IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

SCOT STREMS,

Respondent.

_____/

Supreme Court Case
No. SC20-842

The Florida Bar File No.
2019-70,468(11C)

AMENDED REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

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

On June 11, 2020, The Florida Bar filed its Complaint against Respondent, Mr. Scot Strems. From February 22, 2021 through March 4, 2021, a trial was held in this case (the "Trial"). The Respondent was represented by attorneys Benedict P. Kuehne, Nelson D. Diaz, and Scott K. Tozian, and The Florida Bar was represented by attorneys John Derek Womack, Jennifer Falcone, and Arlene K. Sankel. On March 5, 2021, a Sanctions Hearing was held.

All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence, and the Report of Referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

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

Narrative Summary of the Case. The testimonial and documentary evidence has established that on September 10, 2017 the home of Margaret J. Nowak located at 450 NW 69th Terrace, Margate, Florida sustained damages as a result of Hurricane Irma. Six days later, on September 16, 2017, Margaret J. Nowak retained the Strems Law Firm PA ("SLF") to represent her in a damage claim against her insurer, Florida Peninsula Insurance Company ("FPIC). Ms. Nowak was directed to an independent insurance adjuster through a trusted friend and then to SLF. Dennis Nowak, Esq. and Kenneth Novak, two of Ms. Nowak's sons, were not aware Ms. Nowak engaged an insurance adjuster and retained SLF.

At the time Hurricane Irma struck Ms. Nowak's home, she was an independent eighty-four year old widow living in her home with an adult son and a tenant. Although, two of Ms. Nowak's sons (Kenneth Novak and Dennis Nowak, Esq.) described her as suffering from the early stages of dementia, both sons testified

that Ms. Nowak was not the subject of any incompetency and/or incapacity proceedings or adjudications. Prior to Hurricane Irma, on August 1, 2017, Ms. Nowak voluntarily executed a Durable Power of Attorney ("Durable POA") appointing Dennis Nowak, Esq., her son, as her agent. TFB Ex. C; Strems Ex. 9. The Durable POA was effective as of its date of execution and it would not be affected by any subsequent disability, incapacity, or incompetence that Ms. Nowak may have suffered. *Id.* The record does not reflect any prohibition against Ms. Nowak being able to make any decisions on her own behalf. Ms. Nowak died in May of 2020.

Scot Strems was the founder and sole named partner of the Strems Law Firm at the time of the retention. SLF was a mid-sized law firm handling thousands of cases a year with multiple offices throughout the State of Florida. SLF utilized a team approach to handling cases. As such, multiple attorneys, paralegals, and staff would assist with the case responsibilities and clients. In the Nowak matter, although Christopher Narchet, Esq. signed the complaint, numerous attorneys and staff were involved with the case. In addition to Mr. Narchet, SLF attorneys handling the Nowak case utilizing the team approach included: Carlos Camejo, Karina Rios, Lea Castro-Martinez, Cecile Mendizibal, Lisban Romero, Natalie Fernandez, and Jennifer Jimenez. TFB Ex. V; *see* Strems Ex. 1; *see also* Strems Ex. 2.

Mr. Strems involvement centered around final settlement negotiations, including the negotiation of the executed Release/Hold-harmless/Indemnity agreement. TFB Ex. X; *see also* TFB Ex. W. In addition, on the opposing side representing Ms. Nowak's insurer, FPIC, there were attorneys Matthew Feldman and Hayes Wood. TFB Ex. K.

Although Ms. Nowak was the SLF client, she did not file a complaint with The Florida Bar. Ms. Nowak's son and agent under the Durable POA, Dennis Nowak, Esq., filed said Complaint with The Florida Bar shortly after receiving draft settlement documents.

After his opening argument, counsel for The Florida Bar, Derek Womack, Esq. brought to the Referee's attention that Paragraph 45 of the Complaint filed by The Florida Bar on June 11, 2020 against Mr. Strems was incorrect. Paragraph 45 of the Complaint states:

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

Paragraph 45 is in direct conflict with the outcome of the fee dispute that was settled on May 21, 2020 before the filing of the Complaint on June 11, 2020. Moreover, Paragraph 45 is an untrue statement that should have been known at the time of filing the Complaint with the Court. The Complaint was not amended to remedy the

erroneous material statement.

According to the executed "Release/Hold-harmless/Indemnity Agreement," the monetary terms of the settlement were as follows:

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

Strems Ex. 5.

In addition, prior to the fee dispute with her son being resolved, Ms. Nowak obtained a new roof. Her son, Kenneth Novak testified that the cost of the new roof was between thirteen thousand five hundred dollars ($13,500) and twelve thousand five hundred dollars ($12,500). Dennis Nowak testified he resolved the fee dispute after speaking with Respondent's counsel, Mark Kamilar, Esq. on May 21, 2020.

Witness Testimony

During these proceedings, several witnesses gave testimony. The following table provides a list of those witnesses, the offering party, and the proceeding at which they testified.

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

The Florida Bar called several witnesses to testify on its behalf during trial.

Kenneth Novak is a son of Ms. Margaret Nowak. This Referee found Mr. Novak to be credible.

He testified that he has had a real estate license for over ten (10) years and a mortgage license for twenty (20) years. He is experienced in both commercial and residential mortgages. In addition, he has had two companies as a mortgage broker and a correspondent lender.

Mr. Kenneth Novak testified that although he did not know in advance that his mother, Ms. Nowak, sought the representation of SLF, he "went with it" because he knew she was referred to an adjuster by her trusted friend that was a real estate agent. In addition, he testified he believed his mother's real estate friend may have witnessed her signing the contingent fee retainer agreement. He testified he was not aware of the forty-five thousand dollar ($45,000.00) settlement offer.

Dennis Nowak, Esq. is a son of Ms. Margaret Nowak and he assisted her with her insurance claim after he moved from Florida to North Carolina. He is an experienced commercial trial lawyer. This referee found Mr. Nowak to be credible.

He testified that his mother was competent at the time she signed the Durable Power of Attorney designating him as her agent approximately a month before Hurricane Irma struck and he had concern about her mental health.

In January 2019, Mr. Nowak received and reviewed the settlement documents that were emailed to him from SLF. This was when he first learned of the $45,000.00 settlement amount and the equal split of the insurance proceeds between his mother and the Strems Law Firm of $22,500.00.

His only objection was with the amounts going to his mother and the law firm. He testified that he wanted seventy percent (70%) going to his mother and for SLF to bear the costs. He believed his mother was entitled to $30,000.00 and the legal fees could only be 30% of the recovery. At the time of the dispute, he incorrectly claimed the firm was not entitled to a statutory fee amount because section 627.428, Florida Statutes was only applicable if a judge awarded fees. Mr. Nowak filed the Complaint at issue with The Florida Bar against the Respondent. The record does not reflect Mr. Nowak consulted with Ms. Nowak regarding the fee dispute prior filing the Complaint.

He acknowledged at trial that his understanding of the statute was wrong and that a statutory determination could be made whenever an insured filed a lawsuit against the insurance company, as in Ms. Nowak's case.

On February 23, 2021, Mr. Dennis Nowak provided Bar Counsel with an email thread. Bar Counsel filed the email thread as Exhibit D with the Referee and entitled it "Email correspondence between Strems Law Firm and Dennis Nowak dated January 24, 2019. Exhibit D." The Florida Bar's Exhibit D includes an email not previously provided in the record where Mr. Nowak emailed the Respondent directly on January 24, 2019.

Carlos Camejo, Esq. is a former SLF attorney that did a substantial amount of pre-litigation related work on the Nowak matter. After suit was filed, Mr. Camejo

remained in contact with Ms. Nowak's sons (Dennis and Kenneth) regarding the status of the case, although it was now in the litigation division. This referee found Mr. Camejo to be credible.

