IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No.: SC20-842

v. Fl. Bar File No.: 2019-70, 468 (11C)

SCOT STREMS,

Respondent.
_____/

THE FLORIDA BAR'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

STATUTES

OTHER AUTHORITIES

RULES REGULATING THE FLORIDA BAR

PRELIMINARY STATEMENT

A. Abbreviated Names

Scot Strems, the Respondent, will be referred to as Mr. Strems or the Respondent. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

References to the Report of Referee will be cited as (ROR**).

References to specific pleadings will be made by Tab number in the Amended Index of Record, and with further information when the document is large. (Tab-**).

The transcript of the final hearing will be cited as (T**).

The transcript of the sanction hearing will be cited as (TS**).

The Bar's trial exhibits will be cited as (TFB-Ex*). Exhibits to the complaint that were introduced into evidence with be cited as (EX-*).

The Bar provides an appendix of critical portions of the record to facilitate review. The exhibits in this record include several sets of emails and email chains. The appendix contains those emails separately in chronological order to facilitate review. The appendix is cited as (A**).

NATURE OF THE CASE

The Bar seeks review of the Amended Report of Referee. The Referee recommends that this Court find Mr. Strems guilty of a violation of Rule 4-1.4 concerning his failure to communicate with his client prior to agreeing to a settlement. The settlement with a homeowners insurance company resolved both the client's claim for hurricane damage and his own attorneys' fees based on a "global" offer from the insurance company. The Referee recommends a public reprimand for this violation.

This review involves an underlying issue this Court may have thought it resolved in *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005). Mr. Strems' standard Contingency Fee Retainer Agreement creates conflicts the Bar maintains are either unwaivable or are matters to be resolved in writing as issues requiring informed consent. The Bar fully explains this issue in hopes that the Court will expressly disapprove such retainer agreements.

The Bar contends that the clear and convincing evidence establishes that additional violations occurred during this representation. With these additional violations, it contends that disbarment is appropriate, especially if the sanction is imposed at the same time as the sanction in the earlier disciplinary proceeding that is awaiting resolution at this time. *The Florida Bar v. Strems*, SC20-806.

STATEMENT OF THE CASE AND FACTS[1]

A. The facts concerning the insurance claim.

Hurricane Irma struck Margate, Florida on September 10, 2017. (ROR2). The home of Margaret J Nowak sustained damage in that storm, including significant damage to the roof. (R-Ex27-32). The home was insured by Florida Peninsula Insurance Company (FPIC). (R-Ex1)

Ms. Nowak was over 80 years old and lived with a disabled son and another disabled person. (T53). Through a trusted friend and an independent insurance adjuster, she signed a "Contingency Fee Retainer Agreement" with Mr. Strems' law firm on September 16, 2017. (T118)(A. 76). The circumstances surrounding her signing of the agreement are not well explained in the record. She had limited contact with the law firm. Only one lawyer testified to talking with Ms. Nowak, and that conversation occurred after the fee dispute developed. (T811-12). Ms. Nowak died in May 2020, after the Bar's investigation was initiated, but before this proceeding was filed. (T53).

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[1] This case is quite similar to another pending case, *The Florida Bar v. Saldamando*, SC20-844. That case involves another global settlement, but an earlier retainer agreement with different language, which the Bar will also request this Court to disapprove.

Ms. Nowak had two sons who assisted her with her insurance claim and communicated with the lawyers. The Bar does not contend that failing to talk directly to this elderly woman, or that talking to her sons instead, was a violation. One son, Kenneth Novak, is a commercial real estate agent.[2] (T42). The other son, Dennis Nowak, was a Florida lawyer for thirty-seven years. (T187). Ken was the primary son to deal with the law firm prior to the settlement, (T82), but Dennis became more involved when the fee dispute arose. (T82). He was also the person to whom Ms. Nowak gave a durable power of attorney prior to the storm on August 1, 2017. (T55)(Ex-C).

Prior to the Court's emergency suspension in SC20-806, Mr. Strems' law firm handled thousands of cases each year, using a team approach under which many lawyers might handle a single file. (ROR3)(A. 82). In this case, the pre-litigation group promptly reported the claim to FPIC. Contender Claims Consultants, Inc., a public adjuster, prepared an estimate of the damages totaling $64,031.23. (Ex-D). The law firm sent a proof of loss to FPIC on January 29, 2018. (Ex-V). At the end of February, FPIC took Ms. Nowak's examination under oath. (Ex-V). Mr. Carlos Camejo, from the pre-litigation group, attended the examination under oath with Ms. Nowak and

[2] Son, Kenneth, changed his name to "Novak." For simplicity, the sons will be referred to as Ken and Dennis.

one of her sons. (T429). But FPIC made no offer to settle by the end of July 2018, and the file was transferred to the litigation department. (T342, 347).

Before the file was transferred, Ken communicated with attorneys in the pre-litigation department about his growing concern over the leaky roof, his concerns about mold, and the need for repairs before the upcoming hurricane season. (A. 15-17). It is clear that by that point he was to try to get, at a minimum, enough money to re-roof the house without regard to the cost of all the other repairs. (A. 20).

Mr. Feldman, the attorney for FPIC, extended a "global" offer of $30,000, on July 30, 2018. (A. 28). For such property insurance claims, a global offer is intended to settle both the client's claim and the law firm's claim for fees. (T590). Mr. Camejo responded to this offer simply explaining the lawsuit had been filed and Mr. Feldman needed to "reach out" to Mr. Strems to settle. (A. 29-31).

Mr. Camejo then had communications with Ken in early August explaining what an offer of $30,000 "net" included. (A. 35). Ken emailed back:

> *Carlos, Unless you think you can do better, we would accept the offer of $30k net to my mom.*

(A. 37)

A minute later Ken emailed again to explain he understood that a fee of $7,500 would come from the $30,000, leaving a true net to his mother of $22,500. (A. 38).

Mr. Camejo responded to that email:

> *Let me see if I can work the attorneys fees to be exclusive* ***so your mom ends up with more. I'll get back to you*****.**

(A. 39)(emphasis supplied).

Ken replied to that email:

> *Thanks. There is a lot of work to do and there may be some mold remediation as well. See what you can do. Thanks again for all your help*.

(A. 40).

Mr. Camejo emailed Ken about two weeks later to assure him that "Mr. Strems himself is in communication with the attorney representing the carrier to hopefully finalize the case." (A. 44). On September 10, after Ken had heard nothing more, he emailed Mr. Camejo asking for Mr. Strems to call him about his mother's claim – providing his cellphone number in the email. (A. 45). When he still heard nothing from Mr. Strems, he emailed Mr. Camejo again on September 19 stating:

> *Karina/Carlos, I have not heard from anyone at the law firm since this last request on the 10th. Can someone please get back to me with a status on my mom's case? If this was referred to Mr. Strems for a conclusion can you please copy him on this*

correspondence and have him call me on my cell with a status? Thanks My cell 772-341-9914.

