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 REPLY ON CROSS -APPEAL

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CROSS-REPLY

In its Answer Brief, the Bar argues that Mr. Wohl's conduct warrants exactly the same discipline, a 90-day suspension, as that meted out in *Florida Bar v. Jackson*, 490 So. 2d 935 (Fla. 1986) and *Florida Bar v. Machin*, 635 So. 2d 938 (Fla. 1994). Mr. Wohl's conduct is so far removed from that engaged in by Messrs. Jackson and Machin that a close review of those cases supports his position that discipline is not warranted.

Mr. Jackson was suspended for ninety days for his unilateral and deliberate attempt to sell the testimony of his clients to a party in litigation. Mr. Jackson was the moving force behind the transaction, knew that his clients' testimony was important and, most significantly, knew the testimony was needed at trial. Mr. Wohl, on the other hand, did not initiate the transaction (his client directly contacted Ms. Kerr and, subsequently, her lawyers). Mr. Wohl initially recommended against retaining Ms. Kerr. He was thereafter peripheral to the negotiation with Ms. Kerr (Bruce Winston's trial lawyers negotiated directly with Ms. Kerr's lawyers and Mr. Wohl's role was limited to comments on the drafts which were made through Bruce's trial lawyers). Finally, it was the clear intention of the parties from the onset of the negotiations that Ms. Kerr was not going to testify.

Ms. Kerr was terrified at the thought of having to overtly testify against Ronald Winston. The testimony of all concerned emphasized that it was the intention of the parties that Ms. Kerr would not be called as a witness. The language put into the agreement was carefully designed to be appropriate under New York law and was designed to preclude any argument that Ms. Kerr's silence was being bought. There is no showing that Mr. Wohl had any input into the adoption of that language. Finally, unlike Mr. Jackson, Mr. Wohl relied on the expertise of at least four trial lawyers, all renowned for their ability and ethics, in the preparation of the agreement.

Similarly, Mr. Wohl's conduct is far different from that engaged in by Mr. Machin. Once again, Mr. Machin was the moving force behind the offer to buy the silence of various witnesses at a sentencing hearing. It appeared to be his idea and his idea alone. Mr. Machin "feared that if the victim's family spoke in aggravation" his client would receive a more severe sentence than that contained in the plea agreement. The witnesses whose silence Mr. Machin was attempting to buy were clearly and unequivocally designated as witnesses from the inception of the case. Mr Machin knew that the testimony of the kidnap victim and that of the murder victim's family would be devastating to his client's cause. In an attempt to buy their silence, he offered to set up a $30,000.00 trust fund for the child of the kidnap victim (the child's mother) and the child's murdered father. Mr. Wohl, on the other hand, was dealing with individual who was never intended to be a witness and, perhaps most importantly, he was dealing with an individual that he was not even sure possessed information that would be useful at trial.

A primary distinguishing fact between *Jackson* and *Machin* on the one hand and Mr. Wohl's conduct on the other is the fact that he recommended against bringing in Ms. Kerr as a consultant. TR42. He then proposed a simply hourly agreement with Ms. Kerr which was also rejected. TR23, 24.

The referee specifically considered the *Jackson* and *Machin* cases and chose to disregard them. It is rather ironic that the Bar argues on pages 7 and 8 of its brief that this Court should not accept Respondent's arguments because they were rejected by the referee while simultaneously asking this Court to accept the Bar's arguments (that a 90-days suspension was appropriate) which the referee similarly rejected.

On page 7 of its Cross-Answer Brief, the Bar rhetorically asks why this Court should accept Respondent's arguments when the referee rejected them. The answer is simple: for the sake of fairness. Mr. Wohl has practiced law for 33 years without any disciplinary sanction whatsoever. In the case at bar, in addition to finding that factor a mitigating circumstance pursuant to standard 9.32(a) of the Standards for Imposing Lawyer Sanctions, the referee found that Mr. Wohl had no dishonest or selfish motive, mitigating standard 9.32(b); that he had fully and freely disclosed matters to the Bar and cooperated with it during its investigation, mitigating standard 9.32(e); and that he had an excellent character and reputation, mitigating standard 9.32(g). ROR p. 12. The referee also specifically found on page 13 of his report that there was no evidence indicating anybody was asking Ms. Kerr to testify falsely, a factor that was present in *Florida Bar v. Cillo*, 606 So. 2d 1161 (Fla. 1992)(in which this Court refused to discipline Mr. Cillo for paying a witness to testify truthfully).

