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
REPLY BRIEF

John D. Womack, Esq.
Fl. Bar No. 93318
Bar Counsel
The Florida Bar
444 Brickell Ave., Suite M100
Miami, FL 33131
(305) 377-4445
jwomack@floridabar.org

Chris W. Altenbernd, Esq.
Fl. Bar No: 197394
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Fax No: (813) 222-3066
caltenbernd@bankerlopez.com

Patricia Ann Toro Savitz, Esq.
Fl. Bar No. 559547
Staff Counsel
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
psavitz@floridabar.org

Joshua E. Doyle, Esq.
Fl. Bar No. 25902
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
jdoyle@floridabar.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STANDARDS IMPOSING LAWYER SANCTIONS

STATUTES

RULES REGULATING THE FLORIDA BAR

PRELIMINARY STATEMENT

Mr. Strem's Cross-Review Initial Brief/Answer Brief will be cited as (AB. p.*).

REPLY STATEMENT OF THE CASE AND FACTS

The Florida Bar's initial brief very carefully presented the facts concerning the insurance claim and its settlement. It attempted to tell the facts in a coherent fashion that would be helpful in analyzing the issues in this case. It did so citing to transcript evidence from witnesses that the Referee found credible. It relied on the text of documents from Mr. Strems' law firm, and on the text of emails that are not in dispute. It identified one matter upon which there was a factual dispute.

Without actually identifying any facts that Mr. Strems believes to be inaccurate, unsupported or even exaggerated, Mr. Strems presents a "narrative summary of the case" that quotes or paraphrases extensively from the Report of Referee but does not really tell a cohesive version of the facts. One of the difficulties in this case, and in the other cases involving this Referee, is that the Reports contain narratives, and snippets of portions of the transcript, but not other equally important portions of the transcript. They contain copies of some exhibits, but not others. The Report in this proceeding does not really provide traditional findings of fact to establish a version of events relevant to a charged violation.

The Bar will discuss these facts more in the specific sections of this brief, but two matters warrant comment now.

First, there is a disagreement about whether the discussion between Mr. Strems and Mr. Feldman that resulted in the global $45,000.00 settlement was actually a two-step settlement process or a unified, global settlement. Mr. Strems late-produced memorandum recites that the two men first agreed to a $22,500 settlement for the client and then further negotiated a $22,500 settlement for the law firm; that they engaged in a two-step settlement. Mr. Strems, of course, did not testify in this case and did not claim under oath that this actually happened.

Mr. Strems' brief claims that there was no evidence contradicting his memorandum. (AB 43). But Mr. Feldman sent a contemporaneous email when the case was settled confirming that the two men "reached a global settlement in the amount of $45,000" and asking for the "settlement checks/breakdown," which he would have already known if Mr. Strems' memo were accurate. (A. 50). He testified he did not recall these negotiations, but he estimated that 95% of his cases were settled with global settlements, not two-step settlements. Thus, there was ample evidence disputing the accuracy of the self-serving memorandum.

The Report of Referee discusses this dispute at length at pages 54 to 59 of the Report, but it never really states that the Referee "finds" that Mr. Strems' memo is accurate and Mr. Feldman's email is not. Instead, after

finding Mr. Feldman credible on page 17 of the report, the Referee finds that Mr. Strems "negotiated a settlement and unilaterally decided on the fee he would take from that settlement." (ROR 69). At another location, the Referee finds that "Mr. Feldman confirmed a global settlement with the breakdown instructions email of November 9, 2018." (ROR 62). Thus, the Referee appears to give credence to Mr. Feldman's email. While Mr. Feldman could not recall the negotiations, he thought a non-global settlement would have been memorable. (T608). Mr. Strems did not testify one way or the other about what he recalled from the negotiations. The Referee never really determines that the memo or the email is the more credible record of the settlement.