Mr. Camejo testified as follows during direct examination by Bar Counsel, Mr. Womack, regarding the client's bottom line, in part:

> Q. Okay. Can you tell me, so you understood from what Mr. Novak told you that -- did you understand he was asking for more money?
>
> A. My understanding was that his bottom line in pre-litigation was 30,000, knowing that, in pre-litigation, 25 percent gets subtracted, and the firm would have gotten 7,500. I discussed with him or his brother, I'm not sure which one, to be frank with you, the possibility of having to file suit, is given the fact that Mr. Feldman was being unresponsive to me. They approved it, that request. So I filed the lawsuit.
>
> Then Mr. Novak asked me, hey, what's the status of the lawsuit? I advised him the lawsuit has been filed. Opposing counsel had offered 30K. So, I believe, I don't want to speak for Mr. Novak, but I was under the impression that I was giving him a chronological order as to what was occurring.
>
> They made an offer, but, at that point, we were already in litigation, not pre-litigation. So when I told him let me see if I can work the attorneys' fees to be exclusive, what I meant to say, and I'm not sure if he misunderstood me or not, was that, but now that it's in litigation, let me see if Mr. Strems can get more. How much more? I'm not sure, because I'm not privy to the conversation he had with Mr. Feldman.

Trial Tr. 20:13-21:14 (Feb. 23, 2021).

> Q. And do you recall if you brought this conversation to Mr. Strems' attention?
>
> A. I know I told Mr. Strems what the client's bottom line was, which was the 22.5.

Q. Okay.

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

Trial Tr. 21:24-22:6 (Feb. 23, 2021).

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

A. Yes.

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

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

Trial Tr. 23:12-23 (Feb. 23, 2021).

Mr. Camejo testified as follows during cross-examination by Respondent's counsel, Mr. Kuehne, regarding the client's bottom line, in part:

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

A. Correct.

Trial Tr. 78:2-9 (Feb. 23, 2021).

Q. Okay. And then you tell Mr. Feldman: Since attorneys' fees are involved now. Reach out to Scot if you want to settle. It has been weeks

since I sent my client's bottom line, and they were adamant about pursuing it in court if needed.
Right?

A. Right.

Trial Tr. 80:14-21 (Feb. 23, 2021).

Q. Okay. Let me go to your discussions, and I'm going to bring up your discussion about settlement. It's fair to say that you understood the Nowaks as willing to accept a bottom line of $22,500, getting to them if they got that amount of money, Mrs. Nowak, to walk away from this claim?

A. To my understanding, yes, that was their bottom line. They won't take a penny less than that.

Q. And you understood that and believe that you had communication with the clients, the Nowaks, about their bottom line?

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

Trial Tr. 82:23-83:10 (Feb. 23, 2021).

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

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

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

A. Correct.

Q. And Mr. Novak then responds on August 3rd: Net to my mom less your attorney fee of 7500, so $22,500 actually net to my mom. Do you see that?

A. Yes, I do.

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

A. Yes.

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

A. Correct.

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

A. Yes.

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

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

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

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

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

A. In the pre-litigation stage, yes. But around this time, when these e-mails were being exchanged, I do not recall ever making that

representation to them. There clearly must have been a misunderstanding between both parties for this stage in the game.

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

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

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

A. Yes.

Trial Tr. 85:17-87:24 (Feb. 23, 2021).

Q. Okay. And did Mr. Novak, at any time, tell you that his mother would not accept $22,500 in her pocket, but wanted some amount more than that?

A. Well, no, because that was the whole point of it being the bottom line. After the e-mail exchanges between myself and Mr. Ken Novak, there was pretty much no other communication between me and him, other than me relaying to Mr. Strems that the client was inquiring as to settlement status.

Trial Tr. 88:22-89:5 (Feb. 23, 2021).

Q. And when you understood the client's bottom line to be $22,500, was that conveyed within the law firm?

A. Conveyed? I don't understand the question.

Q. You mentioned that the case moved from your principal responsibility to the litigation side.

A. Correct.

Q. Was the client's $22,500 bottom line conveyed?

A. It was. But it was conveyed at the time that I obtained it. In other words, I obtained that bottom line in pre-litigation. I did not call the client again and say, hey, is your bottom line still the same a month later? or somewhere along those lines.

Q. And as far as you had conveyed the client's bottom line was $22,500?

A. Correct.

Q. And did the client ever express to you that if the law firm got paid more than $7,500, the client wanted more money?

A. No, they did not express that to me. I don't think they would anticipate that.

Q. And did you make an effort to make sure the client or the client's representatives understood that legal fees would be paid differently and computed differently in the litigation stage?

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

Trial Tr. 94:4-95:15 (Feb. 23, 2021).

In addition, Mr. Camejo testified that he was not counsel of record for Ms. Nowak's case. Trial Tr. 91:9-11 (Feb. 23, 2021). Furthermore, he acknowledged Christopher Narchet, Esq. (former attorney for SLF) and Hayes Wood, Esq. (attorney for insurer) were listed as counsels of record denoting lead attorney for plaintiff and defendant, respectively, on the Nowak matter. *Id.*; *see also* TFB Ex. K.

Karina Rios, Esq. is a former associate of SLF. She worked at SLF from 2015 to 2018. This Referee found Ms. Rios to be a credible witness.

Ms. Rios testified that although she was hired to work in the litigation department, Mr. Strems granted her request to work in the Pre-Litigation department. Ms. Rios assisted with the Nowak matter. Ms. Rios was included on two emails dated September 10, 2018 and September 19, 2018 where Mr. Kenneth Novak provided his cell phone number and requested the Respondent to contact him. The Respondent was not included as a recipient on those emails. Ms. Rios testified that she did not know if she did or did not forward said emails to the Respondent. TFB Composite Ex. E.

Mr. Camejo, who was copied on the September 19, 2018 email, responded to Mr. Kenneth Novak's email at 6:03 p.m. that he would follow-up with Mr. Strems. *Id.* The record is unclear as to whether he followed-up.

Matthew Feldman Esq., and Hayes Wood, Esq. represented FPIC in the Nowak matter. This Referee found Mr. Feldman to be credible.

Mr. Feldman exchanged emails with members of the SLF regarding the case, including the $45,000.00 settlement proposal at issue. Based on his testimony, he has no recollection of the specifics of the settlement negotiations just the total amount of $45,000.00 included in the email. Trial Tr. 65:17-67:2 (Feb. 24, 2021); *see also* Strems Ex. 23.

Adrian Arkin, Esq., was proffered and accepted as an expert witness in attorney's fees on behalf of The Florida Bar. TFB Trial Ex. E. On the plaintiff's side of insurance related disputes, Ms. Arkin has litigated about twenty (20) trials to verdict in her career. In addition, she has given expert testimony in two cases and submitted an expert affidavit in one case. Trial Tr. 94:21-95:2 (Mar. 2, 2021). This Referee found Ms. Arkin to be credible.

She was asked to opine "as to customary fee structures in First Party property insurance cases; as to the reasonableness of the fee charged, the applicable paragraphs of the contingency fee agreement of the Strems Law Firm in this matter, as well as the reasonable attorneys fees for the litigation and review of the Strems time sheets." *Id.*

Ms. Arkin testified as follows during direct examination by Bar Counsel, Mr. Womack, regarding her expertise, in part:

> Q. Can you tell me how many times that you've testified offered a report on an expert basis?
>
> A. I believe I've been asked many times, but of those many times, five of them went beyond just, can I name you as my expert? Of those five, I was able to track down three reports and two testimonies.
>
> Q. All right. And can you tell me how many times you've offer a report or testified about fees for your own firm?
>
> A. I couldn't give you an amount, but it's numerous times. Also, in every single one of my cases, I negotiate my fee with the insurance company. In thousands of cases I've done that, even if I haven't written a report or testified about it.

Trial Tr. 4:2-15 (Mar. 1, 2021).

> I would say I was asked for several years to do expert work, but I almost started doing it the last couple of years just based on my own opinion as to whether or not I had enough (inaudible) to start testifying to these matters on my own.