(A. 46).

Mr. Camejo assured Ken that he would follow up with Mr. Strems "once again." He explained to Ken that the notes in "our system" show that Mr. Strems has reached out to Mr. Feldman. (A. 47). In finding a communications violation in this case, the Referee relied on Mr. Camejo's testimony that he "advised Mr. Strems almost every each time that Ken reach out to me." (sic) (ROR-62)(T351).

A month later, on October 22, the law firm another email expressing his frustration, which simply should be read by this Court. (A. 49).

On Friday, November 9, 2018, Mr. Strems himself negotiated with Mr. Feldman, the attorney for FPIC. Without talking to either son or obtaining consent to settle from the client herself, Mr. Strems obtained an offer that was 50% higher than the earlier offer, and settled the case for a total of $45,000. (A. 50)(ROR63-66). He allocated $22,500 to the client, the bottom-line amount that Ken had been willing to take when FPIC's offer was $30,000, and he allocated the remaining $22,500 to his law firm. (A. 51-52).

Thus, Mr. Camejo's promise to try to get Ms. Nowak more and to get back to Ken if circumstances changed was not fulfilled. Mr. Strems did achieve the major increase in the settlement offer that Ken hoped to get for

his mother, but she did not get a penny more than the bottom amount that was discussed when the offer was only $30,000. The client did not even receive a call to see if she wanted more.

The circumstances of this settlement, i.e., whether it was an undifferentiated "global settlement" of the claim and the fees, or a two-step settlement where the client's claim was settled first, followed by negotiations on the attorneys' fees, was disputed at the hearing.

Mr. Feldman confirmed the settlement by email on November 9, 2018, at 4:47 pm. His email began:

> *Please allow this to confirm we have reached a global settlement agreement in the amount of $45,000.00.*
>
> *At your earliest convenience, please forward to me Plaintiff's settlement check instructions/breakdown.*

(A. 50).

In his testimony at the hearing, Mr. Feldman explained that a global settlement includes money for both the client's indemnity claim and the attorneys' fees. (T590). Although he no longer recalled the conversations he had with Mr. Strems that day, he explained that Mr. Strems often was involved in settlements and that Mr. Feldman settled these cases with global settlements. (T584, 591-92). He explained that 95% of his cases were settled with global settlement offers. (T608). A settlement where the fees

were resolved separately was an "extreme minority," and such a settlement would stand out in his mind. (T608).

Mr. Strems did not immediately respond to the "global settlement" email. He never sent an email claiming that the settlement was not a global settlement. Instead, he sent a separate email to two members of his staff a few minutes later, explaining the breakdown as "22500 and 22500, 22500 clean to client, 4500 to LC." (A. 51).

His staff notified other staff members of the settlement on Monday, November 12, and provided instructions to Mr. Feldman to provide a $22,500 check for the client and a $22,500 for the Strems Law Firm. (A. 53-54). No email was sent to the client or her sons, but Ken did become aware that there had been a settlement that he thought was for $46,000. (T80).

During the Bar investigation, Mr. Strems did not initially produce or rely upon a memo dated November 9, 2018. But one was produced by his lawyer on December 19, 2019. (Ex-U). The memorandum states:

> 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 several (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 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.

(A. 52)(Ex-W).

Mr. Strems did not testify in this proceeding, and thus never described how and why he created his memorandum. But Mr. Feldman's contemporaneous email was asking for a breakdown of the settlement, when Mr. Strems' memo says that the two men had already carefully negotiated the client's case first, and then his right to fees second – so Mr. Feldman should already have known that breakdown if the memo is accurate.

The memo also claims that Mr. Strems confirmed the client's settlement authority given to Mr. Camejo, but as seen earlier the emails in the file tell Ken that the firm would try to get more for his mother and would get back to him.

When the Referee makes findings recommending a communications violation, she relies on Mr. Feldman's email and his testimony that he did not have a role in the settlement breakdown. (ROR62-63)(A. 141-42).

It took more than two months to transmit settlement documents to the client, which were sent to Dennis and Ken on January 18, 2019. (T469, 173). The Bar is not claiming that delay is an issue, and it may very well have been a delay by FPIC.

The settlement documents included a closing statement that first provided $22,500 in attorney's fees "(Pursuant to Florida Statute 627.428)." (EX-J) (A. 160). It describes $4,976.90 in costs, including a $4,500.00 "consultant fee." The closing statement does not explain who pays the costs, but Mr. Strems was not deducting them from the "net to client" of $22,500. (Ex-J) (A. 160).

Ken responded three days later explaining that this breakdown was "unacceptable." He was "shocked" that none of the increase in the settlement was going to benefit his mother. (A. 70).

He and Dennis both received a curt email from Ms. Espinal, a non-lawyer, explaining the firm's legal position. Notably, the email does not discuss the terms of the "Contingency Fee Retainer Agreement" signed by Ms. Nowak. The content of that agreement will be discussed in the argument section.

Ms. Espinal states:

> Good afternoon Ken and Dennis,
>
> According to Florida Statute, when an insured has to file a lawsuit against their insurer, the insurance company has to pay reasonable attorneys' fees and costs. The work done on behalf of your Mother's claim is not limited to recovering what you believed you were owed, but the attorney's needed to also prove there was coverage under the policy. The reasoning behind this statute is to ensure the insured does not have to lose some or all of the amount recovered during a lawsuit against the insurer. Our

> firm obtains settlement authority from every client and we aim to settle as close to their authorization. I hope these clears up any doubts and that we are able to proceed with tomorrow's appointment.

(A. 71).

Both brothers responded disagreeing with the law firm's position. Because Dennis is a lawyer, he explained that no fees had been set by a court under section 627.428 and that the retainer agreement called for a 30% contingency fee. He even did the math. He plainly explained that his mother would not be signing the document, and asked Ms. Espinal to:

> *confirm with one of the lawyers in your firm that the Florida Statute cited in your closing statement does not override the provisions of your engagement agreement and, in any event, applies only to court award fees not negotiated settlements*.

(A. 72-73).

He sent a separate email to Mr. Strems forwarding the communications with Ms. Espinal, and asking Mr. Strems to call him. (A. 75).

Mr. Strems did not call Dennis. In fact, Mr. Strems never spoke to Dennis personally. (T244).

Ms. Lea Castro-Martinez did call Dennis on January 25. She was an attorney in charge of "the client support team." (T798). She had never worked on the Nowak file, but was asked by someone in the "settlement department" to call Dennis. (T800). The purpose of the call was to clarify

any concerns or questions Dennis had based on the email he sent. (T805). She did not recall the specifics of the conversation, but she believes she would have discussed the terms of the retainer agreement. (T806). She spoke to other clients about closing statements, but she did not have authority to renegotiate a fee split. (T813). She did not believe that anyone else had authority to negotiate a fee split; she would have gone to a handling attorney or Mr. Strems about this. (T813). She reported the conversation to Ms. Espinal. (T811).