Second, Mr. Strems says that the Bar is asking this Court to hold and announce that a contract containing the language of Mr. Strems' contract is prohibited under the Florida Rules of Professional Conduct when the Bar did not ask the Referee to so hold. It is true that the Bar wants this Court to so hold. That is important to prevent more violations like this one. If there really are other lawyers using this contract with its inherent conflict, they need to be cautioned to stop that practice now.

But the Referee's job was only to make findings of fact and recommendations of guilt as to the elements of the charged violations, and

to make a recommendation as to a sanction for this case. In so doing, the Referee inserted the entire contract into the Report and concluded that it was not "illegal." (ROR 41).

The Bar submits that that the actual issue for this Court is whether the use of such a contract is improper under the Rules of Professional Conduct. The Referee was not delegated the task of resolving the Bar's broader concern with the contract. The violations may have occurred in large part because the contract created an environment that allowed for the violations, but what the Bar is asking this Court to do in this case is: (1) resolve the disciplinary charges in this case against Mr. Strems, and then (2) take the next step of announcing that such a contract is improper under the Rules of Professional Conduct so that this fact pattern will not repeat itself. This second step is one for this Court alone; it was not the job of the Referee.

REPLY ARGUMENT

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

The Bar is not seeking any "wholesale alteration" of the law allowing insureds to recover fees from insurance companies in insurance coverage disputes governed by section 627.428, Florida Statutes. (AB 41). The attorney should be able to recover a loadstar fee in excess of a contingency fee when that fee is actually awarded by the court. *See First Baptist Church of Cape Coral, Fla., Inc. v. Compass Const., Inc.,* 115 So. 3d 978, 980 (Fla. 2013).

After negotiations to obtain the best settlement reasonably available for a client, and after the client's contemporaneous acceptance of that settlement, attorneys and insurance companies should be able to negotiate and settle the fee claim without taking up the court's time.

But a lawyer should not be able to set his client's "bottom" amount prior to litigation – as Mr. Strems admits occurred in this case, (AB 17) – and then negotiate simultaneously a settlement with the carrier for his client's "bottom" amount and the maximum fee he can achieve for himself. This is especially true when that maximum fee exceeds the 30% contingency agreement in his contract. That is what Mr. Strems admits that he did here. And he claims it is okay because his contract allows for this practice.

In this section of the initial brief, the Bar carefully explained the four recognized ways to settle such a claim. Mr. Strems takes no exception to the Bar's legal analysis. Instead, he relies almost exclusively on his memorandum dated November 9 to claim his settlement occurred under the third approach as a two-step settlement, and not the global fourth approach described in Mr. Feldman's email.

But he does not claim there has ever been any case from this Court or from any district court of appeal that allowed an "awarded amount" to be determined between the insurance company and the lawyer without even bothering to contact the client to confirm the first settlement or to obtain authority to finish the negotiations for an amount in excess of the contingency fee percentage. There was nothing court-approved or court-awarded about the fee that he took from this settlement as an "awarded amount." Even if his memorandum is accurate, it proves the violations; it is not proof to the contrary.

Mr. Strems claims that a closing statement was "submitted to the client for review and approval before any settlement was consummated." (AB 44). Actually, the first closing statement in January 2019 was rejected by the client. (A. 160). The second closing statement in May 2020, following the

client's death, gave the client $31,500 – not the $22,500 "bottom" amount. It was not based on Mr. Strems' reading of his contract.

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.

Mr. Strems claims that his "agreement called for fees of a contingent 30% of the amount recovered or statutory fees pursuant to § 627.428, Florida Statutes, whichever is greater, plus costs." (AB 46). If this were actually the case, his contract would look a lot like the contract most lawyers use. But as carefully explained in the initial brief, the key sentence in his contract says:

> ***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.* (A. 76) (emphasis supplied).