Trial Tr. 27:7-11 (Mar. 1, 2021).

In regard to the amount of her fees in comparison to her client's indemnity proceeds, she testified, in part:

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

Trial Tr. 5:21-6:3 (Mar. 1, 2021).

In addition, Ms. Arkin explained that in "the world of first-party property litigation," there are two major business models. Trial Tr. 4:25-5:20 (Mar. 1, 2021). One business model is to "take a lot of claims quickly and easily [and] collect a fee and go." *Id.* Whereas, the other type of business model is the one she mostly practices, where you take "maybe 25 to 50 cases a year, work them up and after the case, after the indemnity portion is paid, litigate the attorney fees, so the attorneys' fees are often more money than the indemnity." *Id.* As such, Ms. Arkin has acknowledged that in cases where her "fee demand is a million dollars" she has put

her timesheets "back together" and makes sure the timesheets match up with the work performed and that they are reasonable. Trial Tr. 28:1-11 (Mar. 1, 2021).

Based on Ms. Arkin's explanation and the record, SLF would be considered the first model, a high volume law firm with smaller claims in both the pre-litigation and litigation stages.

In her report, she stated her opinions, in part, as follows:

Opinions

6. In November, 2018, Scot Strems obtained a $45,000 global offer from an insurance company that he never conveyed to his client, Margaret Nowak. The offer was required to have been conveyed to the client.

7. Once he accepted the settlement, Scot Strems unilaterally determined the amount of fees out of the $45,000 settlement without first discussing it with the client. The client should have been advised before the settlement was accepted, and the client should have been advised of the fees that were to be charged prior to the acceptance of the offer.

8. Scot Strems unilaterally determined the amount to be paid to Contender Claims Consultants, a public adjusting firm, in an amount over 10% of the insured's indemnity in violation of 626.854 (10)(b)(1). The payment of $4500 to Contender as a cost of the litigation was unreasonable and excessive.

9. Mr. Strems initial justification for the initial fee charged to the client was that the client agreed to accept $22,500. However, the agreement to accept $22,500 was based on an offer of $30,000, not $45,000. The return to negotiations was agreed to based on Ms. Nowak obtaining more money, and presumably the attorney as well. Thus Mr. Strems did not have the authority to settle the case without conveying the $45,000 offer and discussing the net result to the client.

10. In justifying the unilaterally determined fee to the Florida Bar, Mr.

> Strems generated a Timesheet to show a Lodestar fee. The Timesheet contains excessive billing entries, is overly duplicative, contains fraudulent entries, and even as to the reasonable entries, does not support the fee charged. The Timesheet was an attempt to charge an excessive fee, and was dishonest.
>
> 11. Mr. Strems' fee agreement would have allowed him to charge a specifically negotiated fee, if he had specifically negotiated a fee. Here, however, the settlement in question was offered as a "global" settlement, and did not separate the fees in the negotiations. The only potential fee discussed with the client prior to the $45,000 offer was $7500 (out of a $30,000 offer.[1]) Accordingly, under the fee contract, because there was no attorney fee negotiated, and assuming Mr. Strems had conveyed the $45,000 offer to the client, at best, Mr. Strems would be entitled to the lodestar fee (reasonable hours x reasonable rate.) Thus, the initial fee charged of $17,523.10 ($22,500, minus costs) was excessive.[2]
>
> 12. Ultimately, the client was not consulted about the $45,000 offer. The client could not make an informed decision regarding the $45,000 offer, or the lodestar fee, because the lawyers did not discuss with Ms. Nowak, or her son[3] the fees and costs which were due out of the $45,000 before accepting the offer. Given the ambiguity in the contract, the only alternative to the lodestar fee would be (possibly) entitlement to 30% of the gross settlement.[4] Still, it should have been discussed with the client prior to acceptance of the offer.

Id.

In cross-examination with Respondent's counsel, Ms. Arkin testified that she does not keep contemporaneous records in her own cases. Trial Tr. 106:10-16 (Mar. 2, 2021). Moreover, she agreed with Mr. Boyar that contemporaneous timesheets are not required and timesheets may be recreated at a later date. *Id.* In addition, she acknowledged that in one of her cases a judge ordered her to present her firm's retainer agreement to The Florida Bar for review and she complied with that order.

Trial Tr. 136:22-138:7 (Mar. 2, 2021). Ms. Arkin further acknowledged that her fees have been cut by an expert by up to fifty percent (50%). Trial Tr. 121:1-20 (Mar. 2, 2021).

In conclusion, Ms. Arkin did not testify or opine in her report that she believed the SLF attorney's fees were "clearly excessive" as defined by the Rules Regulating the Florida Bar.

Respondent called witnesses Lea Castro-Martinez, Esq. and Cris Boyar, Esq. (Expert Witness) to testify on his behalf during trial.

Lea Castro-Martinez, Esq., is a former associate of SLF. She headed the Client Support Team. This Referee found Ms. Castro-Martinez to be credible.

She testified that, although she did not work on the file, she spoke to Mr. Dennis Nowak at some point. She stated he was not in agreement with the split that was written on the closing statement. She did not recall any particularly contentious conversation. Afterwards, she reached out to Ms. Nowak, whom she understood was the client. She was able to speak with her. However, she was not able to resolve concerns regarding the draft closing statement.

Cris Boyar, Esq. was proffered and accepted as an expert witness in attorney's fees on the behalf of the Respondent. Mr. Boyar had previously been requested by The Florida Bar to be their expert in the case of *The Florida Bar v. Kane*, 202 So. 3d 11 (Fla. 2016). Rebuttal Tr. 9:4-11 (Mar. 4, 2021). Although, he

was not called to testify on behalf of The Florida Bar, he provided The Florida Bar with expert analysis and his understanding of the law. *Id.* Mr. Boyar has attended first party fee hearings hundreds of times as an expert, and sometimes as many as fifteen a week. In addition, he has reviewed thousands of timesheets, lectured on first party attorney fees claims and served as a fee expert in all three South Florida counties on a regular basis for many years for both plaintiffs and defendants. Strems Ex. 36; *see* Trial Tr. 61:18-24 (Feb. 26, 2021); *see also* Trial Tr. 63:9-14 (Feb. 26, 2021).

The Referee found Mr. Boyar, an experienced plaintiff's first party property lawyer, trial litigator and fee expert, to be both credible and knowledgeable.

In his report (Strems Ex. 36), he stated his opinions, in part, as follows:

> **Purpose of a one sided attorney fee street.**
> The purpose of Fla. Stat. §627.428 is to encourage prompt dispositions of valid insurance claims without unnecessary litigation and it is meant to discourage insurance companies from contesting valid claims. *See Pepper's Steel v. United States of America*, 28 Fla. L. Weekly S455 (Fla. 2003) and *Florida Life Insurance Co. V. Fickes*, 613 So. 2d 501 (Fla. 5th DCA 1993).
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> * * *
>
> **Fees trigger once you file suit. No judgment required.**
> When an insurer settles during suit it must pay attorney fees and costs. *Wollard v. Lloyds & Cos.*, 439 So. 2d 217, 218 (Fla. 1983); *Fitzgerald & Company, Inc. v. Roberts Electric*, 533 So. 2d 789 (Fla. 1st DCA 1988); *Fortune Insurance Company v. Brito*, 522 So. 2d 1028 (Fla. 3rd DCA 1988). The court has no discretion to deny attorneys fees after such a settlement. *Avila v. Latin American Prop. & Cas. Ins. Co.*, 548 So. 2d 894 (Fla. 3rd DCA 1989).

* * *

Fees are mandatory.
Whenever an insured prevails against an insurer, the court must award attorneys fees. Even if the insurer believed in good faith that the benefits should not have been paid the court must award attorneys fees. *INA v. Lexow*, 602 So. 2d 528 (Fla. 1992); *United Automobile Ins. Co. v. Zulma*, 661 So. 2d 947 (Fla. 4th DCA 1995). Even if the insured prevails only on part of the claim, fees are awarded to the insured as the fee statute is "one way street" intended to discourage insurers from denying valid claims. *Danis Industries Corp. v. Ground Improvement*, 645 So. 2d 420 (Fla. 1994) (statute is a one-way street offering the potential for attorneys' fees only to the insured or beneficiary to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their policies).

