Filing # 135889041 E-Filed 10/05/2021 01:27:46 AM

RECEIVED, 10/05/2021 01:28:21 AM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-842
FLORIDA BAR FILE NO. 2019-70,468 (11C)

THE FLORIDA BAR,
Complainant,

v.

SCOT STREMS,
Respondent.

ON APPEAL FROM THE REPORT OF REFEREE.
HON. DAWN DENARO, CIRCUIT JUDGE/REFEREE

ANSWER BRIEF OF RESPONDENT SCOT STREMS

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The following abbreviations are used in this brief:

TFB Comp. Ex.	= Exhibits to Complaint.
TFB Ex.	= The Florida Bar's trial exhibits.
Strems Ex.	= Respondent's exhibits.
Record	= Amended Index of Record.
ROR	= Amended Report of Referee, March 31, 2021.
Tr.	= Transcript of final hearing.

STATEMENT OF THE ISSUES

I. Are the contingent fee retainer agreement and fees recovered by the Strems Law Firm consistent with Florida law?

II. Did the Strems Law Firm contingent fee retainer agreement create an inherent conflict with the firm's clients?

III. Did the Referee correctly conclude The Florida Bar did not prove the charged violations by clear and convincing evidence?

IV. Are the Referee's recommended sanctions reasonably based on the facts and law and consistent with the applicable standards?

STATEMENT OF THE CASE AND FACTS

A. Preliminary Statement.

Although presented by The Florida Bar as a disciplinary matter involving multiple instances of misconduct that included allegations of dishonesty, deception, and deceit, this case was, at its essence, a fee dispute between an experienced law firm and its client and her sophisticated sons concerning the amount of legal fees to which the law firm was entitled for its successful representation of the client in a first party property lawsuit against a recalcitrant insurance carrier.

The Florida Bar argues that this Court should "expressly disapprove such retainer agreements" used by the firm, citing the decision in *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005), despite not taking that position in the lower tribunal and not even including it in the Bar's proposed Report of Referee. Besides not citing

to *Kavanaugh* in the proposed Report of Referee and never even making that argument to the Referee, the Bar conceded in the proposed Report at page 33 that the alternate fee provision was "common in the world of first-party insurance litigation ..." Nor did the Complaint allege that the contingency fee retainer agreement violated or conflicted with the Rules Regulating The Florida Bar (Record 1). Even the Bar's Notice of Intent to Seek Review of Report of Referee, filed June 2, 2021, failed to include a challenge to the propriety of the retainer.

After initiation of the Bar Complaint by Dennis Nowak, an experienced lawyer, the law firm amicably settled the dispute. The Referee concluded that the entire fees dispute and ultimately the Bar grievance could have been avoided with more careful communication and a willingness on the part of the client and the law firm to discuss their reasonable differences of opinion, and accordingly found Mr. Strems negligently violated Rule 4-1.4 requiring informed communication with a client concerning the case settlement by a miscommunication (ROR 61-67). In so finding, the Report of Referee was based on detailed facts findings from the trial. The Referee made significant credibility decisions, finding the defense witnesses were

truthful, credible, and reliable.

Disappointed with the Referee's findings and conclusions, The Florida Bar presents its appeal by failing to present the record facts in the light most favorable to the Referee's findings and arguing factual matters in a manner inconsistent with the scrupulously detailed Report of Referee.

B. Procedural History.

On June 11, 2020, The Florida Bar filed its Complaint against Respondent Scot Strems (Record 1). Trial took place on February 22, through March 4, 2021. Finding that The Florida Bar proved only a violation of Rule 4-1.4 "regarding the negotiation of the settlement" (ROR 67), the Referee found as a matter of fact that the Bar "failed to prove by clear and convincing evidence" all other violations: "4-1.l (Competence); 4-1.2 (Objectives and Scope of Representation); 4-1.5 (Fees and Costs); 4-1.7 (Conflict of Interest); 4-1.8 (Conflict of Interest; Prohibited and Other Transactions); 4-8.1 (Disciplinary Matters); and 4-8.4(a) and (c) (Misconduct)" (ROR 60-61).

C. Factual Summary.[1]

Respondent objects to the Statement of the Case and Facts in the Initial Brief (pages 3-17) as inaccurately presented in the light most favorable to The Florida Bar. This approach is inconsistent with prevailing standards requiring parties to present the facts in the light most favorable to the lower tribunal's ruling. *See Amjad Munim, M.D., P.A. v. Azar, M.D.*, 648 So. 2d 145, 148-149 (Fla. 4th DCA 1994).

Contrary to the factual recitation in the Initial Brief, a complete presentation of the pertinent facts should be derived from the Report of Referee summarizing the reliable, credible record evidence.

[1] All facts are derived from the Amended Report of Referee and supported by substantial competent evidence. *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016) ("If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee."); *The Florida Bar v. Martocci*, 699 So. 2d 1357, 1359 (Fla. 1997) ("If the referee's findings 'are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.' *Florida Bar v. MacMillan*, 600 So. 2d 457, 459 (Fla. 1992); *Florida Bar v. Weed*, 559 So. 2d 1094 (Fla. 1990).").

1. Narrative Summary of the Case.

As found by the Referee, the testimonial and documentary evidence showed that on September 10, 2017, Margaret Nowak's Broward County home sustained damages from Hurricane Irma. Six days after the hurricane hit, Mrs. Nowak retained the Strems Law Firm, P.A. ("SLF") to represent her in a damage claim against her insurer, Florida Peninsula Insurance Company ("FPIC"). Mrs. Nowak was directed to an independent insurance adjuster through a trusted friend and then to SLF. Dennis Nowak, a lawyer, and Kenneth Novak, two of Ms. Nowak's sons, did not know Ms. Nowak engaged an insurance adjuster and retained SLF (ROR 2).

At the time Hurricane Irma struck, Mrs. Nowak was an independent eighty-four-year-old widow living in her home with an adult son and a tenant (Tr. 51-54, 96, 282). Although Kenneth Novak and Dennis Nowak described her as suffering from the early stages of dementia, both sons testified that Ms. Nowak was not the subject of any incompetency or incapacity proceedings or adjudications (Tr. 98-100, 103, 190-191, 272; ROR 3). Prior to Hurricane Irma, on August 1, 2017, Ms. Nowak voluntarily executed a Durable Power of Attorney ("Durable POA") appointing her son Dennis Nowak as her

agent (Tr. 55, 100; TFB Ex. C; Strems Ex. 9). The Durable POA was effective as of its date of execution and was not affected by any subsequent disability, incapacity, or incompetence that Ms. Nowak may have suffered. *Id.* Ms. Nowak was able to make decisions on her own behalf. Ms. Nowak died in May 2020 (ROR 2-3).

Scot Strems was the founder and name partner of the Strems Law Firm at the time of the Nowak retention (ROR 3). SLF was a mid-sized law firm handling thousands of cases a year with multiple offices throughout the State of Florida. SLF utilized a team approach to handling cases. Multiple attorneys, paralegals, and staff assisted with the case responsibilities and clients. In the Nowak matter, although Christopher Narchet signed the complaint, other lawyers and staff were involved with the case. In addition to Mr. Narchet, SLF attorneys handling the Nowak case as a team included Carlos Camejo, Karina Rios, Lea Castro-Martinez, Cecile Mendizabal, Lisban Romero, Natalie Fernandez, and Jennifer Jimenez (TFB Ex. V; Strems Ex. 1; Strems Ex. 2).

Mr. Strems' involvement centered on final settlement negotiations, including negotiating the Release/Hold-Harmless/Indemnity agreement (TFB Ex. X; TFB Ex. W). Matthew

Feldman and Hayes Wood represented the insurer, FPIC (TFB Ex. K).

Although Ms. Nowak was the SLF client, she did not file the Bar complaint. Instead, Ms. Nowak's son and agent under the POA, Dennis Nowak, filed the complaint shortly after receiving draft settlement documents for his mother (Tr. 83-84, 215-216; ROR 4).

The Referee noted that only after presenting his opening statement at trial, counsel for The Florida Bar Derek Womack brought to the Referee's attention that Paragraph 45 of the Complaint filed by The Florida Bar on June 11, 2020, against Mr. Strems was incorrect. Paragraph 45 of the Complaint states:

> 45. To date, the global settlement agreement of $45,000 has not been consummated. Based on information and belief, FPIC still has the settlement proceeds, and stands ready to tender them. To date, Mrs. Nowak has not received a dime due to respondent's representation in this matter.

But the Referee found Paragraph 45 to be in direct conflict with the outcome of the fee dispute that was settled on May 21, 2020, before the filing of the Complaint (ROR 4). As found by the Referee, Paragraph 45 of the Complaint was an untrue statement that should have been known at the time of filing (ROR 4), but the Complaint was never amended to remedy the erroneous material misstatement.