The significance of this Court's decision in *DeBock v. State*, 512 So. 2d 164 (Fla. 1987) is that this Court emphasized that disciplinary proceedings are not punitive. Respondent submits that disciplining him for conduct that the referee specifically found did not involve a dishonest or selfish motive is punitive. It also runs afoul of this Court's stated three purposes of discipline as set forth in *Florida Bar v. Pahules*, 233 So. 2d 130 (Fla. 1970) that a discipline must be : (1) fair to society in that it protects the public from unethical practitioners while simultaneously not denying it "the services of a qualified lawyer as a result of undue harshness in imposing penalty"; (2) fair to the accused lawyer; and, (3) severe enough to deter others. The deterrence factor is the third in the order of priorities.

As this Court said in *Florida Bar v. Pincus*, 300 So. 2d 16, 17 (Fla. 1973):

> The purpose of disciplinary proceedings is primarily to protect the public from incompetent and unethical practitioners and, only secondarily, to punish the offender and to act as a deterrent to others.

Mr. Wohl clearly is not a threat to the public's welfare. If he erred it was in accepting the validity of the position of at least four highly respected and well-established trial practitioners that the Kerr agreement was not improper.

If, indeed, disciplinary proceedings are remedial, diverting Mr. Wohl to ethics school for one day will have the desired effect on this practitioner of sterling reputation

of 33 years without any blemish on his disciplinary history. A disciplinary sanction is, simply put, unduly harsh for the circumstances at hand. As was pointed out in Respondent's Initial Brief, it was Bruce Winston that sought out Ms. Kerr and asked for her assistance. This was done without Mr. Wohl's knowledge. TR20,107. Mr. Wohl advised his client against using Ms. Kerr as a consultant. TR42. Finally, Mr. Wohl's proposed agreement with Ms. Kerr was less than two pages long and called for her to paid on an hourly basis. That proposed agreement was rejected by Ms. Kerr's lawyers and by Bruce Winston's trial lawyers. TR23, 24.

On page 2 of its brief, the Bar accurately states that there was hope that Ms. Kerr could help Bruce's trial lawyers pin down some of Ronald Winston's misconduct. Respondent is not arguing to this Court that nobody had any idea that Ronald Winston had engaged in misconduct prior to Ms. Kerr being contacted. The Courts had already so ruled. Respondent does quarrel, however, with the referee's intimation on pages 3 and 5 of his report that the parties had knowledge of the ruby diamond necklace when the agreement was signed. It was not until after Ms. Kerr was debriefed that they learned of the necklace. It was for that necklace that Ms. Kerr was listed as a witness by Mr. Mikos in the Florida probate proceedings. Once Mr. Mikos listed Ms. Kerr, Respondent and his co-counsel, Sam Smith, did likewise. When the agreement was signed over one year earlier, none of the parties in the Florida

proceedings (except, perhaps, Ronald) knew that the ruby diamond necklace was going to be an issue.

The Bar would have this Court rule that Mr. Wohl's listing Ms. Kerr as a witness in the Florida probate proceedings is proof that she was intended all along to testify. First this ignores the plain language of the various documents submitted to the referee. Secondly, and perhaps most importantly, Ms. Kerr being listed as a witness in the Florida probate proceedings did not occur until over one year after the agreement was signed and she was debriefed. Then, it was in reaction to Mr. Mikos's listing her as a witness.

In discussing the options available to him, the referee specifically acknowledged on page 7 of his report that

> 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

That is exactly the role intended for her by Bruce's trial lawyers.

While Respondent recognizes that ignorance of the law is no defense, it certainly should be mitigating factor, and one that corroborates the referee's finding of no dishonest or selfish motive, that the rule that Respondent is being found to have violated today was less than two years at the time the Kerr agreement was signed.

Indeed, under *Florida Bar v. Cillo*, 660 So. 2d 1161 (Fla. 1992), even had the parties intended to call Ms. Kerr to testify, paying her for her *truthful* testimony would not have been improper.

In its cross-answer brief, the Bar misconstrues Respondent's challenge to the referee's findings as being a wholesale attack on his findings. In fact, the focus of Respondent's objection to the referee's finding of fact (as opposed to conclusions and recommendations) is tightly focused and primarily surrounds the language on page 3 of his report wherein the referee refers to a ruby diamond necklace missing from Edna Winston's estate. On page 5 of his report, the referee says that Mr. Wohl "confirmed" that Ms. Kerr had gone to Europe wearing the ruby diamond necklace. In fact, there is nothing in the record that indicates that any party knew anything about the ruby diamond necklace until Ms. Kerr's debriefing. It is uncontested by Mr. Wohl that all concerned knew that Ronald Winston had engaged in misconduct prior to Ms. Kerr's signing the agreement on August 29, 1996. See, for example, Florida Circuit Judge William Clayton Johnson's findings on June 21, 1995 as set out on page 8 of Respondent's initial brief on cross-appeal (in which he referred to Ronald Winston's "misrepresentations and fraudulent concealment" and Surrogate Emanuelli's findings in his August 4, 1995 order as set out on page 9 of Respondent's initial brief.