* * *

Alternative Fee agreement are valid.
Alternative fee agreements are not only valid but common in first party litigation case. *See First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., In*c., 115 So. 3d 978 (Fla. 2013) where the court held:
The Fourth District recognized this in *Wolfe v. Nazaire*, 713 So. 2d 1108, 1108 (Fla. 4th DCA 1998) (*Wolfe I*), where it relied on our decision in Kaufman, 557 So. 2d 572, to recognize the validity of an alternative fee recovery clause in the defendant's fee agreement that "provided for a fee to be based on an hourly rate of $85 or whatever may be awarded by the trial court, whichever is higher." In contrast, in cases where the client agrees that the attorney will be paid either a specific percentage of the recovery or the amount awarded by the court pursuant to a prevailing party statute, whichever is higher, the Supreme Court has held that the trial court may award fees which exceed the amount recoverable under the percentage alternative of the fee agreement. This is so because the court-awarded fee does not exceed the fee agreement entered into by the client and the attorney. *Florida Patient's Comp. Fund v. Moxley*, 557 So. 2d 863 (Fla.1990); *Kaufman v. MacDonald*, 557 So. 2d 572 (Fla.1990).

In *TRG Columbus Dev. Venture, Ltd. v. Sifontes*, 163 So. 3d 548, 552 (Fla. 3d DCA 2015) the court stated:

While the contingency fee contract is poorly worded, we conclude that its intention, supported by testimony at the hearing below, is evident. In this case, TRG, a stranger to the contract between Sifontes and his counsel, would have us simply ignore the underlined portion of the contingency fee contract, which allows a "higher ... fee" to be "determined ...pursuant to any ... decisional authority." While this language is not a model of clarity, we cannot simply disregard it as superfluous; we must give it the meaning and effect intended by the parties to the contract. *See Aristech Acrylics, LLC*, 116 So.3d at 544.
In *Florida Dept. of Agric. & Consumer Services v. Bogorff*, 132 So. 3d 249, 257 (Fla. 4th DCA 2013) the court held:

...it is abundantly clear through case law that where the fee agreement with a client in a fee-shifting case contains alternative means of calculating a fee—one based on a percentage of the recovery or the other a fee set by the trial court—the agreement permits the trial court to set a reasonable fee higher than the percentage contained in the contract. *See Kaufman v. MacDonald*, 557 So. 2d 572, 573 (Fla. 1990). The supreme court has recently reiterated its approval of such alternative fee clauses and the trial court's ability to exceed the hourly rate or percentage of recovery limit contained in the contract where the fee is reasonable. *See First Baptist Church of Cape Coral, Fla., Inc. v. Compass Constr., Inc.*, 115 So. 3d 978, 982 (Fla.2013).

There is NO cap on the fees when there is an alternate fee recovery clause.
In *Forthuber v. First Liberty Ins. Corp.*, 229 So. 3d 896, 899 (Fla. 5th DCA 2017) the court held:

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

* * *

Post Stipulation work.
The clock does not stop the moment there is a settlement. *See Palma and Pepper's Steel v. USA*, 850 So. 2d 462 (Fla. 2003) which disagreed with the holding in *Travelers v. Morris*, 390 So. 2d 464 (Fla. 3d DCA 1980) which is a case often cited by the defense. *See also Lugassy v. Independent Fire Insurance Company*, 636 So. 2d 1332 (Fla. 1994) where the Court held attorney fees may properly be awarded against insurance company, upon rendition of judgment against insurer and in favor of insured or beneficiary, for litigating issue of entitlement to attorney fees, but not for litigating amount of attorney fees.

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

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

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

Under the authority of section 627.428(1), Florida Statutes (1983), it applied the principles set forth in our decision in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla.1985), and awarded attorney's fees to Palma in the amount of $253,500. In computing this

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

Contemporaneous Time Entries.
There is no requirement for either instantaneous or even contemporaneous time entries. They can be recreated, even years later. However, *see Morgan and Morgan v. Guardianship*, 36 FLW D1028 (Fla. 2d DCA 2011); *Brake v. Murphy*, 736 So. 2d 745 (Fla. 3d DCA 1999)(time records should be contemporaneous and the time entries cannot be more than wild guesses when reconstructed and should have sufficient detail). *City of Miami v. Harris*, 490 So. 2d 69 (Fla. 3d DCA 1985)(contemporaneous time records are not required). For a case that states a time sheet is not required *see The Glades v. The Glades*, 534 So. 2d 723 (Fla. 2d DCA 1988). *See also Baybridge Chiro v. USAA*, 18 Fla. L. Weekly Supp. 1016 (Fla. Santa Rosa County 2011) for the proposition that there no requirement for an attorney to generate itemized billing to be broken down by each task in a particular day.

Mr. Boyar testified as follows during direct examination by Respondent's counsel, Mr. Kuehne, regarding the differences between fee disputes and matters that rise to The Florida Bar determinations, in part:

Q. Okay. Now let's move on to that. The Florida Bar rule is different from the standard that applies in a lawsuit for determining reasonableness of the fees. Is that fair?

A. Yes.

Q. What do you understand, from your expertise, to be the Florida Bar rule or definition?

A. Florida Rule 4-1.5A kicks in where a fee is illegal, prohibited, or clearly excessive, utilizing their definition. The definition is found at A1. It says, quote, a fee or cost is clearly excessive when, after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or cost exceeds a reasonable fee or costs for services provided to such a degree to constitute a clear, overreaching, or an unconscionable demand on an attorney.

We don't see that language in a generic fee hearing. That's a much different level or burden that is not used in the generic fee hearing.

Q. Is that definition that you've described further amplified by case law, legal authority?

A. Yes.

Trial Tr. 109:1-23 (Feb. 26, 2021).

Q. Okay. And in connection with your expertise under the Bar rules is there a difference between a fee disputes and matters that rise to Bar fee determinations?

A. Yes.

Q. What is that, as you understand it?

A. We don't want fee disputes being resolved by the Florida Bar. Fee disputes are resolved by trial judges. The Florida Bar only gets resolved [involved] if there's a violation as defined in 4-1.5, so you have to be left with a definite and firm conviction that the fee or the cost exceeds the reasonable fee or the cost of service, and this is the important part,

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

Trial Tr. 110:8-111:6 (Feb. 26, 2021).

In addition, Mr. Boyar testified as follows during direct examination by Respondent's counsel, Mr. Kuehne, regarding the differences between fee disputes and matters that rise to The Florida Bar determinations, in part:

> Q. Now, in connection with the work you've done in this case, did you determine whether any time records played any part in the resolution of this case between the law firm and insurance company?
>
> A. You mean did Strems turn over a time sheet as part of the settlement?
>
> Q. Yes, let's start with that.
>
> A. No. The time sheet was at the request of the Bar, is what I'm told.
>
> Q. You've seen time sheets in connection with this matter?
>
> A. Yes.
>
> Q. And when you were deposed, you had stated, if I can represent, that you had not reviewed the time sheets in any detailed way, is that right?
>
> A. And Mr. Boyar [Womack] asked me to, and I have.
>
> Q. Okay. And that's because you asked for specific objections to the various time sheets?

A. Right, because the way that it works, once you give the other side your time sheet, the burden then shifts to them, to point to with specificity and detail which individual task they're taking exception with.

The reason I do that is the plaintiff's expert shouldn't have to go through and prove each task that's not in dispute. You only talk about the ones in dispute. So I asked Mr. Womack to give me his cuts. He asked me to review it for the next morning and I did.

I went through it line by line last night, and my opinion stands, that this is not excessive as defined by the Florida Bar, not even close.