Dennis explained that he discussed with Ms. Espinal his position that the fee should be a 30% contingency rather than a fee under section 627.428 and that he thought the fee charged was in violation of the Florida Bar rules. (T445). She insisted the fee was correct. (T446).

Thus, without settlement authority, she could not agree that Dennis's interpretation of the retainer agreement was correct. Mr. Strems never contacted Dennis to offer to resolve this dispute. (T472). To be clear, the sons were not claiming the $45,000 was an inadequate amount from FPIC; they only disputed the amount claimed by Mr. Strems. He made no offer to resolve this with them by distributing the undisputed amount and mediating or arbitrating the remaining dispute.

Without a resolution of the matter, Dennis filed the inquiry/complaint form initiating the Bar's investigation on February 1, 2019, and the Bar sent the complaint to Mr. Strems later that month.

Following the Bar complaint, the lawsuit and its settlement simply remained open. Mr. Strems did not move to withdraw in the action. Finally, in June 2019, the court issued a notice of lack of prosecution. (Ex-L). Without communicating with the client, Mr. Strems' law firm responded to that notice, representing that the matter had been amicably settled and asking the court to keep the file open "to enforce the terms of the Settlement Agreement." (Ex-M). Thus, they were keeping the court file open to enforce an agreement against their own clients.

Eventually, after Ms. Nowak died in May 2020, Mr. Strems resolved this dispute for $31,500. The resolution was confirmed in a new closing statement with a hand-written override of the standard reference to section 627.428 – the fees were "pursuant to our agreement". (TFB-Ex B-1)(A. 162). Mathematically, that is a 30% contingency fee based on a $45,000 settlement. Thus, it was resolved consistent with Dennis Nowak's original interpretation of the agreement in his January 2019 email.

B. The disciplinary case

When Mr. Strems responded to the Bar complaint, he did so through a letter written by his lawyer, Mark Kamilar. The letter takes the legal position that Mr. Strems could set his own fee based on alleged discussions with Mr. Feldman about a fee that would be appropriate under section 627.428, and he could make that decision binding on his client based on the following language of his contract with his client:

> *If a settlement included 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 statue, the fee shall be thirty percent (30%) or the awarded amount, whichever is greater***. (emphasis supplied).

(Ex-R, p.3).

Mr. Strems is claiming that a fee resolution supposedly reached with a defense attorney who has no interest in whether the money goes to the client or to Mr. Strems establishes an "awarded amount."

The Bar complaint charged Mr. Strems with eight separate violations. After many days of trial, the Referee recommended that this Court find Mr. Strems guilty only of Rule 4-1.4 (a failure to communicate with his client).

The Report relies on Mr. Feldman's and Mr. Camejo's testimony and does not rely on Mr. Strems' November 9 memorandum. (ROR61-67).

In this review, the Bar will contend that the clear and convincing evidence also establishes a violation of Rule 4-1.2 (failure to comply with the objectives of the client), Rule 4-1.7 (conflict of interest with client), and Rule 4-1.5 (excessive fees). The Bar is not challenging the recommendations on the other alleged violations.

In the middle of the trial, Mr. Strems revealed that he wanted to present an expert on section 627.428 and the closing statement in this case. (T537-38). This resulted in a long discussion. Ultimately, the Referee allowed Mr. Strems' expert to testify, gave the Bar the opportunity to retain its own expert, and the trial included extensive testimony by experts on questions of law and on the amount of a fee based on an after-the-fact report of estimated firm time in this case. (T885-1720). Because the Bar is contending the fee is excessive because it exceeds the legal contractual amount, and because legal issues concerning sections 627.428 are for this Court, that testimony will not be summarized.

The sanctions hearing was held prior to any ruling by the Referee on the violations that she would ultimately recommend to this Court, and prior to the submission of the proposed reports. (TS48, 139-40). Thus, the

arguments by both sides could not be based on the actual recommended violation. Mr. Strems presented character witnesses and character evidence at the hearing. (TS19-30, 52-62, 107-117).

The Referee's Report recommends a public reprimand for the one violation to run concurrent with the sanction imposed by this Court in SC20-806. Mr. Strems has not sought review of the Referee's recommendations on either guilt or the sanction. In addition to challenging some of the recommendations of guilt, the Bar challenges the recommended sanction and seeks disbarment in conjunction with the sanction in SC20-806.

THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW

This is an original proceeding filed under this Court's exclusive jurisdiction to "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const. "Standards of review" used to evaluate a trial court's final judgment do not apply here.

Nevertheless, it is still useful to begin a review of the referee's report with a consideration of the decision-making process and the applicable rules governing this Court's ultimate determination on the issues presented in a disciplinary proceeding.

1. Findings of Fact

As this Court explained in *The Florida 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. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)." *See also The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); *The Florida Bar v. Parrish*, 241 So. 3d 66, 72 (Fla. 2018); *The Florida Bar v. Vining*, 721 So. 2d 1164, 1167 (Fla. 1998); *The Florida Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla. 1998); *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996).

2. Credibility

In reaching his or her findings of fact, the Referee has a heightened role in determining issues of credibility, which are important in this particular review.

This Court has long held, "The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *The Florida Bar v. Tobkin,* 944 So. 2d 219, 224 (Fla. 2006) (quoting *The Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991)); *See also The Florida Bar v. Petersen*, 248 So. 3d 1069, 1077 (Fla. 2018).

3. Recommendation of Discipline

The Referee's recommendation of discipline is subjected to greater review by this Court because of this Court's ultimate responsibility to make that decision:

> 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 Florida Bar v. Altman, 294 So. 3d 844, 847 (Fla. 2020).

It is also important to consider that this Court has given notice to the members of the Bar that it is moving toward harsher sanctions than in the past. *See The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). In *Rosenberg*, this Court explained that since the decision in *The Florida Bar v. Bloom*, 632 So. 2d 1016 (Fla. 1994), the Court has moved toward imposing stricter sanctions for unethical and unprofessional conduct. *See also Altman* at 847. As a result, case law prior to 2015 needs to be examined carefully to make certain that the application of sanctions in these earlier cases comports with current standards.

4. Consideration of Mitigating and Aggravating Factors – Both as Findings of Fact and as a Mixed Question of Law and Fact during the Decision to Select the Appropriate Sanction.

A Referee's findings on mitigating and aggravating factors are treated essentially like any other finding of fact:

> [A] referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See The Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). This standard applies in reviewing a referee's findings of mitigation and aggravation. *See, e.g., The Florida Bar*

v. Wolis, 783 So. 2d 1057, 1059 (Fla. 2001); *The Florida Bar v. Hecker*, 475 So. 2d 1240, 1242 (Fla. 1985).

The Florida Bar v. Arcia, 848 So. 2d 296, 299 (Fla. 2003).

"[A] referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record." *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). The burden of demonstrating that the findings in aggravation or mitigation are clearly erroneous lies with the party challenging the findings. *See The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997) (holding that the burden of disproving a referee's findings of fact or recommendations as to guilt is upon the party challenging those findings). *The Florida Bar v. Marcellus*, 249 So. 3d 538, 544 (Fla. 2018).