The fact that Ms. Kerr was brought on to assist Bruce's trial lawyers as Mr. Boies stated does not mean that she was paid to be a witness. Her assistance was to develop leads, not to testify.

The Bar seems to argue that the referee found that Mr. Wohl paid a witness for her testifying. What the referee actually found on page 11 of his report was that Mr. Wohl indirectly participated in offering an inducement to a witness by his participation (which was extremely limited) in the drafting of the Kerr agreement. The referee specifically did not contradict Mr. Wohl's testimony that Mr. Wohl "was unaware of any unethical improprieties . . . ." RR10. The referee concluded that such unawareness would be a finding of mitigation but did not "eliminate his responsibility." RR10. Mr. Wohl argues to this Court that such a finding by the referee supports Respondent's argument that diversion rather than a disciplinary order is the appropriate sanction in this matter.

Respondent acknowledges that he spent a significant amount of time discussing Ronald Winston's fraud and other misconduct in his initial brief. Ronald Winston's conduct was the basis for the Kerr agreement being implemented. Improper conduct by an adverse party has been found by this Court to be a mitigating factor in imposing discipline. See, e.g., *Florida Bar v. Martocci*, 699 So. 2d 1357, 1360 (Fla. 1997). In *Martocci*, this Court emphasized a referee's finding that "most importantly, the

conduct of opposing counsel in this case" was a basis for not disciplining Mr. Martocci.

The Bar asks on page 6 of its brief how one could draft an agreement that pays a witness for information and which doesn't run afoul of the Bar's ethics rules. Once again, Respondent points out that at the time the agreement was drafted there was no intention by anybody that Ms. Kerr would, indeed, be a witness. The Bar quoted Florida Circuit Judge Speiser's statement that Ms. Kerr "crossed the road from becoming a consultant to a witness" on page 6 of its brief. Judge Speiser's complete quote, however, was that he determined the agreement to be "a consulting agreement as opposed to an expert witness agreement." RR p. 6. He then observed that (over a year later) Ms. Kerr became a witness rather than a consultant.

On page 7 of its brief, the Bar stated that once Bruce's lawyer found Ms. Kerr's information to be valuable, Mr. Wohl listed her as a witness. This statement is not quite accurate. It was over one year after Ms. Kerr was debriefed, and one year after the lawyers learned the information that she possessed, that she was listed as a witness. This, too, confirms the statements by all five lawyers involved and by Ms. Kerr herself that she was not intended to be a witness.

The Bar asserts that the referee "correctly identified" standard 6.32 as the appropriate standard to utilize in imposing discipline. That standard calls for

suspension. The Bar then ignored the fact that the referee stated on page 14 of his report that

> Based on my considerations of the evidence, the standards for imposing discipline, case law, and aggravating and mitigating factors, *I believe that an admonishment and the satisfactory completion of a practice and professionalism enhancement program [i.e., diversion] is appropriate.* (Emphasis added).

Standards 6.33 and 6.34 call for a public reprimand or an admonishment respectively when a lawyer engages in negligent misconduct. Such seems to be the thrust of the referee's finding in the case at bar. His recommendation of an admonishment is consistent with standard 6.34 and is an empathic rejection of a suspension or a public reprimand as a discipline.

Respondent submits that the second half of the referee's recommended discipline, referral to a practice and professionalism enhancement program, also called diversion, is a sufficient sanction to protect the public and to emphasize to Mr. Wohl that he should never engage in the creation of such an agreement again.

CONCLUSION

The primary purpose of disciplinary proceedings is to protect the public from unethical lawyers. It is only secondarily to punish and to deter other conduct. Mr. Wohl has practiced law for 33 years in an exemplary and noble manner. He has

never run afoul of any disciplinary precepts before. His conduct in the case at bar was done, as specifically found by the referee, without dishonest or selfish motive. He relied on the expertise of other lawyers and was unaware that the agreement was contrary to Florida law. A remedial sanction, rather than a punitive one, is appropriate for the circumstances before the Court today. Diversion to ethics school will serve the public's best interest and would be fair to the Respondent. There is no necessity to saddle Mr. Wohl with a disciplinary sanction for conduct which was, at worst, done without knowledge that rules were being broken and which was done with no improper motive.

Respondent asks this Court to reject that portion of the referee's recommendation in which he recommends an admonishment and that only the portion of his recommendation relating to a practice and professionalism enhancement program be adopted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of Respondent's Reply on Cross-Appeal 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 mailed 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 21st day of May, 2002.

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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