Trial Tr. 150:2-151:6 (Feb. 26, 2021).

Mr. Boyar reviewed Strems Exhibit 3, the executed settlement agreement, in this matter and testified, in part:

Q. Okay. So based on your review and your expertise of Strems Exhibit 3, there's a significant reduction in the legal fees obtained by the Strems Law Firm, isn't there?

A. It's dramatic. Basically they took --ultimately they accepted $8,560 for their fees.

Q. And that's because costs are included in these fees?

A. Correct. And that is a dramatic reduction under any fact pattern.

Q. And a 30 percent straight contingency, based on the documents you've seen, would have actually been a larger amount of $13,500.

A. Sure or a minimum there should have been a separate line for the client to pay the cost as required in subsection e of the agreement.

Trial Tr. 149:11-150:1 (Feb. 26, 2021).

Mr. Boyar testified as follows during rebuttal examination by Respondent's counsel, Mr. Kuehne, regarding the Ms. Arkin prior expert opinion testimony, in part:

> Q. Okay. So with that instruction in mind, let me proceed Mr. Boyar, and if you need me to clarify, just ask me. Do you recall Ms. Arkin testifying regarding global settlements with insurance companies that multiple checks are issued?
>
> A. I do.
>
> Q. Do you agree with that?
>
> A. I didn't. I did not when she was testifying.
>
> Q. In connection with your expertise, what is your conclusion on that point that was the subject of Ms. Arkin's opinion?
>
> A. If there was a global settlement, meaning inclusive of fees and costs, insurance companies write one check to the trust account.
>
> Q. Okay. And is that based on all expertise that you offered in your direct examination?
>
> A. It's based on my review of the entire file. It's based on my review of over 2,000 to 3,000 time sheets. If insurance companies issued multiple checks when there was a global settlement I would see it on those time sheets. Global settlements will normally, typically, standardly involve one check to the trust account.

Rebuttal Tr. 1:11-2:8 (Mar. 4, 2021).

> Q. Did you hear Ms. Arkin testify that only contingency fee percentage, 30 percent, applies to the resolution of this matter?
>
> A. I did.
>
> Q. Do you agree with that?

A. I do not.

Q. Why? What is your opinion? What is your conclusion?

A. My conclusion, based on all of the evidence, is that 627.428 applied. The 30 percent did not apply. Only 627.428 applied and that is based on not only the contemporaneous memorandum to the file, but also in addition to the follow-up letters explaining how the checks are to be cut.

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

A. I did hear that.

Q. Do you agree with that?

A. I don't.

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

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

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

A. Yes.

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

A. Yes, I do.

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

A. I do.

Q. Do you agree with that?

A. I do not.

Q. What is your opinion?

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

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

A. Yes.

Q. Do you agree with that?

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

Q. Okay. So your opinion is that it is not unreasonable?

A. No, 17,500 is not an unreasonable fee. It's not an excessive fee. And it's not, quote, clearly excessive fee, as the fl defined it.

Q. I hope this is my last question, but we'll see. Did you hear Ms. Arkin testify that the fee sought by the Strems Law Firm was excessive because it exceeded the 30 percent contingency as she calculated it?

A. Yes.

Q. Do you agree with that?

A. I do not.

Q. What is your opinion on that point, based on your expertise.

A. My opinion is that the fee in this case is determined by exclusively 627.428, and if we're utilizing that analysis, I believe a judge, whether the judge gives the multiplier of 1.25 or not would be roughly at $30,000.

Q. Okay. And as to the dollar amount of the fee requested, that Ms. Arkin offered an opinion about, do you have an opinion as to the reasonableness for purposes of these proceedings?

A. I do.

Q. Is that based on your expertise?

A. It is.

Q. What is that opinion?

A. That we're here at a Bar matter of the definition of what is clearly excessive. This is not a fee hearing where one side has a number and the other side has an either higher or lower number and then a judge comes up what the Court finds is the reasonable amount.

I can tell you with 100 percent certainty that at every fee hearing I've ever been to, one side is always going to say the other side's prayer for fees is excessive. That happens 100 percent of the time, without exception.

But we have to travel under the Bar definition of clearly excessive as defined, unconscionable, you know, the exact definition.

Rebuttal Tr. 4:6-7:25 (Mar. 4, 2021).

In evaluating the facts in this matter, I find that Mr. Boyar opinions were consistent with case law and supported by the facts.

Responses to The Florida Bar Inquiries Regarding Requests for Information

The *In re M.W.*, 181 So. 3d 1263, 1267 (Fla. 2d DCA 2015) court stated, in pertinent part:

> [t]he court's ruling was based entirely on what it characterized as "[private counsel's] testimony," which was not testimony at all but simply her unsworn argument. *See Hitt v. Homes & Land Brokers, Inc.,* 993 So. 2d 1162, 1166 (Fla. 2d DCA 2008) ("Unsworn statements of counsel do not establish facts."); *Laussermair v. Laussermair,* 55 So. 3d 705, 706–07 (Fla. 4th DCA 2011) (holding that without an evidentiary hearing former husband's counsel's representations alone did not amount to clear and convincing evidence that the former wife committed fraud on the court); *Leon Shaffer Golnick Adver., Inc. v. Cedar,* 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982) (explaining that the "unsworn statements [of trial counsel] do not establish facts in the absence of stipulation," that "[t]rial judges cannot rely upon these unsworn statements as the basis for making factual determinations," and that the appellate "court cannot so consider them on review of the record"). This was not a sufficient evidentiary basis to support the court's finding of fraud on the court. The statements made by private counsel during the case management conference should not have been imputed to C.B. without a proper evidentiary hearing. *See, e.g., Traylor v. State,* 596 So. 2d 957, 979 (Fla. 1992) (Kogan, J., concurring in part, dissenting in part) (explaining that the acts of an attorney may be imputed to the client except in circumstances involving fraud or violations of professional ethics).

Rule Regulating The Florida Bar 4-8.4 states, in pertinent part:

> A lawyer shall not:
>
> * * *
>
> (g) fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made:

(1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors;

(2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors;

(3) within the time stated in any subpoena issued under these Rules Regulating The Florida Bar (without additional time allowed for mailing);

(4) as provided in the Florida Rules of Civil Procedure or order of the referee in matters assigned to a referee; and

(5) as provided in the Florida Rules of Appellate Procedure or order of the Supreme Court of Florida for matters pending action by that court.

Except as stated otherwise herein or in the applicable rules, all times for response shall be calculated as provided elsewhere in these Rules Regulating The Florida Bar and may be extended or shortened by bar counsel or the disciplinary agency making the official inquiry upon good cause shown.

Failure to respond to an official inquiry with no good cause shown may be a matter of contempt and processed in accordance with rule 3-7.11(f) of these Rules Regulating The Florida Bar.

The comment section of Rule Regulating The Florida Bar 4-8.4 states, in pertinent part:

A lawyer's obligation to respond to an inquiry by a disciplinary agency is stated in subdivision (g) of this rule and subdivision (h)(2) of rule 3-7.6. While response is mandatory, the lawyer may deny the charges or assert any available privilege or immunity or interpose any disability that prevents disclosure of a certain matter. A response containing a proper invocation thereof is sufficient under the Rules Regulating The Florida Bar. This obligation is necessary to ensure the proper and efficient operation of the disciplinary system.

In the instant case, on February 22, 2019, The Florida Bar sent a letter addressed to the Respondent regarding the "Complaint of Dennis A. Nowak against Scot Strems." TFB Ex. O. The letter stated the following, in part:

> Your response to this complaint is required under the provisions of Rule 4-8.4(g), Rules of Professional Conduct of the Rules Regulating The Florida Bar, and is due in our office by March 11, 2019. Responses should not exceed 25 pages and may refer to any additional documents or exhibits that are available on request. Failure to provide a written response to this complaint is in itself a violation of Rule 4-8.4(g). Please note that any correspondence must be sent through the U.S. mail; we cannot accept faxed material.