Once the factors of mitigation and aggravation are found to exist, they are applied to "justify" an increase or a decrease in the "degree of discipline to be imposed." *Florida Standards 3.2(a), 3.3(a).* This process of balancing the positive and negative factors is a mixed question of fact and law. It is part of the ultimate decision to impose a sanction.

SUMMARY OF THE ARGUMENT

When Mr. Strems was under instructions from his client to try to do better than a $30,000 offer, which would have netted the client $22,500 toward the repair of the elderly woman's hurricane damaged home, he successfully convinced the insurance company to offer a global $45,000 settlement. But he still gave his client $22,500 and gave his law firm the rest as fees. He did this without contacting his client, much less discussing it with her or her sons.

The Referee found, and the parties do not challenge, that Mr. Strems violated Rule 4-1.4 because he did not adequately communicate with Ms. Nowak or her sons once he took over this case to settle it. But the Referee does not appear to understand that the genesis of all of this dates back to Mr. Strems' standard Contingency Fee Retainer Agreement.

Most problematic within that agreement is the sentence:

> *In all cases whether there is a recovery of court awarded fees or not, by contract or statue, the fee shall be thirty percent (30%) or the awarded amount, whichever is greater.*

Mr. Strems is attempting to contract with his clients for the right to pick a 30% contingency award or "the awarded amount," whichever he likes better, even when there is no recovery of a court awarded fee. He treats his

personal negotiations with the insurance company's lawyer as the due process event that awards fees to him. This would create a conflict even if he were extremely careful in a two-step settlement negotiation. But it creates unwaivable conflicts when he engages in "global" settlements where the insurance company offers an undifferentiated settlement amount for both Mr. Strems and his client.

One can imagine the discussion he would need to have when entering into this contract:

After I file a lawsuit, which is common because the companies do not offer enough at the beginning, if they make a global offer of $100,000, I will take either $30,000 or the amount that the insurance company and I think the court might award to me. Is that OK with you?

It is obvious that this contract creates a conflict that probably cannot be resolved after informed consent by written stipulation with the client. If the client were referred to another lawyer to obtain informed consent, no lawyer would advise Mr. Strems' clients to sign this agreement. This is an unwaivable conflict.

What is sad is that this Court tried to stop such contracts fifteen years ago in *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005). In that case, the lawyer in what seems to have been a one-time event tried to keep a higher percentage fee on the same theory that the settlement was as good

as a court order. This Court only imposed a public reprimand because the lawyer got an exceptional result for his client.

Here, Mr. Strems negotiated for his client's bottom demand and kept the rest for his law firm. This is not an exceptional result.

What is far worse is that, even with *Kavanaugh* as precedent for him to read, he implemented a "contingency fee" retainer contract establishing a firm-wide system to treat all of his clients the way Mr. Kavanaugh treated one client once. Even without reading *Kavanaugh*, after a few settlement conferences, any lawyer would have come to realize that this approach was unethical; it places the lawyer in a posture where he is chronically tempted to negotiate against his own client. The Bar asks this Court to clearly and emphatically announce that such contracts violate the Rules of Professional Conduct.

The clear and convincing evidence in this case establishes that while attempting to enforce his contract, Mr. Strems violated Rule 4-1.2 by failing to abide by the client's objectives and decisions. He violated Rule 4-1.7 by creating an attorney-client relationship and continuing to represent a client when his own retainer agreement created a patent conflict. He reinforced that conflict by picking the "awarded amount" option for his fee rather than the 30% contingency without even trying to obtain informed consent. He

violated Rule 4-1.5 by persisting in an attempt to charge his client more than the contractual 30% contingency fee even when her son, a lawyer, explained to him that he could not legally rely on the "awarded amount" text of his contract without an actual "award."

The Referee thought the negligence prong of Standard 7.1 applies here. But that is legally and factually incorrect. Standard 7.1 supports a suspension or disbarment for knowing or intentional misconduct that potentially injures a client. Standard 4.3 reaches a similar recommendation, and Standard 4.6 may as well.

The Referee found that Mr. Strems had no selfish motive when the opposite is plain on the face of the competent substantial evidence. The fact that the excess fee went to his law firm and not directly to him does eliminate the selfish motive.

In the final analysis, Mr. Strems' total disregard of *Kavanaugh* warrants at least a long suspension. When combined with the unresolved sanction in SC20-805, the two cases warrant a permanent disbarment.

ARGUMENT

I. A short explanation of the several methods to establish fees ethically for a claim against a property insurer.

The Bar submits that it is very important for this Court to address and plainly prohibit fee agreements similar to Mr. Strems' agreement. The decision in *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005) should have been enough to end this unethical practice, but it has not done so.

Accordingly, this brief will first explain the process of settling property claims that underlies this problem. It will then explain why, although there are specific acts of misconduct in this case by Mr. Strems, the core problem begins with his Contingency Fee Retainer Agreement.

The ethical obligations of a homeowner's lawyer during settlement negotiations are easier to understand if one understands the several methods that can be used when settling a property insurance claim for a client, and when settling a related claim for attorney's fees. These methods are similar to methods used to settle any case where success following litigation will shift the fees to the opposing party. There are several completely ethical methods to determine the fees owed to the lawyer. A written engagement typically needs to cover more than one method and explain those methods clearly to the client.

Pre-litigation. For claims that are resolved prior to litigation, there is generally no right to receive fees from the insurance company. *See Fla. Life Ins. Co. v. Fickes*, 613 So. 2d 501, 504 (Fla. 5th DCA 1993) ("We thus conclude that attorney's fees under section 627.428 cannot be awarded where no suit is filed prior to payment of the full amount of the proceeds due under the insurance policy."). The lawyer and the client can negotiate a fee agreement that is based on a contingency fee, an hourly fee, a flat fee, or even some combination of these approaches. This case does not involve a claim settled prior to litigation. That portion of the Strems' retainer agreement is not at issue here.

Litigation fees. For claims that are resolved after litigation is filed, the payment of fees to the lawyer is more complex. Section 627.428(1), Florida Statutes, has long provided that:

> *Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured . . , the trial court . . . shall adjudge or decree against the insurer and in favor of the insured . . a reasonable sum as fees or compensation for the insured's . . .attorney prosecuting the suit in which the recovery is had.*

Despite the language of this statute, the case law generally treats a payment after the filing of a lawsuit as a confession of judgment that results

in a statutory right to fees. *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1219 (Fla. 2016); *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218-19 (Fla. 1983).