According to the executed "Release/Hold-Harmless/Indemnity Agreement," the terms of the settlement included (Strems Ex. 5):

> ... total sum of fifty thousand, four hundred and seventy-six dollars and 00/100 cents ($50,476.00), less the applicable deductible of five thousand and seventy-six dollars and 00/100 cents ($5,476.00), for the net payment of forty-five thousand dollars 00/100 cents ($45,000), payable as follows: thirty-one thousand five hundred dollars and 00/100 cents ($31,500.00), paid to Margaret Nowak and Strems Law Firm (Coverage A - Dwelling), and thirteen thousand five hundred dollars and 00/100 ($13,500.00), paid to Strems Law Firm, P.A. (Attorney's Fees and Costs)....

Prior to the fee dispute with her son being resolved, Ms. Nowak obtained a new roof. Son Kenneth Novak testified that the cost of the new roof was between $13,500.00 and $12,500.00 (ROR 5). Dennis Nowak testified he resolved the fee dispute after speaking with Respondent's counsel, Mark Kamilar, on May 21, 2020 (Tr. 120, 227-231, 454-455, 835).

2. Witness Testimony.

The following witnesses testified (ROR 6):

WITNESS	PROCEEDING	OFFERING PARTY
Lea Castro-Martinez, Esq., former SLF attorney	Trial	Respondent
Cris Boyar, Esq., Expert	Trial	Respondent
Kenneth Novak, Client's Son	Trial	The Florida Bar
Dennis Nowak, Esq., Client's Son and Complainant	Trial	The Florida Bar
Carlos Camejo, Esq., former SLF attorney	Trial	The Florida Bar
Karina Rios, Esq., former SLF attorney	Trial	The Florida Bar
Matthew Feldman, Esq., Counsel for Florida Peninsula Insurance Company	Trial	The Florida Bar
Cecile Mendizabal, Esq., former SLF Attorney	Trial	The Florida Bar
Adrian Arkin, Esq., Expert	Trial	The Florida Bar
Annette Goldstein	Sanctions Hearing	Respondent
Faheem Mujahid	Sanctions Hearing	Respondent
Melissa Giasi, Esq., attorney and principal of Giasi Law, P.A.	Sanctions Hearing	Respondent

Kenneth Novak is a son of Ms. Margaret Nowak. The Referee found Mr. Novak to be credible (ROR 6). Kenneth Novak testified that he has had a real estate license for over ten (10) years and a mortgage license for twenty (20) years (Tr. 42, 90, 103-104). He is experienced in both commercial and residential mortgages. He has had two companies as a mortgage broker and a correspondent lender (Tr. 48-49, 104; ROR 7). Kenneth Novak testified that although he did not know in advance that his mother sought the representation of SLF,

he "'went with it" because he knew she was referred to an adjuster by her trusted real estate agent friend (Tr. 96-97). He believed his mother's real estate friend witnessed her signing the contingent fee retainer agreement (Tr. 50-52, 95, 115; ROR 7). He was not aware of the $45,000.00 settlement offer (Tr. 125).

Dennis Nowak is also Mrs. Nowak's son. He assisted her with her insurance claim after he retired from his Miami trial law practice and moved to North Carolina. He is an experienced commercial trial lawyer (Tr. 187-188). The Referee found Dennis Nowak to be credible (ROR 7). Dennis testified that his mother was competent at the time she signed the Durable Power of Attorney designating him as her agent approximately a month before Hurricane Irma struck (Tr. 56-57, 282-283; ROR 7).

In January 2019, Dennis Nowak received and reviewed the draft settlement documents that were emailed to him from SLF (Tr. 80-87, 205-208, 214-215). Once the proposed settlement documents were circulated, Denis Nowak became more involved with his mother's claim (Tr. 81-82, 208). This was when he first learned of the $45,000.00 settlement amount and the equal split of the insurance proceeds between his mother and the Strems Law Firm of

$22,500.00. His only objection was with the division of the amounts going to his mother and the law firm. He testified that he wanted seventy percent (70%) going to his mother and for SLF to bear all costs (Tr. 209). He believed his mother was entitled to $30,000.00 and the legal fees could only be 30% of the recovery (Tr. 266, 231-232). At the time of the dispute, Dennis Nowak incorrectly claimed the law firm was not entitled to a statutory fee amount because section 627.428, Florida Statutes was only applicable if a judge awarded fees (Tr. 266, 445). Even though he believed the fees could be negotiated (Tr. 849), Dennis Nowak filed his Complaint with The Florida Bar against Mr. Strems without consulting Mrs. Nowak regarding the fee dispute prior filing (Tr. 447, 452; ROR 8). But Dennis Nowak acknowledged at trial that his uninformed understanding of the attorney's fees statute was wrong and that a statutory determination was appropriate whenever an insured filed a filed a lawsuit against the insurance company, as occurred in Mrs. Nowak's case (Tr. 830).

On February 23, 2021, Dennis Nowak provided Bar Counsel with an email thread, identified as TFB Exhibit D entitled "Email correspondence between Strems Law Firm and Dennis Nowak dated

January 24, 2019. Exhibit D." The Exhibit included an email not previously provided in the record in which Mr. Nowak emailed Mr. Strems directly on January 24, 2019.

Carlos Camejo is a former SLF attorney who did a substantial amount of pre-litigation work on Mrs. Nowak's matter. After suit was filed, Mr. Camejo remained in contact with Mrs. Nowak's sons regarding the status of the case, even though although it was being handled by the law firm's litigation division (Tr. 129, 148-150, 204, 284, 429). The Referee found Mr. Camejo to be credible (ROR 9). Mr. Camejo testified as follows during direct examination by Bar Counsel regarding Mrs. Nowak's bottom-line settlement, in part (Tr. 347-348):

> Q. Okay. Can you tell me, so you understood from what Mr. Novak told you that -- did you understand he was asking for more money?
>
> A. My understanding was that his bottom line in pre-litigation was 30,000, knowing that, in pre-litigation, 25 percent gets subtracted, and the firm would have gotten 7,500. I discussed with him or his brother, I'm not sure which one, to be frank with you, the possibility of having to file suit, is given the fact that Mr. Feldman was being unresponsive to me. They approved it, that request. So I filed the lawsuit.
>
> Then Mr. Novak asked me, hey, what's the status of the lawsuit? I advised him the lawsuit has been filed. Opposing counsel had offered 30K. So, I believe, I don't want to speak for Mr. Novak, but I was under the

impression that I was giving him a chronological order as to what was occurring.

They made an offer, but, at that point, we were already in litigation, not pre-litigation. So when I told him let me see if I can work the attorneys' fees to be exclusive, what I meant to say, and I'm not sure if he misunderstood me or not, was that, but now that it's in litigation, let me see if Mr. Strems can get more. How much more? I'm not sure, because I'm not privy to the conversation he had with Mr. Feldman.

* * *

Q. And do you recall if you brought this conversation to Mr. Strems' attention?

A. I know I told Mr. Strems what the client's bottom line was, which was the 22.5.

Q. Okay.

A. But I would be lying if l said, yes, I remember vividly that I told Mr. Strems this or that, because it's been too long.

(Tr. 349).

Q. I know, okay. We can go to the e-mail. It's page I believe 10 of Composite E. Is this the instance you're referring to, Mr. Camejo, when Ken Novak gave you his cell number?

A. Yes.

Q. And did you let Mr. Strems know that Ken Novak was trying to get in touch?

A. I know I advised Mr. Strems almost every time that Ken reach[ed] out to me. Hey, what's the status? This client keeps inquiring. But if I told him, hey, here's his cellphone number, please call him? I don't recall if I did that.

(Tr. 350).

Mr. Camejo’s examination by Respondent’s counsel regarding Mrs. Nowak’s bottom line was as follows:

> Q. And on this email trail you have a June 21, 2018, email from CJ Camejo to Matthew Feldman, where you're saying: Here’s a roof bid. There is interior damage throughout the house. Our absolute bottom line is $37,000 net exclusive of water mit. That means water mitigation?
>
> A. Correct.

(Tr. 407-408).

> Q. Okay. And then you tell Mr. Feldman: Since attorneys’ fees are involved now. Reach out to Scot if you want to settle. It has been weeks since I sent my client's bottom line, and they were adamant about pursuing it in court if needed. Right?
>
> A. Right.

(Tr. 410).

> Q. Okay. Let me go to your discussions, and I’m going to bring up your discussion about settlement. It’s fair to say that you understood the Nowaks as willing to accept a bottom line of $22,500, getting to them if they got that amount of money, Mrs. Nowak, to walk away from this claim?
>
> A. To my understanding, yes, that was their bottom line. They won’t take a penny less than that.
>
> Q. And you understood that and believe that you had communication with the clients, the Nowaks, about their bottom line?

A. When I was speaking to them in the pre-litigation phase, yes.

(Tr. 412-413).

Q. And then Mr. Novak says: Carlos, unless you think you can do better, we would accept the offer of 30,000 net to my mom. And you understood that to mean Mr. Novak is saying my mom is going to settle for $22,500?

