication to extort money from Cillo. The sole issue became

whether inducing a witness to tell the truth by offering money or other valuables was misconduct. The referee concluded that inducing a witness to tell the truth was not an ethical violation under the rules in effect at the time. The Supreme Court agreed that there was no rule or case law governing that situation and imposed no discipline for that conduct. But, the Court noted:

> We are concerned, however, that the payment of compensation other than costs to a witness can adversely affect the credibility and fact finding function of the disciplinary process. We are also concerned with the use of the Bar's disciplinary process for purposes of extortion. While we do not believe that Cillo's conduct was a violation of the Rules of Professional Responsibility, we do believe that a rule should be developed to make clear that compensation paid to a claimant or an adverse witness is improper unless the fact-finding body has knowledge and has approved any such compensation.

Cillo at 1162.

Within two years, the Court amended Rule 4-3.4(b) to address those concerns. The Florida Bar Re: Amendments to Rules Regulating The Florida Bar, 644 So.2d 282 (Fla. 1994). The rule in effect at the time of Cillo's witness payment simply stated " A lawyer shall not . . . (b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." The amendment struck the phrase "that is prohibited by law" and inserted the following language: "except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, non-

contingent fee for the professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings." Id. In doing so, the Court established that a witness may not be paid, even for truthful testimony, unless those payments fall within the clearly delineated exceptions.

Wohl has maintained that Kerr was never contemplated to be a witness at the time the agreement was signed. Yet Kerr falls into the category of witness at every meaningful point. She observed relevant events while employed at the Winston diamond business; she was listed as a witness; she was deposed as a witness. She did everything a witness normally does except testify before a court at trial. Since all the litigation between the Winston brothers settled, (TR pp 100 – 101), no one can say whether or not she would have testified in court as well.

While the Cillo case does not provide any guidance in terms of discipline, it is extremely instructive of the policy guidelines behind the rule. The rule that Wohl stands accused of violating, Rule 4-3.4(b), prohibits attorneys from using money to induce witnesses to testify, even if that inducement encourages the truth, because it necessarily casts doubt on the truth-finding process. This type of fact finding process lies at the core of the judicial system. Misconduct that casts doubt on such a core function should not be categorized as minor under any circumstances.

This Court should not establish a precedent that declares an attorney who pays a witness is only guilty of minor misconduct.

The third disciplinary case addressed by the referee is The Florida Bar v. Machin, 635 So.2d 938 (Fla. 1994). The decision was rendered on April 21, 1994, six months before Rule 4-3.4(b) was amended. The Court imposed a 90 day suspension for Machin's misconduct in offering to set up a trust fund of up to $30,000 for a minor child of a victim in a criminal case in exchange for the victim's silence at the sentencing hearing. The victim rejected the offer and testified in the aggravation portion of the sentencing hearing of Machin's client. Machin was not alleged to have violated Rule 4-3.4(b), but rather that such conduct was prejudicial to the administration of justice as prohibited by Rule 3-4.3 and Rule 4-8.4(d). While the rule violations differ, the conduct and reasoning are sufficiently similar to warrant consideration. In Machin, the court noted that

> the fair and proper administration of justice requires that the rich and the poor receive equal treatment before the court. . . . This is so because when "justice" can be bought by the highest bidder, there is no justice. An attorney's involvement in the transaction only serves to accentuate the prejudicial effect on the system. When one charged with the special responsibility of upholding the quality of justice attempts to buy a more favorable sentence for a criminal defendant, doubt is cast on our entire system of justice.

Machin at 940.

In deciding to suspend Machin for 90 days, the Court considered several mitigating factors. Machin had no prior disciplinary record. Neither does Wohl. Also like Wohl, Machin had an honorable reputation as a zealous advocate and made worthwhile contributions to his community. But Machin, unlike Wohl, disclosed his proposed agreement to the State Attorney's Office, the sheriff's office, and the victim's assistance representative. Id. Wohl did not reveal the existence of the agreement to the personal representative of Edna Winston's Estate or his local co-counsel in the Florida litigation. (TR p 51). He did not reveal the agreement to any of the several courts involved in the litigation. (TR p 85). He objected to opposing counsel asking Kerr any questions at her deposition relating to conversations she had with him on work product grounds (TR pp 52 – 54). Wohl and Bruce's other attorney's strongly resisted revealing the contents of the agreement. (RR p 6). Machin relied on the acquiescence of those other parties in his belief that his conduct was not unethical. Similarly, Wohl relied on the expertise of the other attorneys involved in the drafting of the Kerr agreement. After considering and weighing all those factors, this Court determined that "a ninety day suspension is an adequate sanction to punish Machin's breach of ethics, to encourage his rehabilitation, and to discourage others from engaging in similar misconduct." Machin at 941. Because Wohl's conduct and mitigating factors are

similar to those in Machin, he should receive the same discipline – a suspension for 90 days.