Because the statute contemplates a judgment "in favor of the client," the fee award seems to belong to the client, but that is not entirely accurate. *See e.g.*, *Forthuber v. First Liberty Ins. Corp.*, 229 So. 3d 896, 899 (Fla. 5th DCA 2017) ("As the plain language of section 627.428 clearly establishes, the fees owed under the statute belong to 'the *insured* not the insured's attorney.' "), quoting *Fortune Ins. Co. v. Gollie*, 576 So. 2d 796, 797 (Fla. 5th DCA 1991); *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1267 (11th Cir. 2000) ("§ 627.428 entitles the insured and not the attorney to the recovery of those fees."); *but see State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993) (holding that litigating the amount of fees under section 627.428 "inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment"); *Brown v. Vermont Mut. Ins. Co.*, 614 So. 2d 574, 582 (Fla. 1st DCA 1993) (holding that insured's prior counsel may continue litigation in the name of the insured to enforce a right to fees under section 627.428 and rejecting *Gollie* in the context of an insurance lawsuit settled without notice to the insured's prior counsel).

Accordingly, the retainer agreement needs to contain language that makes clear that the attorney will be fairly compensated. But it also needs to assure that the client will not have fees taken from her insurance recovery for work compensated under the fees awarded under the statute from the insurance company.

Although larger commercial property losses are sometimes handled by a lawyer based on an hourly fee contract that is not contingent upon winning, most claims for homeowners are handled by lawyers under a fee agreement that includes both a contingency fee provision and a fee provision based on section 627.428. That is the model used by Mr. Strems.

Under this model, there are basically four methods to determine fees. The first three methods are two-step models, and the fourth method is a "global" settlement model:

(1) If the case is actually resolved in court, the client's insurance claim is set by the judge or jury, and the attorney's fees are then set by the court.

(2) If the client's case is resolved in court by the judge or jury, the attorney and the insurance company can then settle the remaining claim for fees and the attorney is paid the amount of that settlement.

(3) If the client's claim is first separately settled without a trial, the attorney and the insurance company can then agree to have the fees resolved by the judge, by some third-party, or by mutual agreement.

(4) Finally, the client and attorney can agree that the attorney will negotiate for an undifferentiated settlement of both the client's claim and the attorney's fee claim, i.e. a "global" settlement, and the attorney agrees to accept a contingency percentage of that gross amount.

There rarely are issues that create professional conduct problems for attorneys arising out of the first three methods. Even the global approach can usually be accomplished ethically by an attorney who is very cautious. But even when the lawyer is cautious, a global settlement can create issues when the lawyer realizes he would get less for himself and more for the client under one of the other options, and the lawyer still chooses to advise the client to accept a global settlement under which the lawyer gets more.[3]

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[3] In class actions, where the lawyer represents the class but cannot realistically have a discussion with the class about the fees, lawyers are typically careful to settle for the class before addressing fees. *See e.g. Nelson v. Wakulla County,* 985 So. 2d 564, 573 (Fla. 1st DCA 2008)(court has duty to review and approve the reasonableness of the attorneys' fees to minimize conflicts that may arise between the attorney and the class. This

Alternate fee recovery clauses to permit a higher fee from the insurance company. When a lawyer has a contract that results in a lower fee if paid by the client than the fee awardable under section 627.428, sometimes insurance companies or other parties who owe the fee under another fee-shifting provision will argue that the fee they should be required to pay should not exceed the fee the lawyer would charge his client. *See Forthuber*, 229 So. 3d at 899-900 (noting such arguments raised by insurer and rejecting them because "[t]he fee agreement between a lawyer and client, no matter how reasonable, does not control the amount of fees assessed against a third-party under a fee-shifting statute" in the context of an alternative fee agreement); *Royal Belge v. New Miami Wholesale, Inc.*, 858 So. 2d 336, 338 (Fla. 3d DCA 2003) (holding that a court cannot award attorney's fees under section 627.428 in an amount that exceeds the fee agreement between the attorney and client in the context of an agreement that provided only a fee based on a fixed percentage of the recovery).

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review "guards against the public perception that attorneys exploit the class action device to obtain large fees at the expense of the *class."); Ramirez v. Sturdevant*, 26 Cal. Rprt. 2d 554, 565 (Cal. Ct. App. 1994) ("the duty of counsel to promote the client's interest in obtaining the highest settlement amount [conflicts with] the interest of the attorney in obtaining satisfactory compensation for work done").

Alternate fee recovery clauses are used to make it clear that the attorney can get more from the insurance company than the attorney would charge his client. *First Baptist Church of Cape Coral, Fla., Inc. v. Compass Constr., Inc.*, 115 So. 3d 978, 981-82 (Fla. 2013); *Forthuber*, 229 So. 3d at 899-900. There is nothing wrong with such provisions.

But, as this case demonstrates, Mr. Strems' contract uses this alternate fee concept to charge fees to his client that are not set by a court or within his contingency fee percentage.

II. Mr. Strems' contract inherently creates conflicts with his clients from the inception of the attorney-client relationship and should be prohibited as unethical in the plainest of terms by this Court.

Although Mr. Strems violated Rule 4-1.4 because he did not communicate with his client before settling this case, he committed other violations as well. His worst violations arise because his contingency fee contract inherently creates conflicts with the client from the inception of the attorney-client relationship. Those conflicts are worse because of the practice of negotiating global settlements. But even if Mr. Strems' memorandum of November 9 was actually an accurate statement of what occurred, the negotiations with an insurance company's lawyer was an unethical method to set a fee for his client.

The critical language in Mr. Strems' "Contingent Fee Retainer Agreement," (A. 76), is easier to understand if it is examined sentence-by-sentence, starting with sentence two.

Sentence 2.

> *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*.

So long as this sentence applies to fees set by the court, or to fees negotiated separately following settlement of the client's claim, this sentence is not a problem. If it applies to a global settlement "achieved via negotiations" it creates major ethical problems because Mr. Strems would need to negotiate as an adversary with his clients to take his fee from the global settlement.

The proper, ethical function of such a sentence, properly written, is merely to serve as an "alternate fee recovery clause," making clear that the law firm is entitled to receive an award of fees from the insurance company that can be greater than the fee that would be charged to the client. So long as that is all such a clause is used for, there is nothing improper about an "alternative fee" language. But this sentence is not so written.

Sentence 3.

> *If a settlement included an amount for attorney's fees, attorney shall be entitled to receive all of its expended and/or negotiated fees.*

Again, so long as this text only covers a separate settlement of the fees that is negotiated after resolution of the client's claim that is adequately communicated to the client, these terms are appropriate. But if this sentence means the attorney is "entitled to receive all of its expended and/or negotiated fees" in a global settlement, there are two major problems. First, the "fees" are not separately "negotiated" with the insurance company during settlement negotiations based on a global settlement. The insurance company offers a lump sum and takes no position how Mr. Strems divides this money with his client. Second, if the offer is a global settlement, the contract does not even explain how to calculate the "expended" fee at the time of the settlement or even the hourly rates that will be used to calculate this fee. The client would never know how much of a global settlement she would eventually receive when entering into the contract. Even when the global offer is made, there is no basis for Mr. Strems to show her agreed upon billing amounts. He is postured to negotiate against his client on his own terms.