A. Yes. My understanding is that was him advising me that 22.5 was his bottom line.

Q. Okay. And that was based on your assessment of a 25 percent attorneys' fees subtracting on a pre-litigation?

A. Correct.

Q. And Mr. Novak then responds on August 3rd: Net to my mom less your attorney fee of 7,500, so $22,500 actually net to my mom. Do you see that?

A. Yes, I do.

Q. Now, since the case was in litigation, so in order to net $22,500 to Mrs. Nowak, you had to actually had to get a better settlement than $30,000, didn't you?

A. Yes.

Q. Because, first of all, just the attorneys' fees themselves would mean 30 percent versus 25 percent?

A. Correct.

Q. And then the costs of this case have to be paid for, right?

A. Yes.

Q. And you knew that there were costs incurred already?

A. That part, I didn't know, but I made an educated guess.

Q. And then you respond to Ken on August 3rd: Ken, let me see if I can work the attorneys' fees can be exclusive so your mom ends up with more. I'll get back to you. What were you conveying there?

A. I was conveying there that I wanted to see if we could get him more money, but I that would have to get back to him, because I did not have the authority to either promise him or guarantee him a certain amount, since I was not the person negotiating the claim at the time. I had already told Mr. Feldman that he needed to settle the claim with Mr. Strems.

Q. In any time in your discussions with Ken Novak, Mrs. Nowak, or Dennis Nowak, did you ever tell them that $7,500 was all that the law firm was going to receive for handling the case?

A. In the pre-litigation stage, yes. But around this time, when these emails were being exchanged, I do not recall ever making that representation to them. There clearly must have been a misunderstanding between both parties for this stage in the game.

Q. Now, even though the case had gone into litigation, you still maintained client contact?

A. Yes. He would routinely send me e-mails asking for updates.

Q. He and Dennis Nowak, the brother as well, both of them?

A. Yes.

(Tr. 415).

Q. Okay. And did Mr. Novak, at any time, tell you that his

> mother would not accept $22,500 in her pocket, but wanted some amount more than that?
>
> A. Well, no, because that was the whole point of it being the bottom line. After the e-mail exchanges between myself and Mr. Ken Novak, there was pretty much no other communication between me and him, other than me relaying to Mr. Strems that the client was inquiring as to settlement status.

(Tr. 418-419).

> Q. And when you understood the client's bottom line to be $22,500, was that conveyed within the law firm?
>
> A. Conveyed? I don't understand the question.
>
> Q. You mentioned that the case moved from your principal responsibility to the litigation side.
>
> A. Correct.
>
> Q. Was the client's $22,500 bottom line conveyed?
>
> A. It was. But it was conveyed at the time that I obtained it. In other words, I obtained that bottom line in pre-litigation. I did not call the client again and say, hey, is your bottom line still the same a month later? or somewhere along those lines.
>
> Q. And as far as you had conveyed the client's bottom line was $22,500?
>
> A. Correct.
>
> Q. And did the client ever express to you that if the law firm got paid more than $7,500, the client wanted more money?
>
> A. No, they did not express that to me. I don't think they would anticipate that.

> Q. And did you make an effort to make sure the client or the client's representatives understood that legal fees would be paid differently and computed differently in the litigation stage?
>
> A. Again, I don't recall having this conversation, but I know if and when -- not if, when I discussed it with the brothers, the possibility of having to go to litigation, if we did not get to that bottom line number they gave me, I always explain to clients how the payment will work and, okay, it's not a contingency number anymore. Now fees get involved, because there's a statute. That's my ordinary course of business, so to speak. But I can't tell you in a vacuum that, yes, I said this to them. Because it's been 2 1/2 years already.

(Tr. 424-425).

Mr. Camejo testified he was not counsel of record for Mrs. Nowak's case (Tr. 421) but continued to stay in touch with her and her sons. He spoke about the legal fees agreement and had no reason to think Mrs. Nowak did not understand the terms of the retainer (Tr. 404-406, 428). He acknowledged Christopher Narchet (former attorney for SLF) and Hayes Wood (attorney for insurer) were listed as counsels of record denoting the lead lawyers for the parties on Mrs. Nowak's matter. *Id.*; *see also* TFB Ex. K.

Karina Rios was an associate of SLF. The Referee found Ms. Rios to be a credible witness (ROR 15). Ms. Rios was hired to work in the Litigation Department but was allowed to work in Pre-Litigation

(Tr. 475). Ms. Rios assisted with the Nowak matter (Tr. 129, 145-147). She was included on two emails dated September 10 and September 19, 2018, in which Kenneth Novak provided his cell phone number and requested the Respondent to contact him (Tr. 485-486). Respondent was not included as a recipient. Ms. Rios did not know if she did or did not forward the emails to Respondent (Tr. 512-515; TFB Ex. E). Mr. Camejo, copied on the September 19, 2018 email, responded to Kenneth Novak's email at 6:03 p.m. that he would follow-up with Mr. Strems. *Id.* (Tr. 515).

Matthew Feldman and Hayes Wood represented FPIC in the Nowak matter (Tr. 586). The Referee found Mr. Feldman to be credible (ROR 15). Mr. Feldman exchanged emails with SLF regarding the case, including the $45,000.00 settlement proposal (Tr. 593-594). He had no recollection of the specifics of the settlement negotiations, just the total settlement amount of $45,000.00 included in the email (Tr. 593). He knew the total amount included both indemnity and fees (Tr. 628-629; Strems Ex. 23). While most of his settlements were global resolutions, he sometimes separately negotiated indemnity and fees (Tr. 607-608).

Adrian Arkin was proffered and accepted as an expert witness

for attorney's fees on behalf of The Florida Bar (TFB Trial Ex. E). On the plaintiffs' side of insurance related disputes, Ms. Arkin litigated about twenty (20) trials to verdict. She gave expert testimony in two cases and submitted an expert affidavit in one case (Tr. 1224-1225, 1684). The Referee found Ms. Arkin credible (ROR 16).

Ms. Arkin offered her opinion on customary fee structures in First Party property insurance cases, the reasonableness of the fee charged, the applicable paragraphs of the Strems Law Firm contingency fee agreement, the reasonableness of the fees for the litigation, and a review of the Strems time sheets. Ms. Arkin testified regarding her expertise in fee matters (Tr. 1225). She acknowledged that Mr. Strems prepared a contemporaneous memorandum of his settlement discussions with insurance defense counsel in the Nowak matter (Tr. 1613-1619). She testified as follows regarding a comparison of fees to counsel and indemnity to the client (Tr. 1226):

> Q. I see. And you said just moments ago that your fees are often more than the client's indemnity, is that right?
>
> A. Well, how it works, there's an expectation that that definitely would happen at some point in the litigation as a final component. When it winds up that way, then that's something different. But we do make that consideration from the get-go.

Ms. Arkin explained that in "the world of first-party property litigation," there are two major business models (Tr. 1224-1225). One business model is to "take a lot of claims quickly and easily [and] collect a fee and go." *Id.* Whereas, the other type of business model is the one she mostly practices, where you take "maybe 25 to 50 cases a year, work them up and after the case, after the indemnity portion is paid, litigate the attorney fees, so the attorneys' fees are often more money than the indemnity." (Tr. 1226). SLF used the first model, a high-volume firm with smaller claims (ROR 18). Ms. Arkin acknowledged that in cases in which her "fee demand is a million dollars" she recreated timesheets to make sure the timesheets match up with the work performed and that they are reasonable (Tr. 1249).

Ms. Arkin's report included these opinions (TFB Trial Ex. E):

<u>Opinions</u>

> 7. Once he accepted the settlement, Scot Strems unilaterally determined the amount of fees out of the $45,000 settlement without first discussing it with the client. The client should have been advised before the settlement was accepted, and the client should have been advised of the fees that were to be charged prior to the acceptance of the offer.
>
> * * *
>
> 9. Mr. Strems initial justification for the initial fee charged to the client was that the client agreed to accept $22,500. However, the agreement to accept $22,500 was based on

an offer of$30,000, not $45,000. The return to negotiations was agreed to based on Ms. Nowak obtaining more money, and presumably the attorney as well. Thus Mr. Strems did not have the authority to settle the case without conveying the $45,000 offer and discussing the net result to the client.

* * *

11. Mr. Strems' fee agreement would have allowed him to charge a specifically negotiated fee, if he had specifically negotiated a fee. Here, however, the settlement in question was offered as a "global" settlement, and did not separate the fees in the negotiations. The only potential fee discussed with the client prior to the $45,000 offer was $7500 (out of a $30,000 offer. 1) Accordingly, under the fee contract, because there was no attorney fee negotiated, and assuming Mr. Strems had conveyed the $45,000 offer to the client, at best, Mr. Strems would be entitled to the lodestar fee (reasonable hours x reasonable rate.) Thus, the initial fee charged of $17,523.10 ($22,500, minus costs) was excessive.