Id.

On March 14, 2019, Mr. Kamilar, Esq., responded in kind to the February 22, 2019 letter and wrote, in part:

> Please be advised that the undersigned counsel represents Respondent Scot Strems regarding the above complaint. Mr. Nowak has never been a client of The Strems Law Firm and Scot Strems has never represented Mr. Nowak nor did he personally provide the legal services to Mr. Nowak's mother and client of the firm Margaret J. Nowak which are the subject of Mr. Nowak's complaint. Nevertheless, response is made to the issues raised as follows.

TFB Ex. P. In the remainder of the letter Mr. Kamilar went into more discussion regarding the complaint against Mr. Strems and wrote, in part:

> 1. Mr. Nowak was not able to speak directly with Scot Strems - Mr. Nowak admits that he received responses from the primary attorney with case responsibility and others but did not receive a personal call back from Scot Strems regarding the file. The Strems Law Firm consists of 25 attorneys and 107 staff with offices in five cities throughout the state of Florida. Mr. Strems has overall firm

> responsibility with individual claims being assigned to an attorney with primary case responsibilities with varying responsibilities handled by additional attorneys and staff. This is a modern fact of life in medium-size firms in the state of Florida and is not improper or a violation of the Rules of Professional Responsibility. Questions and processing being handled by staff counsel and not Mr. Strems personally, especially where he had no direct file responsibilities, is again customary in larger law firms and is not a violation of the Rules of Professional Responsibility.

Id.

In a letter dated March 25, 2019 and addressed to The Florida Bar, Mr. Dennis Nowak, Esq. (Client's son) responded Mr. Kamilar's response and stated, in part:

> In the opening sentences of his response, Mr. Strems has attempted to distance himself from the unethical conduct set forth in the Complaint by asserting that he did not "personally" provide legal services to Margaret J. Nowak, a client of the Strems Law Firm. The assertion is belied by the fact that Mr. Strems signed both the Contingent Fee Agreement and the Closing Statement as a representative of the Strems Law Firm in this case.
>
> This assertion is further contradicted by email between Carlos Camejo and Ken Novak from August 23-31, 2018, more than a month after the lawsuit was filed, in which he stated that he would have to "follow up with Mr. Strems" to provide an update, indicating that Mr. Strems was actively involved in the settlement. See Email attached as Exhibit D to the Complaint. Although much of the communication regarding the handling of the case was between Mr. Camejo and Ken Novak, no terms of the ultimate settlement were discussed between any attorney and anyone acting on Mrs. Nowak's behalf.

TFB Ex. Q.

On July 30, 2019, The Florida Bar sent a letter addressed to Mark Kamilar, Attorney for Respondent, regarding the "Complaint of Dennis A. Nowak against Scot Strems." TFB Ex. R. The letter stated the following, in part:

> Please provide our office with a copy of Mr. Strems file pertaining to his representation of Ms. Nowak, including all correspondence and emails with the insurance company's attorney, as well as all documentation concerning communications with Ms. Nowak and Ms. Nowak's family members, as well as all billing information maintained in support of Mr. Strems' fees request to the insurance carrier. Please provide the requested information on or before August 9, 2019 or this matter may be referred to a grievance committee.

Id.

On August 23, 2019, Mr. Kamilar, Esq., responded in kind to the July 30, 2019 letter and wrote, in part:

> Attached is a copy of The Strems Law Firm's file as requested in your letter. We note that there is reference to (1) photographs, (2) the full policy and (3) and some other evidentiary materials.
>
> We have not included these documents other than the face page of the policy as they would not appear to material to your inquiry and the file is already large.
>
> In going through the file and the hours, it appears that although Scot Strems did not have file responsibility, he was involved in several strategy sessions and did make some calls and wrote letters to promote settlement.
>
> We would therefore amend our initial response of March 14, 2019 to so reflect.
>
> In that response we covered each of the issues in the complaint and Mr. Strems' limited work which would not appear material to the inquiry.

> Again, we believe these materials show the substantial work undertaken by The Strems Law Firm's attorneys and staff, substantial communication with the client and her sons, and again demonstrate the lack of any basis for a conclusion that a violation of the Rules has occurred.
>
> For these reasons we would again request that this inquiry be closed for lack of probable cause.

TFB Ex. S.

On November 26, 2019, The Florida Bar sent a letter addressed to Mark Kamilar, Attorney for Respondent, regarding the "Complaint of Dennis A. Nowak against Scot Strems." TFB Ex. T. The letter stated the following, in part:

> In furtherance of my investigation of this matter, please provide the following information as it pertains to the litigation underlying this grievance:
>
> • Copies of all communications (including letters, emails and texts) to or from opposing counsel concerning settlement negotiations, offers and counteroffers pertaining to the settlement of the indemnity portion of the claim and also pertaining to negotiations for attorney's fees regarding the Margaret Nowak case;
>
> • Copies of all proposed and finalized releases pertaining to the settlement; and
>
> • Copies of all internal firm emails, texts, documents, memos and notes pertaining to offers and counter offers regarding the settlement and attempted settlement of both the indemnity potion and the attorney's fees portions of the claim pertaining to Margaret Nowak.
>
> Please respond on or before December 6, 2019 with copies to Mark Dresnick, Grievance Committee Investigating Member.

Id.

On December 20, 2019, Mr. Kamilar, Esq., responded in kind to the November 26, 2019 letter and wrote, in part:

> Response is made to your letter of November 26, 2019 requesting additional documents.
>
> Because of the volume of those documents we are only including one set and just forwarding this cover letter to Mr. Dresnik [sic].
>
> Please advise if there is anything further you need in this regard.

TFB Ex. U.

Although, counsel for The Florida Bar has argued there were four documents that were not included in the initial response by Mr. Kamilar, Esq. dated March 14, 2019 and/or untimely, the record, including witness testimony or documentary evidence, is unclear as to the chain of custody of some of the alleged late documents and the dates of receipt. In addition, Mr. Kamilar's responses to The Florida Bar were not sworn statements or affidavits.

Contingent Fee Retainer Agreements

Fee agreements between attorneys and clients are governed by the law of contracts. *See, e.g., Lugassy v. Indep. Fire Ins. Co.,* 636 So. 2d 1332, 1335 (Fla. 1994).

In *First Baptist Church of Cape Coral, Florida, Inc. v. Compass Construction, Inc.*, 115 So. 3d 978, 983–84 (Fla. 2013), the Supreme Court of Florida stated:

> Over twenty years ago, we approved the use of an alternative fee

> recovery clause to require the losing party to pay prevailing party attorney's fees in an amount that exceeded what the prevailing party would have been required to pay her attorney under the contingency-fee clause of her contract. *See Kaufman v. MacDonald,* 557 So. 2d 572, 573 (Fla. 1990).

Section 627.428(1), Florida Statutes, provides:

> 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 or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

"[T]he purpose of section 627.428 is to discourage insurers from contesting valid claims and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their policy rights." *Liberty Nat. Life Ins. Co. v. Bailey ex rel. Bailey*, 944 So. 2d 1028, 1030 (Fla. 2d DCA 2006).