Sentence 4.

> *In all cases whether there is a recovery of court awarded fees or not, by contract or statue (sic), the fee shall be thirty percent (30%) or the awarded amount, whichever is greater.*

This sentence is the core of the problem for Mr. Strems in this case. The sentence is probably ambiguous, but it is understandable if there is a "court awarded" fee, i.e., an award determined by a judge. If there is an award of fees under section 627.428 by the judge, Mr. Strems receives a 30% contingency if that is bigger, or he gets the judge's award if that is bigger.

Why Mr. Strems would not think the court award would not be sufficient, and how he explains his right to use the contingency amount after the court determines a reasonable fee for him are very good questions for a case where he invokes this right. But this is not such a case.

Simply put, this case is not a case with a "court awarded" fee. Such cases are the exception at the Strems law firm (and at most firms) because lawyers strive to settle cases for their clients. That is what they should do.

Thus, this settlement falls under the "or not" language. Because there is no "awarded amount" when the fees is not awarded by the court, there can never be a greater awarded fee than the 30% contingency. This is why the

client's son, Dennis Nowak, who is a lawyer, properly objected to the fee taken by Mr. Strems.

Sentences 4 & 5.

> Pursuant to 627.428, Florida Statue, 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.

This is a reasonably accurate statement about the contents of section 627.428. But it is not a statement that once you agree to your "bottom figure" when the offer is $30,000, we will not negotiate to get you a higher settlement; we will negotiate for a higher amount and use the rest of the global recovery to pay ourselves up to the maximum possible amount. This sentence is misleading.

In this case, while it is important that Mr. Strems be appropriately sanctioned for his misconduct, it is even more important that this Court prohibit such contracts. Unless a lawyer uses a very careful two-step process with informed consent of his client, any fee established by settlement – and especially a global settlement – should be limited to a contingency fee amount. Contracts that allow the lawyer to pick the fee structure that benefits him at the expense of his client should be prohibited in the strongest terms.

The sanction in *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005) obviously did not deter Mr. Strems from creating a standard contract containing an inherent conflict with his clients and a settlement process that allows him to benefit from that conflict. The sanction here should be sufficient so that no lawyer is tempted again to benefit from this unethical practice.

III. Although the Referee correctly found a communications violation, the evidence supports additional violations.

A. Rule 4-1.4, Communication

The Report of Referee extensively explains this recommendation. (ROR61-67). This rule requires a lawyer to promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the rules. That includes a settlement after the opposing party substantially increases the offer.

Mr. Strems also needed to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" before he agreed to a settlement and afterwards when Dennis was rejecting that settlement for his mother and asking Mr. Strems to contact him.

He needed to "keep the client reasonably informed about the status of the matter," and despite prompting from Mr. Camejo and the emails he

received, Mr. Strems did not keep his client reasonably informed. There are multiple times in this case when Mr. Strems violated this rule himself.

Mr. Strems structured his law firm so that he had control of a substantial percentage of the settlements. While some communications with clients can be delegated adequately to another attorney, no one communicated with the client before Mr. Strems accepted the new offer, and when the dispute arose the lawyer who called the client, Mr. Strems' "client support" lawyer, did not have authority to resolve the disagreement. If he intended to handle thousands of cases in this fashion, he had to be the one communicating with his clients and obtaining informed consent. But he was too busy trying to expand his law firm to talk to clients – even an elderly woman living in a home with major hurricane damage.

The Referee recommends that this Court find Mr. Strems guilty of this violation, and he does not challenge that recommendation.

B. Rule 4-1.2, Objectives

Rule 4-1.2 requires a lawyer to abide by the client's decisions. It plainly states that a lawyer "must abide by a client's decisions concerning the objective or representation" and on the client's decision "whether to settle a matter."

After finding that Mr. Strems did not communicate the settlement to his client, the Referee is not recommending a violation of this rule even though Ken made clear in his emails to Mr. Camejo that he hoped Mr. Strems would get more money for his mother given that her home had damage beyond the roof. Dennis made it clear in his email that his mother's claim would not be settled on the terms that Mr. Strems discussed with Mr. Feldman.

Mr. Strems not only failed to advise Mr. Feldman that the settlement could not go forward using the fee split on the checks he had requested from FPIC, but after this Bar complaint was filed, his firm responded to the notice of failure to prosecute explaining that the case should be kept open to enforce the settlement; to enforce the settlement against his client whose objectives he was ignoring.

The clear and convincing evidence demonstrates that Mr. Strems did not abide by his client's objectives. Although the Referee recommends that this Court not find this violation, (ROR-60), the Report does not appear to explain why this recommendation is made. The Report does not appear to have any finding that Mr. Strems abided by his client's objectives. This Court should find a violation of this Rule.

C. Rule 4-1.7, Conflict with current client

The comments to this rule explain that a conflict can arise that prohibits representation "from the lawyer's own interests." A lawyer cannot represent a client if there is a substantial risk that the representation will be materially limited by "a personal interest of the lawyer." In some instances a client can waive the conflict by giving "informed consent, confirmed in writing or clearly stated on the record."

As explained in the preceding section, the conflict was born when the client signed Mr. Strems' standard contact. Mr. Strems' contract provides that "whether there is a recovery of court awarded fees or not," he will be able to pick either a 30% contingency fee or the "amount awarded" whichever is greater. And he interprets his own contract to allow that amount to be determined by his negotiations with defense counsel.

It is really hard to imagine the conversation necessary to explain this contract to a potential client in order to obtain informed consent as that concept is explained in the Preamble to the Rules of Professional Conduct. It probably is a conflict that would require referral to another lawyer to obtain such consent; and no lawyer would advise a client to sign this. It is an unwaivable conflict because no discussion could reasonably explain this prior to obtaining written consent, which certainly not obtained here.

The conflict became more serious when he prepared his memo and had the fee split information sent to Mr. Feldman. Given the hours he had spent reviewing this file, he had to know he was supposed to try to negotiate for the mother and obtain a better result for her. Even if he really settled her claim before he settled his own, he knew the settlement was coming from an offer of $45,000. He was negotiating against his client with a lawyer who did not represent her.

But the conflict comes to a full head, when Dennis objects to the closing statement. Because Mr. Strems did not have written or even verbal consent to settle his client's case for the "bottom" amount when the offer increased 50%, his unilateral decision to give himself all of the increased offer – followed by his decision to maintain this position despite Dennis' correct reading of the contract – prohibited him from continuing the representation. He was not allowed to stay in the case to keep the file open to enforce it against his clients. If he was standing by his closing statement, he had to withdraw.

The Referee relied on a comment to Rule 4-1.7 indicating that the loyalty owed to a client is not impaired if the conflict does not foreclose alternatives that would otherwise be available to the client. (ROR-50). The Referee concluded a conflict did not exist because "SLF continued to

negotiate remaining terms of the settlement agreement with the insurer." (ROR-53).