12. Ultimately, the client was not consulted about the $45,000 offer. The client could not make an informed decision regarding the $45,000 offer, or the lodestar fee, because the lawyers did not discuss with Ms. Nowak, or her son the fees and costs which were due out of the $45,000 before accepting the offer. Given the ambiguity in the contract, the only alternative to the lodestar fee would be (possibly) entitlement to 30% of the gross settlement. Still, it should have been discussed with the client prior to acceptance of the offer.

Ms. Arkin did not keep contemporaneous time records in her own cases (Tr. 1389) and agreed with Respondent's expert Mr. Boyar that contemporaneous timesheets are not required, and timesheets may be recreated (Tr. 1389). She acknowledged that her fees have

been cut by an expert by as much as fifty percent (50%) (Tr. 1404). Ms. Arkin did not testify or opine that she believed the SLF attorney's fees were "clearly excessive" as defined by the Rules Regulating The Florida Bar (Tr. 1687; ROR 20).

Lea Castro-Martinez, a former associate of SLF, headed the Client Support Team (Tr. 798-799). The Referee found Ms. Castro-Martinez to be credible (ROR 20). She spoke with Dennis Nowak at some point (Tr. 799-800), and never informed him the draft closing statement was a final version (Tr. 841-842). Dennis Nowak did not agree with the division of fees and client recovery written on the draft closing statement (Tr. 446). Hers was not a contentious conversation (Tr. 444-445, 809). She reached out to and spoke with Mrs. Nowak, whom she understood was the client. She was unable to resolve concerns regarding the draft closing statement (Tr. 800, 820-821).

Cris Boyar was proffered and accepted as an expert witness in attorney's fees on the behalf of Respondent. Mr. Boyar had previously been requested by The Florida Bar to be their expert in the case of *The Florida Bar v. Kane*, 202 So. 3d 11 (Fla. 2016) (Tr. 1717). He provided The Florida Bar with an expert analysis and his understanding of the law in *Kane*. *Id.* Mr. Boyar has attended first

party fee hearings hundreds of times as an expert, and sometimes as many as fifteen a week *Tr. 946-947, 1048-1049). In addition, he reviewed thousands of timesheets, lectured on first party attorney fees claims, and served as a fee expert in all three South Florida counties on a regular basis for many years for both plaintiffs and defendants (Strems Ex. 36; Tr. 947). The Referee found Mr. Boyar, an experienced plaintiffs first party property lawyer, trial litigator, and fee expert, to be both credible and knowledgeable (ROR 21).

Mr. Boyar's opinions were consistent with law and supported by the facts (ROR 32). Alternative fee agreements such as that included in the Strems retainer were reasonable, and the standard form of retainer agreement was consistent with Florida law (Tr. 960-961, 1015-1016). He detailed his opinions and supported the opinions with relevant and accurate Florida legal authority in his Expert Report (Strems Ex. 36):

> **Purpose of a one-sided attorney fee street.**
> The purpose of Fla. Stat. §627.428 is to encourage prompt dispositions of valid insurance claims without unnecessary litigation and it is meant to discourage insurance companies from contesting valid claims. *See Pepper's Steel v. United States of America*, 28 Fla. L. Weekly S455 (Fla. 2003), and *Florida Life Insurance Co. v. Fickes*, 613 So. 2d 501 (Fla. 5th DCA 1993).
>
> * * *

Fees trigger once you file suit. No judgment required.
When an insurer settles during suit it must pay attorney fees and costs. *Wollard v. Lloyds & Cos.*, 439 So. 2d 217, 218 (Fla. 1983); *Fitzgerald & Company, Inc. v. Roberts Electric*, 533 So. 2d 789 (Fla. 1st DCA 1988); *Fortune Insurance Company v. Brito*, 522 So. 2d 1028 (Fla. 3rd DCA 1988). The court has no discretion to deny attorneys fees after such a settlement. *Avila v. Latin American Prop. & Cas. Ins. Co.*, 548 So. 2d 894 (Fla. 3rd DCA 1989).

* * *

Fees are mandatory.
Whenever an insured prevails against an insurer, the court must award attorneys fees. Even if the insurer believed in good faith that the benefits should not have been paid the court must award attorneys fees. *INA v. Lexow*, 602 So. 2d 528 (Fla. 1992); *United Automobile Ins. Co. v. Zulma*, 661 So. 2d 94 7 (Fla. 4th DCA 1995). Even if the insured prevails only on part of the claim, fees are awarded to the insured as the fee statute is "one way street" intended to discourage insurers from denying valid claims. *Danis Industries Corp. v. Ground Improvement*, 645 So. 2d 420 (Fla. 1994) (statute is a one-way street offering the potential for attorneys' fees only to the insured or beneficiary to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their policies).

* * *

Alternative Fee agreement are valid.
Alternative fee agreements are not only valid but common in first party litigation case. *See First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., Inc.*, 115 So. 3d 978 (Fla. 2013) where the court held: The Fourth District recognized this in *Wolfe v. Nazaire*, 713 So. 2d 1108, 1108 (Fla. 4th DCA 1998) (*Wolfe I*), where it relied on our decision in *Kaufman*, 557 So. 2d 572, to recognize the validity of an alternative fee recovery clause in the defendant's fee agreement that "provided for a fee to be based on an hourly rate of $85 or whatever may be awarded by the trial court, whichever is higher." In

contrast, in cases where the client agrees that the attorney will be paid either a specific percentage of the recovery or the amount awarded by the court pursuant to a prevailing party statute, whichever is higher, the Supreme Court has held that the trial court may award fees which exceed the amount recoverable under the percentage alternative of the fee agreement. This is so because the court-awarded fee does not exceed the fee agreement entered into by the client and the attorney. *Florida Patient's Comp. Fund v. Moxley*, 557 So. 2d 863 (Fla.1990); *Kaufman v. MacDonald*, 557 So. 2d 572 (Fla. 1990).

In *TRG Columbus Dev. Venture, Ltd. v. Sifontes*, 163 So. 3d 548, 552 (Fla. 3d DCA 2015), the court stated:
While the contingency fee contract is poorly worded, we conclude that its intention, supported by testimony at the hearing below, is evident. In this case, TRG, a stranger to the contract between Sifontes and his counsel, would have us simply ignore the underlined portion of the contingency fee contract, which allows a "higher ... fee" to be "determined ... pursuant to any ... decisional authority." While this language is not a model of clarity, we cannot simply disregard it as superfluous; we must give it the meaning and effect intended by the parties to the contract. *See Aristech Acrylics, LLC*, 116 So.3d at 544.

In *Florida Dept. of Agric. & Consumer Services v. Bogorff*, 132 So. 3d 249, 257 (Fla. 4th DCA 2013) the court held:
.. .it is abundantly clear through case law that where the fee agreement with a client in a fee-shifting case contains alternative means of calculating a fee--one based on a percentage of the recovery or the other a fee set by the trial court-the agreement permits the trial court to set a reasonable fee higher than the percentage contained in the contract. *See Kaufman v. MacDonald*, 557 So. 2d 572, 573 (Fla. 1990). The supreme court has recently reiterated its approval of such alternative fee clauses and the trial court's ability to exceed the hourly rate or percentage of recovery limit contained in the contract where the fee is

reasonable. *See First Baptist Church of Cape Coral, Fla., Inc. v. Compass Constr., Inc.*, 115 So. 3d 978, 982 (Fla. 2013).

There is NO cap on the fees when there is an alternate fee recovery clause.

In *Forthuber v. First Liberty Ins. Corp.*, 229 So. 3d 896, 899 (Fla. 5th DCA 2017), the court held:

Although there are circumstances where the contractual relationship between a lawyer and client might cap the fees that may be recovered under a fee-shifting statute, here, the fee agreements did not establish a cap because they contained “alternative fee recovery clauses,” under which Appellant agreed to pay the greater of a percentage of the recovery or the statutory fee. Under this fee arrangement, the contractual agreement does not operate as a cap on statutory fees. This principle is illustrated in *First Baptist Church of Cape Coral, Florida, Inc. v. Compass Construction, Inc.*, 115 So. 3d 978 (Fla. 2013).

* * *

Post Stipulation work.

*** * ***

In *North Dade Church of God v. JM Statewide*, 851 So. 2d 194, 196 (Fla. 3d DCA 2003), the Court held:

It appears that a certain amount of the attorney's fee award included time spent litigating the amount of attorney's fees that the lender and assignee were claiming. It is settled that in litigating over attorney' fees, a litigant may claim fees where entitlement is the issue, *but may not claim attorney's fees incurred in litigating the amount of attorney’s fees. State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 832-33 (Fla.1993); *Mangel v. Bob Dance Dodge, Inc.*, 739 So. 2d 720, 723-24 (Fla. 5thDCA 1999); *Oruga Corp., Inc. v. AT & T Wireless of Florida, Inc.*, 712 So. 2d 1141, 1145 (Fla. 3d DCA 1998); *Dept. of Trans. v. Winter Park Golf Club, Inc.*, 687 So. 2d 970, 971 (Fla. 5th DCA 1997). On remand, the court must delete time attributable to litigating the amount of attorney's fees claimed.