He has created the novel device of an "awarded amount" even when there is no recovery of a court-awarded fee. No case law permits this. None. He either awarded himself this amount unilaterally or Mr. Feldman agreed that Mr. Strems could award himself this amount and then forgot the event. Whichever may be the case, setting such a fee, which is taken from the client's settlement – leaving the client only the "bottom" amount – is unethical. The contract written by Mr. Strems inherently creates a conflict with his client. His client wants the fee to be 30%, and Mr. Strems wants

more. So Mr. Strems' law firm negotiates its client down to her minimum amount, and then Mr. Strems settles with the insurance company for a much larger amount while giving the client the minimum amount and setting his own "awarded mount" by keeping the rest.

This Court needs to write to explain that a contingency fee contract can provide for an alternative higher fee separately set by the court to be paid by an insurance company or separately negotiated after the client's claim is resolved and accepted by the client, but that a lawyer cannot have an "awarded amount" provision that allows for a fee in excess of the contingency fee that is determined without contemporaneous, written informed consent of the client.

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

A. Rule 4-1.4, Communication

No reply required.

B. Rule 4-1.2, Objectives.

Mr. Strems argues that he fulfilled his client's objectives by the larger settlement payment following her death and after her son, Dennis, had filed the Bar complaint. But that settlement was hardly abiding by his client's "decisions concerning the objective or representation." Frankly, determining

the least amount that your client will take and then working to obtain a higher settlement only for your own benefit is not abiding by your client's decisions concerning the objective; it is the result of failing to communicate to obtain decisions about objectives during negotiations. But here, Mr. Camejo promised to try to get "more" for the client, and Mr. Strems, as the negotiator, made no effort to do that at all.

Mr. Strems emphasizes the Bar's burden of proof, but his own file establishes he did not abide by his client's objectives. He abided by his own objectives.

C. Rule 4-1.7, Conflict with current client

Mr. Strems relies on the Referee's discussion on page 53 of the Report to demonstrate he had no conflict with his client. That discussion simply demonstrates the Referee's confusion. The Referee concludes that Mr. Strems had no conflict with his client because – after the conflict arose, and the Bar complaint was filed by her son, and the client died – Mr. Stems acceded to a better settlement for his client's sons.

The Referee simply did not understand that the conflict existed during and before the negotiations with Mr. Feldman. The settlement of the dispute created by the conduct in conflict with the client's interests does not mean the conflict never existed. As explained earlier, when Mr. Strems decided to

set himself an “awarded amount ” in excess of his contingency fee, he had a conflict of interest with his client, and he had to know it was a conflict.

D. Rule 4-1.5, Excessive Fees

Mr. Strems’ answer does not really address the issue presented in the Bar’s initial brief. The Bar’s position is that the fee is excessive under the valid terms of the parties’ lawful contract. Mr. Strems is not entitled to a loadstar amount from his client merely because he could separately negotiate a settlement for himself for a loadstar amount from an insurance company. He is not allowed to set his own “awarded amount” against his client. He has a contract in which he has agreed with his client to take 30% or the awarded amount. Despite his misleading contractual condition – “whether there is a recovery of court awarded fees or not” – there can be no “awarded amount” set by himself. He is required to take a 30% contingency unless he engages in a genuine two-step process where he actually resolves his client’s claim for the most he can obtain for the client (with her knowledge and acceptance of that settlement) and then separately negotiates his own fee with the insurance company.

Admittedly, in the settlement negotiated in May 2020, following the filing of the Bar complaint by the son, Mr. Strems did resolve this matter for essentially the 30% fee. But that occurred only after he and his staff were

insistent that he was entitled to a fee in excess of this amount. The violation occurred when he tried to obtain payment of the higher fee, not when he eventually agreed to take a lower fee.

Notably, Mr. Strems' fee expert, Mr. Boyar, did not claim that he used an "amount awarded" agreement. When he received a global settlement offer, he took only the contingency fee because "the whole offer needs to go to the client." (T1227-28). If he negotiated his fee separately, Mr. Strems' expert explained that his client "would know that before taking the whole amount." (T1228). Mr. Boyar was not Mr. Strems' expert on the ethical considerations in this case, but only on the methods used to set fees under the statute. Under Mr. Boyar's own practice, this fee would appear to be excessive.