In *Forthuber v. First Liberty Insurance Corp.*, 229 So. 3d 896, 900 (Fla. 5th DCA 2017), the court stated:

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

The applicable SLF Contingent Fee Retainer Agreement states, in pertinent part:

1. **Attorney's Fees ; Pre-Litigation:** This employment is on a contingent fee basis. If no recovery is made for, or on behalf of Client, THE CLIENT SHALL NOT PAY ATTORNEY'S FEES for any of the services rendered in this matter. From the gross recovery attorney shall receive, inclusive of pre-litigation costs, 25% of recovery (inclusive of recoverable depreciation, overhead and profit, and all claims that are to be charged from dollar one less deductible), or five percent (5%) in the event amount is recovered via an invocation of appraisal, increased to 25% if Client does not have his/her/its own appraiser. Attorney will honor and cooperate with client's choice of appraiser, estimator or loss consultant. Should the insurer invoke their right to conduct an Examination Under Oath (EUO), attorney shall be entitled to an additional one-thousand-two-hundred-fifty dollars ($1,250.00) for professional services rendered relating to said EUO as a flat fee, which fee is contingent on recovery. THERE ARE NO UPFRONT FEES. Note: The Policyholder is responsible for half of the appraisal expenses, where applicable.
2. **Attorney's Fees: Litigation:** Client hereby authorizes Attorney to file suit against Client's insurance carrier or other responsible party should they deny, reject, or under-pay Client's claim. If the payment of attorney's fees is required to be determined by the Court, or if settlement is achieved via negotiations with the responsible party, attorney shall be entitled to receive all of such attorney's fees, including any and all contingency risk factor multipliers awarded by the Court. If a settlement includes an amount for attorney's fees, attorney shall be entitled to receive all of its expended and/or negotiated fees. In all cases whether there is a recovery of court awarded fees or not, by contract or statue, the fee shall be thirty percent (30%) or the awarded amount, whichever is greater. Pursuant to 627.428, Florida Statute, the Insurance Company is responsible to pay for the Client's attorney's fees when and if, the Client prevails against the Insurance Company. NO RECOVERY, NO FEE.
3. **Litigation Costs/Breach of Contract Actions:** Attorney is entitled to be paid by Client or award of Court, all court costs and reasonable claim related expenses incurred in this matter. Client understands and acknowledges that Attorney may retain and work on this matter in conjunction with a loss consulting group or other attorneys, and that associated costs and expenses for work performed by that consulting group or attorneys prior to litigation may be advanced by this Attorney. Any work performed by the loss consulting group, or Attorney, in association with any litigation of this matter shall be in the capacity of a retained expert, and will be billed in addition to any attorney fees owed in accordance with the above. Expenses are to never exceed 35% of indemnity/settlement recovered. Client agrees that in the event of a fee payment dispute, Attorney is entitled to and may file a charging and retaining lien to recover its outstanding fees and costs. In the event that Client has retained an expert, consultant, or public adjuster, prior to retaining the Attorney, Client and Attorney affirms that they will acknowledge prior relationship(s) and will honor Client's agreement. Client affirms that they will remain liable for professional fees incurred as a result of prior agreement.

Based on applicable case law, evidence and expert testimony, this Referee does not find the Contingent Fee Retainer Agreement to be illegal.

Rule 4-1.2, Objectives and Scope of Representation

Rule 4-1.2 of the Rules Regulating the Florida Bar states:

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer must abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, must reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client that is impliedly authorized to carry out the representation. A lawyer must abide by a client's decision whether to settle a matter. In a criminal case, the lawyer must abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Based on the evidence, SLF was "impliedly authorized to carry out the representation" of Ms. Nowak. The Respondent was authorized by Kenneth Novak, on behalf of his mother, to both settle the case or go to trial. The Respondent abided by his "client's decision whether to settle a matter." Upon receipt of the settlement

documents by Kenneth Novak and Dennis Nowak, the fee dispute arose and the sons rejected the net settlement for $22,500.00.

The miscommunication in transmitting the client's "bottom line" did not cause any actual or potential harm to Ms. Nowak because Ms. Nowak had not yet approved and consented to settlement. The Respondent met objectives of representation by securing a final settlement for Ms. Nowak with a net of $31,500.00 with the actual cost of her roof replacement being between $12,500.00 and $13,500.00.

Rule 4-1.5, Fees and Costs for Legal Services

"While the attorney for the insurer charges and receives an hourly rate regardless of whether the defense is successful, the insured's attorney bears the risk of never being compensated for the number of hours spent litigating the case." *Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122, 1133 (Fla. 2017).

The thrust of this case is a fee disagreement between a lawyer and the client that has become a subject of a Florida Bar grievance and complaint. *Florida Bar v. Winn*, 208 So. 2d 809, 811 (Fla. 1968) (acknowledging that "What may be a reasonable fee in one area of the State may be unreasonable in another and this Court can take judicial knowledge of the fact that the opinions of reputable lawyers concerning what constitutes a reasonable fee in any given situation are often as far apart as the poles."), *receded from on other grounds by The Florida Bar v. Della-*

Donna, 583 So. 2d 307 (Fla. 1989) (concluding restitution of an excessive fee may be ordered as a condition of readmission or reinstatement).

In addition, "[c]ontroversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent." R. Regulating Fla. Bar 5-1.1(d).

Rule 4-1.5 of the Rules Regulation the Florida Bar states, in relevant part:

> **(a) Illegal, Prohibited, or Clearly Excessive Fees and Costs.** A lawyer must not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost, or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee or cost is clearly excessive when:
>
> (1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or
>
> (2) the fee or cost is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.
>
> **(b) Factors to Be Considered in Determining Reasonable Fees and Costs.**
> (1) Factors to be considered as guides in determining a reasonable fee include:
>
> (A) the time and labor required, the novelty, complexity, difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
(F) the nature and length of the professional relationship with the client;
(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

(2) Factors to be considered as guides in determining reasonable costs include:

(A) the nature and extent of the disclosure made to the client about the costs;
(B) whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;
(C) the actual amount charged by third party providers of services to the attorney;
(D) whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;
(E) the reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and
(F) the relationship and past course of conduct between the lawyer and the client.

All costs are subject to the test of reasonableness set forth in subdivision (a) above. When the parties have a written contract in which the method is established for charging costs, the costs charged under that contract will be presumed reasonable.

(c) Consideration of All Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(d) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

(e) Duty to Communicate Basis or Rate of Fee or Costs to Client and Definitions.

(1) *Duty to Communicate.* When the lawyer has not regularly represented the client, the basis or rate of the fee and costs must be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. A fee for legal services that is nonrefundable in any part must be confirmed in writing and must explain the intent of the parties as to the nature and amount of the nonrefundable fee. The test of reasonableness found in subdivision (b), above, applies to all fees for legal services without regard to their characterization by the parties.

The fact that a contract may not be in accord with these rules is an issue between the lawyer and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved.

(2) *Definitions.*

(A) Retainer. A retainer is a sum of money paid to a lawyer to guarantee the lawyer's future availability. A retainer is not payment for past legal services and is not payment for future services.

(B) Flat Fee. A flat fee is a sum of money paid to a lawyer for all legal services to be provided in the representation. A flat fee may be termed "non-refundable."

(C) Advance Fee. An advanced fee is a sum of money paid to the lawyer against which the lawyer will bill the client as legal services are provided.

(f) Contingent Fees. As to contingent fees:

> (1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by subdivision (f)(3) or by law. A contingent fee agreement must be in writing and must state the method by which the fee is to be determined, including the percentage or percentages that will accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether those expenses are to be deducted before or after the contingent fee is calculated. On conclusion of a contingent fee matter, the lawyer must provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
>
> (2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding in which the lawyer's compensation is to be dependent or contingent in whole or in part on the successful prosecution or settlement must do so only where the fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm must sign the contract with the client and must agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client must be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule will apply to such fee contracts.

The evidence does not prove clearly and convincingly that the contingent fee retainer agreement in this matter with Ms. Nowak is illegal or prohibited. The agreement itself does not violate any Rules Regulating the Florida Bar and the agreement is not for an illegal purpose.

Mr. Boyar concluded that a fee request of $22,500.00 that included costs of $4,976.00 was not unreasonable and not clearly excessive in violation of Bar rules. Moreover, the fees are not "clearly excessive" because after reviewing the facts of the case, a lawyer of ordinary prudence would not be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by SLF or the Respondent.

In addition, Mr. Boyar explained that fee requests in first party property cases are often reduced by trial judges, sometimes by over 50%. But, the attorney's requested fees are not considered "clearly excessive" or in violation of Bar rules by the Court. This Referee has considered the cases cited by Mr. Boyar in his expert report (Strems Exhibit 36).