Correlation between the recovery and the fee.
Under §627.428 there is NO significant correlation between the amount of the recovery and the number of hours awarded. *See State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836, 837 (Fla. 1990), where the amount recovered was $600 medical expense for a thermographic examination and the court awarded $253,500.

Under the authority of section 627.428(1), Florida Statutes (1983), it applied the principles set forth in our decision in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), and awarded attorney's fees to Palma in the amount of $253,500. In computing this fee, the trial court found that 650 was a reasonable amount of hours and that a reasonable hourly rate was $150. Further, the trial court applied a multiplier of 2.6. We note that State Farm's counsel expended 731 hours on this case. *See also Forthuber v. First Liberty Ins. Corp.*, 229 So. 3d 896, 900 (Fla. 5th DCA 2017), where the court held "This is especially true in small cases such as this one, where a percentage formula alone would not provide the incentive for a lawyer to undertake a case involving the potential commitment of many hours and substantial costs. The statute is also intended to dissuade insurers from delaying or denying the payment of legitimate claims." *See also Patient Transportation Service, Inc., and Jorge Llanso v. William Lehman Leasing Corporation*, 11 Fla. L. Weekly Supp. 612a (Fla. 11th Cir. 2004); *United v. Daniel,* 11 Fla. L. Weekly Supp. 617c (Fla. 11th Cir. 2004). "Merely because the amount of attorney's fees awarded in this case was higher than the amount of recovery did not make the fees excessive or unreasonable. *See State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836, 838 (Fla. 1990)."

Contemporaneous Time Entries.
There is no requirement for either instantaneous or even contemporaneous time entries. They can be recreated, even years later. …

Mr. Boyar testified during direct examination regarding the differences between fee disputes and matters that rise to The Florida Bar determinations, in part:

> Q. What do you understand, from your expertise, to be The Florida Bar rule or definition?
> A. Florida Rule 4-1.5A kicks in where a fee is illegal, prohibited, or clearly excessive, utilizing their definition. The definition is found at Al. It says, quote, a fee or cost is clearly excessive when, after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or cost exceeds a reasonable fee or costs for services provided to such a degree to constitute a clear, overreaching, or an unconscionable demand on an attorney.
> We don't see that language in a generic fee hearing. That's a much different level or burden that is not used in the generic fee hearing.
> Q. Is that definition that you've described further amplified by case law, legal authority?
> A. Yes.

(Tr. 995).

> Q. Okay. And in connection with your expertise under the Bar rules is there a difference between a fee disputes and matters that rise to Bar fee determinations?
> A. Yes.
> Q. What is that, as you understand it?
> A. We don't want fee disputes being resolved by The Florida Bar. Fee disputes are resolved by trial judges. The Florida Bar only gets resolved [involved] if there's a violation as defined in 4-1.5, so you have to be left with a definite and firm conviction that the fee or the cost exceeds the reasonable fee or the cost of service, and this is the important part, to such a degree as to constitute clear overreaching or an unconscionable demand by the

> attorney, so clear overreaching or unconscionable demand.
> It doesn't mean a mistake. It doesn't mean unreasonable. It doesn't mean excessive. It's a higher level. Somebody has to say this is unconscionable to create a Bar issue, not you made a mistake, not you charged too much, hey, you billed .2, and it should be .1. That is not something that the Bar would get involved in, in my opinion. You've got to use the definitions that we're all traveling under.

(Tr. 946-947).

> Q. Okay. And that's because you asked for specific objections to the various time sheets?
> A. Right, because the way that it works, once you give the other side your time sheet, the burden then shifts to them, to point to with specificity and detail which individual task they're taking exception with.
> The reason I do that is the plaintiffs expert shouldn't have to go through and prove each task that's not in dispute. You only talk about the ones in dispute. So I asked Mr. Womack to give me his cuts. He asked me to review it for the next morning and I did.
> I went through it line by line last night, and my opinion stands, that this is not excessive as defined by The Florida Bar, not even close.

(Tr. 1037-1038).

Mr. Boyar reviewed and testified about Strems Exhibit 3, the executed settlement agreement:

> Q. Okay. So based on your review and your expertise of Strems Exhibit 3, there's a significant reduction in the legal fees obtained by the Strems Law Firm, isn't there?
> A. It's dramatic. Basically they took -- ultimately they accepted $8,560 for their fees.
> Q. And that's because costs are included in these fees?

> A. Correct. And that is a dramatic reduction under any fact pattern.
> Q. And a 30 percent straight contingency, based on the documents you've seen, would have actually been a larger amount of $13,500.
> A. Sure or a minimum there should have been a separate line for the client to pay the cost as required in subsection e of the agreement.

(Tr. 1036-1037). According to Mr. Boyar, it is black-letter law that settlements after initiation of litigation involve the mandatory application of the Section 627.428 fee shifting statute (Tr. 1015-1016). Lawyers routinely settle with the insurance company to guarantee the client's bottom line, and then negotiate the fee award from the insurance company (Tr. 1026-1027).

Mr. Boyar disagreed with Ms. Arkin's expert opinion testimony concerning global settlements and multiple checks from insurance companies (Tr. 1710).

> Q. Did you hear Ms. Arkin testify that only contingency fee percentage, 30 percent, applies to the resolution of this matter?
> A. I did.
> Q. Do you agree with that?
> A. I do not.
> Q. Why? What is your opinion? What is your conclusion?
> A. My conclusion, based on all of the evidence, is that 627.428 applied. The 30 percent did not apply. Only 627.428 applied and that is based on not only the contemporaneous memorandum to the file, but also in addition to the follow-up letters explaining how the checks

are to be cut.

Q. Did you hear Ms. Arkin testify that in computing the 30 percent contingency, the only number you work from is the $45,000?

A. I did hear that.

Q. Do you agree with that?

A. I don't.

Q. What is your conclusion on that point as an expert?

A. It would be the total amount of the settlement. That means everything. That's $50,540, from memory, which was on the release. The release tells you what the case resolved for, and that's the amount.

Q. And is that based on your experience as an expert for industry standards?

A. Yes.

Q. All right. Do you recall Ms. Arkin offering her opinion that Strems Exhibit 10, that's the November 9, 2018, memorandum to the Strems Law Firm file. Do you have that in your head?

A. Yes, I do.

Q. Okay, so let me ask you the question. Do you recall Ms. Arkin being asked and offering the opinion that the Strems Exhibit 10 memorandum is inconsistent with the file and materials she reviewed?

A. I do.

Q. Do you agree with that?

A. I do not.

Q. What is your opinion?

A. That that memo is consistent with a fee that was -- is settlement where the indemnity was determined, the fees were determined. That is what is consistent and supported, with not only that memo, but also with the follow-up documentation in the file.

Q. Okay. And you heard Ms. Arkin opine that $17,500 in attorneys' fees is unreasonable?

A. Yes.

Q. Do you agree with that?

A. That is unreasonable, and I do not agree. I thought it was a discounted amount.

Q. Okay. So your opinion is that it is not unreasonable?
A. No, 17,500 is not an unreasonable fee. It's not an excessive fee. And it's not, quote, clearly excessive fee, as the [Florida Bar Rules] defined it.
* * *
Q. What is your opinion on that point, based on your expertise.
A. My opinion is that the fee in this case is determined by exclusively 627.428, and if we're utilizing that analysis, I believe a judge, whether the judge gives the multiplier of 1.25 or not would be roughly at $30,000.
Q. Okay. And as to the dollar amount of the fee requested, that Ms. Arkin offered an opinion about, do you have an opinion as to the reasonableness for purposes of these proceedings?
A. I do.
Q. Is that based on your expertise?
A. It is.
Q. What is that opinion?
A. That we're here at a Bar matter of the definition of what is clearly excessive. This is not a fee hearing where one side has a number and the other side has an either higher or lower number and then a judge comes up what the Court finds is the reasonable amount.
I can tell you with 100 percent certainty that at every fee hearing I've ever been to, one side is always going to say the other side's prayer for fees is excessive. That happens 100 percent of the time, without exception.
But we have to travel under the Bar definition of clearly excessive as defined, unconscionable, you know, the exact definition.

(Tr. 1712-1716). Contemporaneous time keeping is not required and rarely used (Tr. 956).

D. Sanctions Proceedings.

In considering the evidence offered at the sanctions hearing, the

Referee reviewed the Bar's proffered aggravators in Standard 3.2. The referee also evaluated Respondent's Standard 3.3 mitigation evidence that consisted of witness testimony and extensive documentation of Respondent's character and fitness (ROR 69-73). The Referee found the following mitigating factors: Standard 3.3(b)(2) (absence of a dishonest or selfish motive), Standard 3.3(b)(4) (timely good faith effort to make restitution or rectify consequences), Standard 3.3(b)(7) (character or reputation).