If Mr. Strems had actually negotiated a settlement just for his client, getting her the highest amount he could get the insurance company to pay, then he could have gone to Court and he could have sought a loadstar fee from the insurance company that exceeded the fee he actually received. That fee would not have been excessive vis-à-vis the insurance company. That does not mean that the fee he sought from his client was not excessive vis-à-vis her.

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.

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

Standard 4.3 Conflicts of Interest. Mr. Strems argues that the standard for disbarment does not apply "in the absence of 'serious or potentially serious injury to the client….'" (AB 56). This argument is apparently based on his settlement with the sons following the death of their mother.

But the conflict created by Mr. Strems when relying on the "amount awarded" language in his contract to negotiate only for her "bottom" amount and not seeking a higher payout was not really resolved by the settlement. And as explained in the initial brief, he could have paid his client $22,500 in January 2019, to cover the repair of the roof, and then could have held the rest in trust pending a resolution of the fee dispute over his claim for a larger fee. But he took no steps to do this.

Even if this Court concludes the potential injury is not "serious" despite the fact it arises from Mr. Strems' standard engagement agreement, Standard 4.3(b) states that a suspension is appropriate when the lawyer's conduct causes only "injury or potential injury," which clearly is satisfied in this case.

Standard 4.6 Deception of a Client. Mr. Strems presumably maintains that he did not deceive this client with the content of his "Contingent Fee Retainer Agreement." But he does not argue this in his brief in response to the Bar's argument that he deceived his client in that agreement by using his novel "amount awarded" to set fees without court approval. (AB 56). He does not respond to the argument that he was deceptive in January 2019 when he failed to answer Dennis's email questioning whether the closing statement was an effort to override the engagement agreement, and when he had a staff member, with no authority to resolve the issue, contact Dennis. (IB 14).

He argues that he was not deceptive in his November 9 memorandum. (AB 48). As discussed earlier, the Referee does not expressly find that Mr. Strems' memorandum was or was not deceptive. While the Bar submits that Mr. Feldman's email confirming a global settlement is the more reliable evidence, it admits that the Referee does not make a finding of fact on this.

Standard 7.1. Mr. Strems argues that the Referee properly relied on the negligent conduct prong of this Standard because "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." (AB 56). What it had authority to do and what Mr. Strems did are two very different things. And,

as argued in the initial brief, Mr. Strems' conduct in January 2019 when he declined to respond to Dennis's email was an intentional effort to keep the "amount awarded" for his own benefit. The sanction for either an intentional or a knowing violation of this Standard should apply in light of the facts in this case.

B. The applicable mitigating and aggravating circumstances

Mr. Strems claims that the Bar argues, supposedly at page 35 of its initial brief, that this Court is obligated to make its own determination of these factors. (AB 54). Actually, the Bar recognizes that the Referee's finding of the existence of a factor, as a factual matter, is reviewed to determine whether the finding is clearly erroneous. (IB 21).

But the Bar does submit that the weighing of competing factors is a mixed question of fact and law, which is one of the reasons that this Court's review of the recommended discipline is broader than the review of factual findings. The referees rarely explain this weighing process, and in fulfilling this Court's ultimate responsibility to order the appropriate sanction, this Court does need to weigh the competing factors.

Nevertheless, in this case, two of the factors found by the Referee are clearly erroneous.

First, concerning the mitigating factor of absence of a dishonest or selfish motive and the corollary aggravating factor of dishonest or selfish motive, Mr. Strems argues that the Referee found that a selfish motive was not proven. (AB 57). It is true, as discussed in the initial brief, that the Referee made this finding. But it was based on a theory that the funds "would be provided to SLF." (ROR 72)(IB 50). Mr. Strems was the sole owner of SLF. By determining the "amount awarded" to the law firm, he was determining an amount that would benefit him. The Answer Brief has no response for this. The Referee's reasoning was incorrect as a matter of law, and the finding of fact was also clearly erroneous.

