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.
_____/

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On June 11, 1999, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. An Answer to the Complaint was filed on July, 12, 2001. Apparently, a response to the Requests for Admissions should also have been filed that day, but were not received by the referee until the date of the final hearing. A Motion to Abate these proceedings was filed on August 5, 1999, and was granted without objection on October 11, 1999. The abatement was premised on underlying related civil litigation, which was settled on December 19, 2000. A final hearing was scheduled for September 24, 2001, but continued until October 11, 2001, to accommodate the Respondent.

On October 11, 2001, a final hearing was held in this matter. The parties were represented by Edward Iturralde, on behalf of The Florida Bar, and John A. Weiss on behalf of Mr. Wohl. Each

party submitted a notebook of trial exhibits by stipulation. The only testimony came from Mr. Wohl, the respondent. All of the aforementioned pleadings, responses thereto, exhibits received in evidence and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary Of Case.

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 by Mr. 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 Mr. Wohl made the offer either directly or indirectly.

Does the Agreement offer an inducement to a witness?

Background

Mr. 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 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 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 the preparation of 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. (Emphasis

supplied.) 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 on 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 Mr. Mikos, the successor personal representative to the Edna Winston Estate. Mr. Mikos then listed Kerr as a witness in the Estate proceedings 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 Mr. 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 the other Florida 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 dependent 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 Maas, 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. Mr. 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).

Most 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 some of 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

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

Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another"). (Emphasis supplied.)

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 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.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating Rule 4-3.4(b) of the Rules Regulating The Florida Bar.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. An admonishment for minor misconduct.

B. Probation for one year with the condition that he successfully complete a practice and professionalism enhancement program.

C. Payment of The Florida Bar's costs in these proceedings.

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

A. Personal History of Respondent:

Age: 58 years old

Date admitted to the Bar: August 9, 1974

B. Standards For Imposing Lawyer Sanctions

I find that Standard 6.3 involving Improper Communications with Individuals in the Legal System is the appropriate standard and that 6.32, which recommends a suspension, is the proper sanction because the agreement did interfere with the administration of justice by requiring numerous hearings in a variety of venues to determine the nature and extent of the payments to Kerr and other possible witnesses. I also find that Wohl knew or should have known his ethical responsibilities.

C. Aggravating Factors:

Prior Discipline: None

9.22(I) Substantial experience in the practice of law.

D. Mitigating Factors:

9.32(a) Absence of a prior disciplinary record;

9.32(b) Absence of a dishonest or selfish motive;

9.32(e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

9.32(g) Character or reputation (See Respondent Exhibits 9 and 10).

E. Case law

I also considered the following cases. In The Florida Bar v. Jackson, 490 So.2d 935 (Fla. 935), an attorney was suspended for three months for attempting to negotiate a payment of $50,000.00 to have his clients testify in a case pending in New York. Jackson, like Wohl, had no prior discipline.

The Supreme Court, quoting from the Referee's Report, stated: "The very heart of the

judicial system lies in the integrity of the participants. ...Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of testimony before courts of justice."

In The Florida Bar v. Cillo, 606 So.2d 1161, (Fla. 1992), the Supreme Court agreed with the referee's finding that Cillo could not be disciplined for paying a witness to testify truthfully. Again, although those facts are arguably present here as well (there was no evidence establishing that Kerr's testimony was false in any way), the Court subsequently amended Rule 4-3.4(b) on October 20, 1994, to correct this deficiency in the rule. See The Florida bar Re: Amendments to Rules Regulating The Florida Bar, 644 So.2d 282 (Fla. 1994).

A third case is The Florida Bar v. Machin, 635 So.2d 938 (Fla. 1994). Machin was also suspended for 90 days for offering, on behalf of his client, to set up a $30,000.00 trust fund for the murder victim's child in exchange for the silence of the victim's family at the sentencing hearing. The State Attorney's office, the Sheriff's Office, the victim's assistance representative, and the sentencing court were made aware of the offer. The victim's family refused the offer and testified at the sentencing hearing. Machin also had no prior discipline, and contributed to his family church and community. The referee and the Court found that the "approval or acquiescence of others and the alleged occurrence of similar unethical conduct does not absolve Machin of responsibility for his actions". Machin at 941. These facts were considered as mitigating factors in imposing the 90 day suspension and finding that it was "an adequate sanction to punish Machin's breach of ethics, to encourage his rehabilitation, and to discourage others from engaging in similar misconduct." Id.

Finally, I considered Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine

Association, 865 F.Supp. 1516 (S.D.Fla. 1994). Wohl relied on Golden Door in his initial response to The Bar. I believe his reliance is misplaced. Rather than being a case that supports his position, Golden Door clearly condemns agreements such as the one at issue here. In Golden Door a special master was appointed to determine whether sanctions should be imposed against Lloyds for paying fact witnesses and what those sanctions should be. The Court found that payments by Lloyds to individuals who provided factual information and deposition testimony contingent on that testimony being truthful, material and helpful, was a clear violation of Rule 4-3.4(b). The Court was not impressed with counsel's argument that the payments came directly from Lloyds. The Court stated that counsel "actively had knowledge of, assisted and even negotiated the amounts of money to be paid to non-expert witnesses, informants and intermediaries." Golden Door at 1525. That court was also persuaded that payment for truthful testimony circumvented the rule. "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." Golden Door at 1526 (citing In re Robinson, 151 A.D. 589, 600, 136 N.Y.S. 548, 445 (1912)). This court found that conditioning the payments on the usefulness of the testimony was even more egregious. "That Lloyds' willingness to pay was contingent on the condition that the testimony had to be helpful to Lloyds in its defense of this civil action makes even more pronounced the subversive and egregious nature of Lloyds' and its counsel's actions." Id.

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 is appropriate.

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

1.	Administrative Costs	$ 750.00
2.	Photocopies	701.85
3.	Court Reporter Fees	150.00
	TOTAL	$ 1,601.85

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless otherwise deferred by the Board of Governors of The Florida Bar.

Dated this _____ day of October, 2001.

_____
F. E. STEINMEYER III
Circuit Judge/Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. Mail to JOHN A. BOGGS, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; EDWARD ITURRALDE, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and JOHN A. WEISS, Counsel for Respondent, at 2937 Kerry Forest Parkway, Suite B, Tallahassee, Florida 32308-6825, on this _____ day of October, 2001.

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F. E. STEINMEYER III
Circuit Judge/Referee

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