E. Recommendation as to Discipline.

The Referee announced her conclusion on discipline (ROR 77):

> Upon review of the disciplinary standards, aggravating factors, mitigating factors, and case law discussed above, I recommend that Respondent be found guilty of violating Rule 4-1.4, Rule Regulating the Florida Bar (Communication), justifying disciplinary measures, and that Respondent is disciplined by Public Reprimand. I further recommend that any sanction of the Respondent run concurrent with the suspension because the conduct at issue occurred prior to the June 5, 2020 Emergency Suspension.

STANDARD OF REVIEW

A. Review of Factual Determinations.

It is the referee's function to weigh the evidence and determine its sufficiency. *Florida Bar v. Weiss*, 586 So. 2d 1051, 1053 (Fla. 1991). This Court set forth the legal standard for review of a Referee's

Report and Recommendations in *Fla. Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016):

> This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000); *see also Fla. Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla. 1998). Also, a referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt. *See Fla. Bar v. Shoureas*, 913 So. 2d 554, 557-58 (Fla. 2005).

See The Florida Bar v. Martocci, 699 So. 2d 1357 1359 (Fla. 1997) (burden to prove by clear and convincing evidence; referee’s findings are presumed correct “unless clearly erroneous or lacking evidentiary support.”); *The Florida Bar v. Vannier*, 498 So. 2d 896, 898 (Fla. 1986) (referee’s factual findings and recommendation as to guilt are presumed correct and must be sustained “unless clearly erroneous or without support in the record.”); Rule 3-7.7(c)(5) of the Rules Regulating The Florida Bar (“[u]pon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified.”).

The Florida Bar v. Schwartz, 284 So. 3d 393, 396 (Fla. 2019) (emphasis added), explained the applicable standard this way:

> But as to the actual recommendations of guilt, the referee's factual findings must be sufficient under the applicable rules to support the recommendations. *See Fla. Bar v. Shoureas*, 913 So. 2d 554, 557-58 (Fla. 2005). Ultimately, **the party challenging the referee's findings of fact and recommendations as to guilt has the burden to demonstrate "that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions."** *Fla. Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007).

If the record evidence fails to support the Bar's allegations of misconduct as to a specific rule violation, the referee must find in favor of the respondent and dismiss the Bar's complaint alleging such violation. *See Florida Bar v. Scott*, 566 So. 2d 765, 766 (Fla. 1990) (disapproving finding of guilt as to rule violation because record evidence did not support the referee's finding by clear and convincing evidence); *Florida Bar v. Quick*, 279 So. 2d 4, 7-9 (Fla. 1973) (same).

B. Review of Disciplinary Recommendation.

On matters of discipline, the Referee's recommended sanction is subject to a broader level of review, as described in *The Florida Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020):

> In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See The Florida Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852,

> 854 (Fla. 1989)). At the same time, this Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the standards. *See The Florida Bar v. Alters*, 260 So. 3d 72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008).

The Referee's findings on aggravation and mitigation are the equivalent of factual determinations for which the presumption of correctness applies so long as there is any supporting evidence. *The Florida Bar v. Arcia*, 848 So. 2d 296, 299 (Fla. 2003).

SUMMARY OF THE ARGUMENT

The Florida Bar did not present convincing evidence that Respondent handled the Nowak case for any purpose other than attempting to utilize his experience to obtain a fair and reasonable settlement consistent with the client's expressed intention and directive. Respondent and his law firm assigned competent, capable lawyers to pursue Mrs. Nowak's case against an insurance company that unreasonably denied her claim, even as it was abjectly apparent that she was not at fault and the insurance company was obligated to cover her hurricane-caused property damage. The law firm explained the basis and rate of the fees and costs at the pre-litigation stage (fixed fee and costs) and the litigation stage (contingency fee or

alternative statutory determination) (Strems Ex. 36).

Only when it became evident the insurance company would not pay despite numerous pre-litigation overtures to settle the case, the law firm obtained the client's permission to initiate litigation and promptly did so. The lawsuit finally brought the insurance company to the settlement table, and Mr. Strems was called upon to use his experience to help achieve a settlement consistent with Mrs. Nowak's best interest and within her stated settlement authority.

At no time did the litigation or settlement result in any smaller settlement amount going to Mrs. Nowak. To the contrary, the "alternate fee recovery clause" in the retainer agreement was used to secure the client's bottom-line settlement on liability, so the insurance company would bear the full obligation for attorney's fees and costs with no reduction from the client's funds.

Mr. Strems and the firm's lawyers and staff used their best efforts to reasonably communicate the status of the case with Mrs. Nowak and her sons. The communication problem arose when Dennis Nowak, but not Mrs. Nowak, objected to the money allocated for Mrs. Nowak on the draft closing agreement submitted to her for approval before being finalized. The total settlement was not

contested, but Mrs. Nowak's lawyer-son incorrectly insisted the law firm was limited to a contingency amount from the total settlement proceeds, and that the law firm was to bear the costs of the case. The law firm attempted to explain the application of the fee shifting statute, § 627.428, but Mr. Nowak was obstinate in his refusal to concede the accuracy of the firm's position, and further refused to negotiate an amicable settlement despite the firm's willingness to do so in the client's best interests. Only at trial, after the settlement dispute had been fully and amicably resolved as found by the Referee (ROR 53), did Mr. Nowak concede he was wrong all along and that the statutory fee shifting provision and the Contingent Fee Retainer Agreement signed by his mother (TFB Complaint Ex. B) authorized the firm to receive its statutory award without reducing the liability portion due to the client.

The Contingency Fee Retainer Agreement, consistent with Florida law and in use by first party plaintiff's property claims lawyers throughout Florida, did not create any impermissible conflict of interest between the lawyer and the client, and was not shown to violate Rules 4-1.7 or 4-1.8. Instead, as occurred here, the law firm protected the client's bottom-line for recovery from the insurance

company and thereafter negotiate the statutory award due the law firm, without any portion of the fees or costs reducing the amount recovered by the client. As expert witness Cris Boyar explained, and as agreed by the Bar's fees expert, the alternative statutory fee provision did not create a conflict between the lawyer and the client when the lawyer was attentive to the client's bottom line. This was and is consistent with alternate fee agreements validated in *First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., Inc.*, 115 So. 3d 978 (Fla. 2013).

The trial evidence is consistent with the Referee's findings that Respondent met the objectives and scope of Mrs. Nowak's representation in accordance with Rule 4-1.2 and that the fees and costs for the successful legal services provided to Mrs. Nowak were not clearly excessive, and thus were compliant with Rule 4-1.5. Mr. Strems and his firm were competent as required by Rule 4-1.1. The Bar's evidence did not clearly and convincingly prove the charged violations, and thus the Referee's determinations should be upheld.

ARGUMENT

I. THE CONTINGENT FEE RETAINER AGREEMENT AND THE FEES RECOVERED BY THE STREMS LAW FIRM WERE CONSISTENT WITH GOVERNING FLORIDA LAW.

Despite presenting no clear and convincing evidence that the fee agreement with Mrs. Nowak and her ultimate recovery were not incompatible with the Rules Regulating The Florida Bar, the Bar on appeal stakes out a broad and sweeping condemnation of a lawyer's use of the statutory fee shifting provision of Section 627.428, Florida Statutes. In doing so, the Bar seeks to hold Respondent accountable for what the Bar hopes will be a wholesale alteration of existing Florida law when insureds are left with no choice but to sue their own insurance for improperly denying a valid claim.

The fee shifting statute applicable in this case, included in the retainer agreement signed with Mrs. Nowak, is an integral component of a fair relationship between insurance companies and their insureds: "[T]he purpose of section 627.428 is to discourage insurers from contesting valid claims and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their policy rights." *Liberty Nat. Life Ins. Co. v. Bailey ex rel. Bailey*, 944 So. 2d 1028, 1030 (Fla. 2d DCA 2006). The Referee

correctly recognized that client representation would likely be impossible without the ability to hold insurers accountable for refusing to cover claims.

Forthuber v. First Liberty Insurance Corp., 229 So. 3d 896, 900 (Fla. 5th DCA 2017), underscored the importance of the statute to cases exactly like this one involving Mrs. Nowak's relatively modest hurricane damage claim:

> Appellee's argument that the fee-shifting statute only permits the court to "reimburse [Appellant] for the attorney's fees incurred" ignores the plain language of the statute and distorts its objective. Indemnity is not the objective of this statute. This statute is calculated to level the playing field so that aggrieved insureds can find competent counsel to represent them. This is especially true in small cases such as this one, where a percentage formula alone would not provide the incentive for a lawyer to undertake a case involving the potential commitment of many hours and substantial costs. The statute is also intended to dissuade insurers from delaying or denying the payment of legitimate claims.