Second, concerning a timely good faith effort to make restitution, Mr. Strems and the Referee rely on the settlement with the sons on May 21, 2020. But factually and legally, this is not a timely good faith effort to resolve the dispute that Dennis clearly presented to Mr. Strems in his January 2019 email. The May 2020 settlement occurred more than fifteen months after Mr. Strems did not communicate with Dennis in January, and after Dennis sent his Inquiry/Complaint Form to the Bar in February. It occurred only twenty-one days before the filing of this proceeding. If Mr. Strems had resolved this matter with his client in January 2019 – or even if he had agreed to give her the undisputed $22,500 at that time, settle with the insurance company, and

resolve the remaining fee dispute promptly – the Bar would agree that the restitution was "timely." But Mr. Strems did not do this. Both factually and legally, this is not a "timely" act of restitution performed in "good faith."

C. The Case Law

Both sides rely primarily on *The Florida Bar v. Kavanaugh,* 915 So. 2d 89 (Fla. 2005). Mr. Strems maintains that *Kavanaugh* is merely evidence of a comparable case that supports a public reprimand.

The Bar submits that Mr. Strems' "amount awarded" provision in his Contingency Fee Retainer Agreement simply codified for use with all of his clients in 2017 the misconduct that Mr. Kavanaugh engaged in for a single client in 2001. The Bar submits that *Kavanaugh* was fair notice to Mr. Strems that he could not ethically create a standard procedure setting a fee that he decided was "equivalent" to an awarded fee because such a provision violates the Rules of Professional Conduct and creates an inherent conflict with his clients. But he intentionally inserted a fee provision into his contract, granting himself the "equivalent" of a court-ordered fee "whether there is a recovery of court awarded fees or not." He did this for the purpose of charging his clients fees in excess of the 30% contingency amount without court approval and while negotiating only for his client's bottom amount. The

Bar submits that this conduct warrants a permanent disbarment if the sanction is imposed with the sanction in SC20-805.

Respectfully submitted,

/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.
Florida Bar No: 197394
Email: service-caltenbernd@bankerlopez.com
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Fax No: (813) 222-3066

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 25th day of October, 2021, to:

Scott K. Tozian, Esq.
Gwendolyn H. Daniel, Esq.
Smith, Tozian, Daniel & Davis, P.A.
109 N. Brush St., Suite 200
Tampa, FL 33602
stozian@smithtozian.com
gdaniel@smithtozian.com
Attorney for Respondent

John D. Womack, Esq.
444 Brickell Ave., Suite M100
Miami, FL 33131
jwomack@floridabar.org
Attorneys for The Florida Bar

Patricia Ann Toro Savitz, Esq.
651 E. Jefferson St.
Tallahassee, FL 32399
psavitz@floridabar.org
Attorneys for The Florida Bar

Benedict Kuehne, Esq.
Kuehne Davis Law, P.A.
100 SE 2nd St., Suite 3105
Miami, FL 33131
Ben.kuehne@kuehnelaw.com
Attorney for Respondent

Kendall Coffey, Esq.
Coffey Burlington, P.L.
2601 S. Bayshore Dr., Penthouse
Miami, FL 33133
kcoffey@coffeyburlington.com
service@coffeyburlington.com
Attorney for Respondent

Nelson David Diaz, Esq.
LNL Law Group, PLLC
10945 SW 82nd Ave.
Miami, FL 33156
ndiaz@lnllawgroup.com
Attorney for Respondent

/s/ *Chris W. Altenbernd*
Chris W. Altenbernd, Esq.

CERTIFICATE OF TYPE SIZE & STYLE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rule of Appellate Procedure 9.045. The font is 14-point Arial. The word count is 3609. It has been calculated by the word-processing system and excludes the content authorized to be excluded under the rule.

/s/ *Chris W. Altenbernd*
Chris W. Altenbernd, Esq.