But Mr. Strems did not resolve the fee split with his client or inform the insurance company's lawyer that the settlement could not go forward due to the unresolved split of the global offer. His "client support" lawyer was not authorized to resolve the conflict. He did not suggest to Dennis that they finalize a settlement and resolve the fees later. He simply stopped communicating. The "remaining issues" the Referee references are issues that were resolved before the client ever received the fee split information on the closing statement.

The competent substantial evidence in this record clearly demonstrates a conflict with a client. A conflict actually created by Mr. Strems. There is no competent substantial evidence to support the Referee's recommendation on this violation.

D. Rule 4-1.5, Excessive Fees

A lawyer may not charge a clearly excessive fee under Rule 4-1.5. The Bar's position on this is very simple: a fee in excess of the amount that can be charged under the terms of the contingency fee retainer agreement is clearly excessive. Just like the 53% fee was excessive in *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005), because it was not actually approved

by a court and exceeded the contingency fee specified in the contract, the same is true here. As a matter of law, the reference to "amount awarded" when there is no amount awarded by the Court or even agreed to by the client, gives Mr. Strems no good faith basis to ever claim a fee above the 30% contingency fee.

Mr. Strems knew when Dennis sent him the email that he did not have an "amount awarded" documented in his file that he could ethically charge to his client. He knew the only legal option under their agreement was to charge a 30% contingency fee even if he believed the language of his contract was actually ethical. And yet he did not alter his fee or even offer to mediate or arbitrate the matter.

This is not an ordinary fee dispute between a lawyer and client. This dispute arises because Mr. Strems created a "contingency" fee agreement that allows him to override the percentage contingency fee. Once he knows the minimum amount his client will take, he can charge his client a fee that consumes all of the insurance companies offer that exceeds the minimum amount. It allows him to self-deal concerning the "amount awarded" while disclosing little or nothing to the client.

The competent substantial evidence clearly supports a violation of Rule 4-1.5 because the fee is excessive even under the terms of the contract.

The violation is worse because the option to charge the client a fee that is not based on a percentage contingency in the context of such a global offer is so patently a conflict that Mr. Strems had to know it was ethically unenforceable.

There is extensive testimony in the record from two fee experts that came on the scene mid-trial on whether the fee would be excessive as a loadstar fee. But the Bar does not need to contend in this review that the fee would be necessarily excessive if a loadstar analysis were applicable.

Simply put, the contingency fee contract controls and not a loadstar analysis that would be used to set a fee under section 627.428 against a third party. This Court's case law allowing loadstar fees and multipliers in cases against insurance companies, such as the recent decision in *Joyce v. Federated National Insurance Company*, 228 So. 3d 1122 (Fla. 2017) is based on the premise that the insurance company breached a contract to its insured. It is not a true sanction, but it is a disincentive for insurance companies to process claims improperly.

The concept of incorporating a loadstar, and especially a multiplier, into your retainer agreement with your client is mind-boggling. The concept of using that structure against a client, instead of a fixed contingent percentage,

when an insurance company offers a global settlement certainly has never been authorized in any case by this Court. It should not be authorized here.

The narrow issue that the fee was in excess of the lawful contract amount got lost before the Referee in the forest planted by Mr. Strems in the extensive testimony about the law of section 627.428, Florida Statutes.

Much of the expert testimony discusses a document produced by Mr. Strems that looks like an invoice to a client. (Ex.-V). But it is not. It was an after-the-fact creation apparently trying to justify a loadstar amount. It is comparable to what many law firms create when they are entitled to fees under a statute, a contract, or a proposal for settlement. It is the kind of document that Mr. Strems would use to negotiate his fee with an insurance company after he won at trial.

The document also resulted in lots of misdirection during the hearing, and the Bar did have a count for misconduct during the disciplinary matter relating to the late-produced November 9 memorandum and the problems created during this proceeding. But Mr. Strems did not testify in this case and the Bar does not seek review of the recommendation against a finding of guilt on the Rule 4-8.1 charge of misconduct during a disciplinary proceeding.

IV. A public reprimand is not supported by the Standards or the case law, especially as a concurrent sanction with the sanction in SC20-805.

The Referee is recommending a public reprimand concurrent with the sanction imposed in SC2-805. This recommendation is based only on Standard 7.1(c), which provides for a public reprimand for negligent conduct that is a violation of a professional duty and causes injury or potential injury to a client. (ROR68, 77-78). As explained in the statement of facts, the sanction hearing was held prior to the Referee's decision on the recommended violations, which made it difficult for both sides to argue the appropriate penalty. But each of the Standards and the aggravating and mitigating factors discussed here were discussed at the sanction hearing. (TS33-46).

The Bar maintains that the Referee should have recommended the additional violations discussed earlier. Although the Bar maintains that a public reprimand would not have a reasonable basis in the Standards and the case law even for the communications violation, it is clearly insufficient if one or more of the additional violations are included.

A. The applicable Standards "absent aggravating or mitigating circumstances"

Standard 4.3. This Standard addresses failures to avoid conflicts of interest. In subsection 4.3(a)(1) it states:

> *Disbarment is appropriate when a lawyer causes serious or potentially serious injury to the client and, without the informed consent of the affected client(s): (1) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another*.

When Mr. Strems negotiated the settlement without informed consent from the client and wrote his self-serving memorandum on November 9, 2018 – even without the language in his contract creating a conflict – he had enough experience to know that his interests were adverse to Ms. Novak. Because he would not address this problem when it became completely evident in January, the funds to repair her home were not delivered until after her death. This Standard applies.

At a minimum, Standard 4.3(b) applies:

Suspension is appropriate when a lawyer knows of a conflict of interest, does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Standard 4.6. This Standard addresses lack of candor and provides recommended sanctions for cases where the lawyer engages in fraud,

deceit, or misrepresentation directed toward a client. Subsection 4.6(a) and (b) state:

> *(a) Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client.*
>
> *(b) Suspension is appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to the client.*

It is the Bar's position that Mr. Strems deceives his client in his contingency fee agreement, and that he specifically misrepresented the facts in his November 9 memorandum, and in January when he stood by his incorrect closing statement. That deception was intentional in January and designed to allow him to keep a fee in excess of 30%. At a minimum, this conduct qualifies for a suspension.

Standard 7.1. As explained above, the Referee relied on Standard 7.1(c), which recommends a public reprimand for negligent conduct. But subsections (a) and (b) state:

> (a) *Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.*
>
> *(b) Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.*

Mr. Strems' violation of a professional duty was done so that he could keep a higher fee than 30%. The Referee reasoned that Ms. Novak was not harmed because Mr. Strems paid $31,500 after she died, and the cost to replace the roof was $13,500. (ROR69). But the reason that Ken wanted more, if possible, was because the house had other damages, as is borne out by the photographs that Mr. Strems placed into evidence. (R27-33).