The Strems Law Firm and Mr. Strems himself took affirmative action, consistent with the client's knowledge and with due regard to her bottom line, to validate her indemnity claim and separate out the law firm's entitlement to statutory payment of fees and costs by the insurance company. Mr. Strems described the settlement negotiations in his contemporaneously drafted Memorandum dated

November 9, 2018 (Strems Ex. 10), explaining his conversations with defense counsel that culminated in an agreement on November 9, 2018, subject to finalizing settlement documents. Mr. Strems' memorandum described the negotiations with clarity:

> On November 9th upon reviewing the file and having noted that client's settlement authority given to Carlos Camejos, was $22,500 net (clean) I commenced negitations [sic] with defense counsel. After serveral [sic] conversations back and forth, we were able to agree to a settlement of $ 22,500 in indemnity, net to the client and exclusive of any Assignement [sic] of Benefits [sic] monies owed to the water mitigation company. Once that settlement was secured, we were further able to negotiate Strems' statutory attorney fees and costs. As such we are able to negotiate and agree to $22,500 in statutory fees and costs. We considered the matter settled pending execution of release documents.

Following the described negotiations, defense counsel requested instructions for the "breakdown" of the checks to be issued (Strems Ex. 22), consistent with Mr. Strems' documented settlement discussions explaining an agreement for "$22,500 in indemnity, net to the client" followed by an agreement on "$22,500 in statutory fees and costs." No evidence contradicted the memorandum. Then, after conferring with the client's son on November 12, 2018, about the settlement (The Florida Bar Exhibit V, p. 10), the Strems Law Firm instructed the insurance carrier that the payment breakdown should

be $22,500.00 payable to Mrs. Nowak and the firm for indemnity, with a separate check for $22,500.00 payable to the Strems Law Firm for fees (Strems Ex. 25).

Expert witness Boyar, upon whom the Referee extensively relied, found that the process utilized by the Strems Law Firm to settle the indemnity claim was consistent with the client's bottom line; the negotiations for a statutory fees award were routine negotiations of a post-litigation settlement with an insurance carrier involving discussions of indemnity and a separate discussion of attorney's fees and costs. That the defense lawyer asked for a breakdown of the settlement proceeds confirmed that the settlement discussions included indemnity and separate discussions for fees (Tr. 1710). Mr. Strems' contemporaneously prepared settlement memorandum was consistent with the prevailing practice in this area of law (Tr. 1712). The subsequent preparation of a draft Closing Statement was submitted to the client for review and approval before any settlement was consummated. The result, according to Mr. Boyar and as found by the Referee, was a reasonable fee that was "not excessive," and "not clearly excessive" in violation of Bar rules (Tr. 1714). Even Ms. Arkin recognized that litigation fees routinely exceed

a client's indemnity recovery, and that situation is entirely consistent with prevailing law and practice.

II. THE STREMS LAW FIRM CONTINGENT FEE RETAINER AGREEMENT DID NOT CREATE AN INHERENT CONFLICT WITH THE FIRM'S CLIENTS AND WAS NOT REASONABLY UNDERSTOOD TO CREATE ANY IMPERMISSIBLE CONFLICT.

The Florida Bar offered no evidence, and most certainly did not prove by clear and convincing evidence, that the firm's standard Contingent Fee Retainer Agreement widely utilized by the plaintiffs' bar created an impermissible conflict of interest between the law firm and the client. The Strems Law Firm represented only the interests of Mrs. Nowak and no other client during the representation. Obtaining and implementing the client's bottom line for indemnity purposes was consistent with the client's interest. Resolving indemnity with the insurance carrier and then discussing the firm's statutory entitlement to a fee to be paid by the insurance carrier did not pit the law firm against the client, as was fully explained by Mr. Boyer and acknowledged by the Referee (ROR 49-54). Mr. Boyar discussed the fee negotiations involved in this case as not involving any actual or potential conflict. Instead, the settlement negotiations were in accord with prevailing practices in this area of law.

The Bar did not dispute that the form of retainer agreement utilized by the Strems Law Firm was an industry standard form for first party property insurance claims that incorporated both pre-litigation and litigation provisions for attorney's fees. The Agreement was of a type defined by Florida courts as an approved alternative fee arrangement. The Florida Bar presented no convincing evidence that the agreement was not compliant with Florida law and Bar rules.

Mr. Camejo was in frequent communication with Mrs. Nowak and sons and did his best to explain the terms of the agreement with her (ROR 9-14). The agreement called for fees of a contingent 30% of the amount recovered or statutory fees pursuant to § 627.428, Florida Statutes, whichever was greater, plus costs. The attorney's fees language of the agreement was thoroughly discussed and dissected at trial and explained by Mr. Boyar as standard for plaintiff first party property insurance cases.

On appeal, despite evidence describing the agreement as encompassing that which is authorized by law, The Florida Bar now asserts the unsupported claim that the agreement inherently creates a conflict. Section 2 of the agreement states differently (TFB Comp. Ex. B):

> If the payment of attorney's fees is required to be determined by the Court, or if settlement is achieved via negotiations with the responsible party, attorney shall be entitled to receive all of such attorney's fees, including any and all contingency risk factor multipliers awarded by the Court. If a settlement includes an amount for attorney's fees, attorney shall be entitled to receive all of its expended and/or negotiated fees. In all cases whether there is a recovery of court awarded fees or not, by contract or statute, the fee shall be thirty percent (30%) or the awarded amount, whichever is greater. Pursuant to 627.428, Florida Statute, the Insurance Company is responsible to pay for the Client's attorney's fees when and if, the Client prevails against the Insurance Company. NO RECOVERY. NO FEE.

The Bar's effort to limit application of the statutory fee shifting statute to a "court awarded fee" (Initial Brief at 35) is unsupported by the evidence and inconsistent with controlling law. That is because when an insurer settles a claim during a lawsuit, it must pay attorney's fees and costs regardless of whether the recovery is obtained through a settlement or a court award (ROR 21). *Wollard v. Lloyds & Cos.*, 439 So. 2d 217, 218 (Fla. 1983). There is no discretion to deny attorney's fees after a settlement. *Avila v. Latin American Prop. & Cas. Ins. Co.*, 548 So. 2d 894 (Fla. 3rd DCA 1989).

As the evidence demonstrated, and the Bar's contrary argument did not undo, Mr. Strems followed existing law and professionalism practices in negotiating Mrs. Nowak's entitlement to indemnity within

her authorized bottom line, and then separately negotiated the statutory attorney's fees. No portion of the attorney's fees agreement reduced Mrs. Nowak's indemnity recovery, and neither the firm nor Mr. Strems engaged in any negotiations adverse to the client.

Accordingly, there is no proof of a client conflict by clear and convincing evidence in violation of Rules 4-1.7 or 4-1.8.

III. AS FOUND BY THE REFEREE BASED ON THE RECORD, THE BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THE CHARGED VIOLATIONS.

In finding that Mr. Strems failed to keep Mrs. Nowak fully informed of the progress of the settlement efforts, the Referee determined that the record was "unclear" whether Mr. Strems or anyone else at the firm informed Mrs. Nowak "of the $45,000.00 settlement figure at issue prior to its acceptance by the respondent." (ROR 67). But the Referee acknowledged that others at the firm worked on Mrs. Nowak's matter, communicated with Mrs. Nowak and her sons, and ultimately resolved the fee dispute with a payment of $31,500.00 to Mrs. Nowak (Tr. 458-460). Importantly, no settlement documents were executed before Mrs. Nowak's sons had an opportunity to review them (ROR 7, 67). For that violation, the Referee recommended a "public reprimand" to run concurrent with

Mr. Strems' current suspension because the conduct at issue occurred before the June 2, 2020 Emergency Suspension in SC20-806 (ROR 77).

As to the other charged violations, the Referee was clear that the Bar had offered no "clear and convincing evidence" of misconduct on Respondent's part. That ruling is supported by substantial competent evidence and is subject to a presumption of correctness. Since the record evidence did not support the Bar's allegations of misconduct as to the specific rule violations, the Referee properly found in favor of Respondent. *See Florida Bar v. Scott*, 566 So. 2d 765, 766 (Fla. 1990) (disapproving referee's finding of guilt as to rule violation because the record evidence did not support the referee's finding by clear and convincing evidence); *Florida Bar v. Quick*, 279 So. 2d 4, 7-9 (Fla. 1973) (same).

The Bar's standard of clear and convincing evidence is a "high" or "heavy" burden to achieve the relief sought. Florida courts define the term "clear and convincing evidence" as follows:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The

> evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). The requirements of this burden must be undertaken as to each element or issue required for the relief sought. *Grad v. Copeland*, 280 So. 2d 461 (Fla. 4th DCA 1973*); Goodwin v. Blu Murray Insurance*, 939 So.2d 1098 (Fla. 5th DCA 2006).