The last case considered by the referee is not a disciplinary case. Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association, 865 F.Supp. 1516 (S.D. Fla. 1994) *affirmed in part* 117 F.3rd 1328 (11th Cir. 1997), addressed an alleged violation of Rule 4-3.4(b) for paying witnesses for truthful testimony. The evidence submitted before a special master revealed that Lloyds had paid over $750,000 to fact witnesses, potential witnesses, intermediaries, and others in an attempt to investigate a theft of gold from their insured. The special master hearing the evidence, like the referee in Cillo, determined that there was no violation of rule 4-3-4(b) because the rule at that time only prohibited inducements prohibited by law and counseling or assisting witnesses to testify falsely. The District Court took a different view of the matter. Relying on this Court's decision in The Florida Bar v. Jackson, supra, and the comment to Rule 4-3.4, the Golden Door court found that payments to fact witnesses contingent upon the testimony being truthful, material and helpful to Lloyds was "egregious and constituted wilful and repetitive violations of Rule 4-3.4(b)." Golden Door at 1524 -- 1525. The comment to Rule 4-3.4 relied upon by the Court states: "The common law rule in

most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay and expert witness a contingent fee."

In the instant case , the referee found that Kerr was not an expert witness, but a fact or occurrence witness. (RR pp 7 – 9). He also found that the agreement provided for a very lucrative contingency payment of up to $1,000,000. The payments under the Kerr agreement, similar to the payments in Golden Door were conditioned upon truthfulness and usefulness.

That the payments came directly from Lloyds and not the attorneys did not impress the Golden Door court because the attorneys "actively had knowledge of, assisted and even negotiated the amounts of money paid." Id. at 1525. The court also relied on precedent from other jurisdictions, citing with approval In Re Robinson, 151 A.D. 589, 600, 136 N.Y.S. 548, 445 (1912):

> Payment to a witness to testify in a particular way, payment of money to prevent a witness's attendance at trial and the payment . . . to make him sympathetic . . . are all payments which are absolutely indefensible. . . . The payment of a sum of money to a witness to "tell the truth" is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.[2]

In concluding its analysis, the Golden Door court stated that these payments for truthful testimony "unquestionably violated the very heart of the integrity of the

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[2] Incidentally, Robinson was disbarred.

judicial system." Golden Door at 1526. The court further stated that the condition that the testimony had to be helpful "makes even more pronounced the subversive and egregious nature of Lloyds' and its counsel's actions." Id.

A review of these four cases provides some interesting results. Both Machin and Jackson were suspended for 90 days for merely making offers to pay witnesses. Cillo, who actually paid a witness, received no discipline for that conduct because the rule in place at that time did not contemplate that a payment for truthful testimony was a violation. A federal district court reached the opposite result in Golden Door under the same wording of the Rule applicable to Cillo. That court found that even payments for truthful testimony is egregious, subversive, violates the integrity of the judicial system and undermines the administration of justice. The Florida Bar submits that a finding by this Court that Wohl's conduct in this case merits the same discipline imposed Machin and Jackson. Otherwise the rule amendment enacted to cure the defective result in Cillo will be meaningless and will create a dangerous precedent allowing attorneys and their clients to buy justice at the auction block.

CONCLUSION

Wohl participated in the formation of an agreement to pay an individual with certain factual information (i.e. a witness) between $25,000 to $1,025,000, with the ultimate amount contingent upon the usefulness of that information and the success of Wohl's client in obtaining settlement or judgment. He then listed that individual as a witness, despite his claims that she was never intended to testify. Such payments, even for truthful testimony have been consistently held to strike at the very heart of the administration of justice. Such conduct should never be whitewashed as minor misconduct. This Court should reject the referee's recommendation of an admonishment for minor misconduct with probation conditioned upon completion of a practice and professionalism enhancement program and suspend Wohl for 90 days, consistent with the precedents of this Court.

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.

_____
Edward Iturralde

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case No. Case No. SC95770 (TFB File No. 1998-01193-02) has been mailed by certified mail # 7099 3400 0010 4419 4816 , return receipt requested, to John A. Weiss, Counsel for Respondent, at his record Bar address of 2937 Kerry Forest Parkway, Tallahassee, Florida 32308, on this _____ day of February 2002.

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