The Bar submits that the clear and convincing evidence does not support a finding that Mr. Strems negligently set his fee from the global settlement when he did not even have authority to settle the client's indemnity claim. Even if he thought he had that authority, he did not negligently maintain he was entitled to that fee in January when he did not respond to the email from Dennis and had underlings with no settlement authority communicate with his client.

Thus, the Standards, especially if this Court adds one or more of the additional violations, support a suspension or disbarment without reference to the other case awaiting a sanction.

B. The applicable mitigating and aggravating circumstances.

Mitigating Circumstances. The Referee found that Mr. Strems had presented evidence to support:

(1) Standard 3.3(b)(7), character and fitness;

(2) Standard 3.3(b)(2), absence of a dishonest or selfish motive;

(3) Standard 3.3(b)(timely good faith effort to make restitution).

The Bar does not contest the finding that he established character and fitness. But the Referee found there was no evidence that Mr. Strems was dishonest or selfish in this case because there was no evidence that he would benefit personally from this misconduct. The Referee reasoned that the excess fee was going to the Strems' Law Firm instead. Given Mr. Strems' ownership of this law firm, that reasoning seems very flawed. His motive in settling without informed consent and in ignoring the problem once it came to a head, was both dishonest and selfish.

As to restitution, Mr. Strems did make restitution. Whether it was timely and in good faith is the issue. The client agreed that the case could be settled with FPIC for $45,000 and Mr. Strems would have known that if he had communicated with the client. The client disagreed on his right to take more than 30%. He had the absolute ability in January to limit the dispute to the amount over $22,500. He could have paid Ms. Nowak that amount in January to allow the roof to be repaired while she was alive, and simply held the rest in trust while they resolved the fee issue. But instead, he did nothing and allowed the settlement with FPIC to languish while the lawsuit was kept

alive to enforce the settlement. The Bar submits that the evidence does not support this mitigating factor.

Aggravating Circumstances. The Referee found that Mr. Strems had presented evidence to support:

(1) Standard 3.2(b)(a), Prior disciplinary offenses (the pending proceeding);

(2) Standard 3.2(b)(8), Vulnerability of victim;

(3) Standard 3.2(b)(9), Substantial experience in the law.

In addition to these factors, the Bar submits that it proved by clear and convincing evidence:

(4) Standard 3.2(b)(2), dishonest or selfish motive. This aggravating factor is the corollary to the mitigating factor discussed above. The Referee seems to think the law firm was selfish, but not Mr. Strems. The Bar submits that both logically and factually it is Mr. Strems who is selfish in this context.

(5) Standard 3.2(b)(4), multiple offenses. The Referee did not find this factor because she found only one violation. If this Court accepts the arguments in this brief, there are multiple offenses.

The Bar discussed Standard 3.2(b)(7), refusal to acknowledge wrongful nature of his conduct with the Referee at the hearing. (TS35-36). The Referee's Report neither finds this factor nor rejects it. It is true that Mr.

Strems does not acknowledge the wrongful nature of his conduct. But Mr. Strems did not testify at the sanctions hearing. He did not testify at all. Because the Referee did not announce the violations before the sanctions hearing, the Bar mentions this factor simply to point out that he was not in a procedural posture where he was obligated to show remorse prior to the Referee's Report.

The Bar submits that the balance among these factors, even without adding the additional factors that the Bar did prove, does not support any downward adjustment for the sanction. When selfish motive is moved from one side of the scale to the other and multiple offenses are added, these factors weigh in favor an increased sanction. Obviously, the sanction imposed here will have no impact if this Court imposes a permanent disbarment in SC20-806. But if this Court were considering disbarment with a right to reapply in five years or even a three-year suspension in the earlier case, the sanction here should warrant an increased overall sanction.

C. The Case Law

The Referee relies heavily on *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005) to justify a public reprimand. (ROR74-75). What the Referee seems to overlook is that *Kavanaugh* is the case where this Court put lawyers on notice that they could not do precisely what Mr. Strems

actually incorporated into his standard contingency fee agreement more than ten years later.

In *Kavanaugh*, after the lawyer could not convince a car dealership to cancel his client's automobile lease, he entered into a revised engagement to sue the dealership. The new engagement allowed him to receive "the greater of the amount awarded by the Court (to be paid by the defendant) or that amount determined according to the following schedule." The schedule was a contingency fee schedule. *Id*. at 91. When the case settled for $44,868.06, the lawyer took a 53% fee instead of the scheduled 40% fee. His justification for this higher fee, as explained in the opinion, was that his settlement was "equivalent" to court ordered fees. *Id*. The Referee found that the lawyer "arbitrarily" awarded himself the 53% fee. This Court agreed.

The public reprimand in that case was based significantly on a finding that the lawyer had obtained an exceptional result. *Id*. at 94. The Referee in Mr. Strems' case thought his result for Ms. Nowak was "arguably an excellent result." (ROR75). But she based that qualified finding on the $31,500 payment made after the client's death. The Report repeatedly explains that the settlement numbers discussed by Ken were his "bottom line," not the amount needed to repair all of the damage. (ROR9-13). Mr. Strems stopped negotiating for his client and started negotiating for himself

when he reached the client's bottom amount. And that occurred after Mr. Camejo promised that Mr. Strems would negotiate for a better offer. This is hardly an excellent result.

But far more important, the *Kavanaugh* decision plainly explained that a sentence like – "In all cases whether there is a recovery of court awarded fees or not, by contract or statue, the fee shall be thirty percent (30%) or the awarded amount, whichever is greater" – has no place in a Florida lawyer's contract. Mr. Kavanaugh probably just made a mistake in this one contract with a client. But Mr. Strems added the concept, "whether there is a recovery of court awarded fees or not" to his standard contract that somehow can be signed in the field on an Ipad. The Bar is here today asking this Court to write another opinion that clearly announces that a contract like Mr. Strems is a violation of professional conduct.

Thus, Mr. Strems cannot rely on *Kavanaugh* as authority in 2018 for a public reprimand. The new harsher sanction policy of this Court aside, the *Kavanaugh* decision was published to stop this practice, not to give him assurance that he would get a public reprimand for making this practice his standard operating procedure.

Without regard to the pending proceeding which warrants disbarment by itself, this situation, by itself, justifies a long-suspension or disbarment.

That harsher sanction is needed to protect the public. It is needed to punish Mr. Strems. And he is proof positive that it is needed to deter other lawyers in the future from committing the misconduct this Court tried to stop in *Kavanaugh*.

CONCLUSION

The Court should find Mr. Strems guilty of violations of Rule 4-1.4 as recommended by the Referee, but also of Rule 4-1.2, Rule 4-1.7 and Rule 4-1.5 because those violations are clearly proven by the competent substantial evidence in this record. Standing alone, these violations warrant at least a long rehabilitative suspension, but the sanction in this case should be imposed along with the sanction for the pending violations in SC20-805. Collectively they warrant a permanent disbarment.

Most of all, this Court should announce that contracts like the one used by Mr. Strems are unauthorized and a violation of the Rules of Professional Conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 2nd day of August, 2021 to:

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