Much of the Bar's evidence and its argument are vague and accusatory but not of sufficient weight to convince a trier of fact without hesitancy. *Dana v. Eilers*, 279 So. 2d 825 (Fla. 2nd DCA 2019). Without proof by evidence adequate to leave "no substantial doubt … sufficient to convince ordinarily prudent minded people[,]" the proof is inadequate. *Slomowitz v. Walker*, 429 So. 2d at 799. Even as argued by the Bar, the record evidence is inconclusive or contradictory as to proof of the elements of rule violations, warranting the affirmance of the Referee's finding in favor of Respondent because the evidence "does not establish the charges with that degree of certainty as should be present in order to justify a finding of guilt" as

to a disciplinary rule violation. *See Florida Bar v. Rayman*, 238 So. 2d 594, 598 (Fla. 1970) (disapproving findings and concluding that the inconsistent and inconclusive record evidence failed to comprise that degree of proof necessary to warrant a finding of guilt for disciplinary rule violation). *See also Florida Bar v. D'Ambrosio*, 946 So. 2d 977, 980-981 (Fla. 2006) (disapproving referee's findings when the referee failed to "discuss differing accounts, make any credibility findings, resolve conflicts of evidence or present specific factual findings" and failed to "conduct any analysis of the facts in light of the case law.").

A. Rule 4-1.2 (Objectives and Scope of Representation).

The record supports the Referee's finding that SLF was "impliedly authorized to carry out the representation" of Ms. Nowak (ROR 42-43). Respondent was authorized by Kenneth Novak to settle the case or go to trial. Respondent abided by his "client's decision whether to settle a matter." The dispute arose when the sons received and rejected the net settlement for $22,500.00. Any miscommunication in transmitting the client's "bottom line" did not cause any actual or potential harm to Ms. Nowak because Ms. Nowak had not yet approved and consented to settlement. Mr. Strems, based

on the evidence, sufficiently met objectives of representation by securing a final settlement for Ms. Nowak with a net of $31,500.00 with the actual cost of her roof replacement being between $12,500.00 and $13,500.00 (Tr. 458-460; ROR 43; Strems Ex. 5).

This finding is not clearly erroneous.

B. Rule 4-1.7 (Conflict of Interest; Current Clients).

The Referee found the evidence did not clearly and convincingly prove an actionable conflict of interest (ROR 49-54). The use of an alternative fee arrangement wherein Respondent negotiated the client's indemnity portion and then sought statutory attorney's fees did not detract from or minimize the client's recovery. Subsequent negotiations with the client concerning the division of the settlement funds did not pose any conflict, and no other client's interests were at issue. As the Referee noted in relying on the Comment to Rule 4-1.7, the separately negotiated division between indemnity and fees did not "foreclose[ ] alternatives that would otherwise be available to Mrs. Nowak." (ROR 53). The dispute over the division of recovery "did not materially interfere with the Respondent's independent professional judgment in considering alternatives …" *Id.*

Mr. Boyar cogently described the fee negotiations indicated in

this case as not involving any actual or potential conflict. Instead, the settlement negotiations were in accord with prevailing and acceptable practices in this area of law. Importantly, as the Referee found, the dispute at issue was essentially one regarding the division of fees, a matter not ordinarily governed by the conflict rules. *See* Rule 4-1.8 (Comment).

C. Rule 4-1.5 (Fees and Costs for Legal Services).

With no evidence in the record, including that presented by the Bar's expert, of fees being "clearly excessive" (Tr. 1687), this fees dispute did not rise to the level of an unconscionable fee "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney" (Tr. 1508).

Florida Bar v. Winn, 208 So. 2d 809, 811 (Fla. 1968), acknowledges that "What may be a reasonable fee in one area of the State may be unreasonable in another and this Court can take judicial knowledge of the fact that the opinions of reputable lawyers concerning what constitutes a reasonable fee in any given situation are often as far apart as the poles." The Referee found, supported by

Mr. Boyar's testimony, that the fees sought were reasonable and "are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent." R. Regulating Fla. Bar 5-1.1(d). Mr. Boyar's informed opinion was that the fee was reasonable and within the ordinary range for the representation, whether governed by the lodestar or a multiplier (Tr. 1711-1712).

On this record, the Referee's findings are supported by substantial competent evidence.

IV. THE REFEREE'S RECOMMENDED SANCTIONS ARE REASONABLY BASED ON THE FACTS AND THE LAW AND ARE CONSISTENT WITH THE APPLICABLE STANDARDS, ALL OF WHICH WERE CAREFULLY CONSIDERED.

As an initial matter, The Florida Bar argues that this Court is obligated to make its own determination as to the applicable mitigating and aggravating factors (Initial Brief at 35). On this record, however, the Referee considered all aggravating and mitigating circumstances presented by the parties and gave each factor appropriate weight. The Referee ignored none of the cases cited by The Florida Bar and did not diminish the Bar's argument. Moreover, the Referee adhered to the admonition that the purposes of

discipline, as enunciated in *Florida Bar v. Poplack*, 599 So. 2d 116, 118 (Fla. 1992) (citing *Florida Bar v. Lord*, 433 So. 2d 983 (Fla. 1983)), must be considered in evaluating the recommended discipline. These purposes are: (1) "the judgment must be fair to society ... by protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer;" (2) the sanction "must be fair to the respondent," punishing for ethical breaches and yet encouraging reformation and rehabilitation; and (3) the sanction "must be severe enough to deter others who might be ... tempted to become involved in like violations." *Id.*

This Court should "not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw." *The Florida Bar v. Lecznar*, 690 So. 2d 1284, 1288 (Fla. 1997). The recommended sanction is reasonably supported in the standards and the law.

A. The Referee's Application of Mitigating and Aggravating Factors Has a Reasonable Basis in the Standards.

For instance, without any actual conflict, Standard 4-3 was properly omitted by the Referee in the absence of "serious or potentially serious injury to the client …". Application of Standard 4.6 for lack of candor when a lawyer engages in fraud or deceit is mis-argued by the Bar in the absence of compelling evidence of fraud and in the face of the Referee's well-supported findings to the contrary. Against the Bar's complaint that Respondent "misrepresented the facts in his November 9 memorandum" (Strems Ex. 10), the Referee properly did not apply this standard to the Bar's argument that is not based on any evidence of a misrepresentation by Respondent.

Standard 7.1 was considered by the Referee based on the findings of negligently failing to fully communicate with the client about the settlement negotiations. The public reprimand is the appropriate sanction. Contrary to the Bar's argument at page 49 of the Initial Brief, the Strems Law Firm had authority to negotiate a settlement consistent with the client's terms, and then present that settlement to the client for approval.

Additionally, the Referee's application of mitigating factors in Standards 3.3(b)(2) (absence of a dishonest or selfish motive) and 3.3(b)(4) (timely and good faith restitution) has "a reasonable basis in existing case law and the standards." *The Florida Bar v. Altman*, 294 So. 3d at 847. Mr. Strems was not shown to have acted dishonestly or selfishly, a speculative Standard 3.2(b)(2) aggravator the Bar did not prove by clear and convincing evidence, as the Referee specifically found (ROR 76). As well, he and his firm continued to work to satisfy the client's fees disagreement by making restitution, even as Respondent was handicapped by the pending Bar complaint against him from Mrs. Nowak's son. With no multiple offenses, the Referee correctly declined to apply aggravator 3.2(b)(4) and no evidence was adduced by the Florida Bar that Respondent refused to acknowledge the wrongful nature of his conduct for application of the 3.2(b)(7) aggravator.

The Referee analyzed the totality of the charged conduct, the circumstances giving rise to that conduct, Respondent's prompt corrective action, the ultimate recovery by Mrs. Nowak that exceeded her bottom line, and "Ms. Nowak was not injured by the fee dispute." (ROR 69). As a result, Standard 4.3 is inapplicable in the absence of

"serious or potentially serious injury to the client ..."

B. The Referee Applied Relevant Case Law When Recommending Sanctions.

The Referee discussed the legal authority presented by the parties. *Florida Bar v. Kavanaugh,* 915 So. 2d 89 (Fla. 2005), supports the public reprimand in a case involving a legal fees dispute. Equally, *Florida Bar v. Shoureas,* 892 So. 2d 1002 (Fla. 2004), is supportive of the public reprimand arising from a "communication breakdown" surrounding the $45,000.00 settlement.

The proffered case law and standards were considered and applied by the Referee, leading to a reasoned and fact-based recommendation of a public reprimand. The Referee cautiously and carefully analyzed the applicable standards and law and considered all mitigating and aggravating circumstances presented by the parties and apparent in the record. Accordingly, the Court should accept the recommended sanction.

CONCLUSION

Respondent asks this Court to approve the Report of the Referee as to the rule violations and recommended sanction.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this document complies with

the font and word count requirements of Rules 9.045 and 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure. The font type is 14-point Bookman Old Style. The word count is 12,995 words as counted by Microsoft Word.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the has been furnished this October 5, 2021, via the State of Florida's E-Filing Portal, to: Chris W. Altenbernd, service-caltenbernd@bankerlopez.com, John Derek Womack, Bar Counsel, The Florida Bar, jwomack@floridabar.org; Patricia Ann Savitz, Staff Counsel, The Florida Bar, psavitz@floridabar.org.

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