The facts of the case include Ms. Nowak as an eighty-four (84) year old senior citizen being subjected to a five hour Examination Under Oath (EUO) at the request of her insurer. After becoming involved in his mother's case, Dennis Nowak, Esq. wanted to sit for the EUO on her behalf, as her agent under a durable power of attorney. This was an issue that could have had dire consequences as to the viability of Ms. Nowak's claim.

In addition, the evidence supports the basis or rate of the fee and costs being communicated to Ms. Nowak, in writing, before or within a reasonable time after

commencing the representation. RRTFB 4-1.5(e). Ms. Nowak signed the contingent fee agreement and checked boxes that affirmed she "thoroughly read and understood the terms and conditions of retainer agreement." TFB Ex. B.

Rule 4-1.7, Conflict of Interest; Current Clients and Rule 4-1.8, Conflict of Interest; Prohibited and Other Transactions)

Rule Regulating the Florida Bar 4-1.7 states:

CONFLICT OF INTEREST; CURRENT CLIENTS
(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:
(1) the representation of 1 client will be directly adverse to another client; or
(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.
(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.
(d) Lawyers Related by Blood, Adoption, or Marriage. A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the

other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.
(e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

The comment to Rule 4-1.7 states, in part:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The **conflict in effect forecloses alternatives that would otherwise be available to the client.** Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially **interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.** Consideration should be given to whether the client wishes to accommodate the other interest involved.

(Emphasis added).

Rule 4-1.8, Rules Regulating the Florida Bar states, in pertinent part:

4-1.8 (Conflict of Interest; Prohibited and Other Transactions)
RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS
(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer is prohibited from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and

transmitted in writing to the client in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Using Information to Disadvantage of Client. A lawyer is prohibited from using information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

(c) Gifts to Lawyer or Lawyer's Family. A lawyer is prohibited from soliciting any gift from a client, including a testamentary gift, or preparing on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

(d) Acquiring Literary or Media Rights. Prior to the conclusion of representation of a client, a lawyer is prohibited from making or negotiating an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) Financial Assistance to Client. A lawyer is prohibited from providing financial assistance to a client in connection with pending or contemplated litigation, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) Compensation by Third Party. A lawyer is prohibited from accepting compensation for representing a client from one other than the client unless:
(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by rule 4- 1.6.

(g) Settlement of Claims for Multiple Clients. A lawyer who represents 2 or more clients is prohibited from participating in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure must include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) Limiting Liability for Malpractice. A lawyer is prohibited from making an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer is prohibited from settling a claim for liability for malpractice with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in making the agreement.

(i) Acquiring Proprietary Interest in Cause of Action. A lawyer is prohibited from acquiring a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee.

(j) Representation of Insureds. When a lawyer undertakes the defense of an insured other than a governmental entity, at the expense of an insurance company, in regard to an action or claim for personal injury or for property damages, or for death or loss of services resulting from personal injuries based on tortious conduct, including product liability claims, the Statement of Insured Client's Rights must be provided to the insured at the commencement of the representation. The lawyer must sign the statement certifying the date on which the statement was provided to the insured. The lawyer must keep a copy of the signed statement in the client's file and must retain a copy of the signed statement for 6 years after the representation is completed. The statement must be available for inspection at reasonable times by the insured, or by the appropriate disciplinary agency. Nothing in the Statement of Insured Client's Rights augments or detracts from any substantive or ethical duty of a lawyer or affect the extra disciplinary consequences of violating an existing substantive legal or ethical duty;

> nor does any matter set forth in the Statement of Insured Client's Rights give rise to an independent cause of action or create any presumption that an existing legal or ethical duty has been breached.
>
> The comment to Rule Regulating the Florida Bar 4-1.8 states, in part:
>
> It does not apply to ordinary fee arrangements between client and lawyer, which are governed by rule 4-1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or part of a fee.

When the fee dispute arose with Ms. Nowak's sons, it did not effectuate the foreclosure of alternatives that would otherwise be available to Ms. Nowak. In addition, the dispute did not materially interfere with the Respondent's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should have been pursued on behalf of Ms. Nowak. During the fee dispute, the Respondent and SLF continued to negotiate remaining terms of the settlement agreement with the insurer. Those remaining settlement issues included the Release/Hold-harmless and the water mitigation issue. The instant case is a dispute regarding an ordinary fee arrangement between the Respondent and Ms. Nowak's sons.

Ms. Arkin testified about negotiating attorney fees under section 627.428, Florida Statutes, as follows:

> Q. But all the contingency fee engagement agreements that you've seen in this kind of area includes a 627.428 provision?
>
> A. Yes.

> Q. Every single one of them?
>
> A. Yes, not only that, but also a provision about negotiating your attorney fee being separate. And there's a case, I would have to do you the name of it, that indicates the attorneys' fees under Statue [Statute] 627.428 that the attorneys' fees actuality belonged to the attorney and not the client.

Trial Tr. 155:6-16 (Mar. 2, 2021).

Settlement (Global or Bifurcated)

In summary, Mr. Feldman testified that Ms. Nowak's settlement was a global settlement and no bifurcated offer had been made. He based his testimony on his correspondence and other documents in the record because he did not have an independent recollection as to the specifics of Ms. Nowak's case. His testimony is in direct conflict with the Respondent's November 9, 2018 contemporaneous memorandum to file.

The Florida Bar Exhibit W is a contemporaneous memorandum to file from the Respondent and states:

STREMS | LAW FIRM

MEMORANDUM

TO: File

FROM: Scot Strems

DATE: Novemeber 9, 2018

SUBJECT: Margaret Nowak v. Florida Peninsula: CACE -18-015968: Settlement Negotiaions

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 with defense counsel. After serveral 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 Benfits 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.

Strems Exhibit 23 contains a portion of an email thread The Florida Bar alleged was not provided by the Respondent prior to trial. The email is from Mr. Strems to staff members Laura Acevedo and Johana Espinal. The said portion is as follows:

Vanessa Rodriguez

From: Scot Strems
Sent: Friday, November 9, 2018 5:15 PM
To: Laura Acevedo; Johana Espinal
Subject: FW: Nowak, Margaret v. Florida Peninsula Insurance Company (clam FPI079881)

22500 and 22500
22500 clean to client
4500 to LC

Scot Strems
Attorney

www.stremslaw.com
Email: scot@stremslaw.com
E-Service: pleadings@stremslaw.com

Mr. Feldman testified as follows during direct examination by Bar Counsel, Mr. Womack, regarding settlement negotiations, in part:

> Q. Mr. Feldman can you tell me what you mean here by global resolution?
>
> A. Sure. That would include all issues outstanding.
>
> Q. Would that include Ms. Nowak's indemnity claim?
>
> A. Yes, sir.
>
> Q. Would that include attorneys' fees and costs?
>
> A. Yes, sir.
>
> Q. Now, when you -- global resolution, is that a term that just you use?
>
> A. I mean, I use it. I don't know what everyone else uses. I use it to include anything that is outstanding, whether it assignment of benefits

outstanding. Whatever is outstanding in this claim, I use the term global to say this amount will satisfy anything outstanding in relation to this claim.

Q. And is, global resolution, is that a common term or phrase in your line of work?

A. I believe it to be. It's something that I use, and it seems to be understood, but I don't want to comment what other defenses or plaintiff counsel uses, but it's something that I use.

Q. Is this a term that you had used with the Strems Law Firm in the past?

A. I mean, it's something that I use, so I would guess it is something I've used in the past. I don't want to say that I – it's something I use, so I would assume yes.

Q. And do you generally make settlement offers on a global basis?

A. Yes.

Q. Are most of your settlements resolved on a global basis?

A. Most of my settlements are resolved inclusive of attorneys' fees and costs.

Trial Tr. 9:18-11:3 (Feb. 24, 2021).

Q. And do you recall at any point approaching Mr. Strems or anyone at the law firm with an offer of 22.5 in indemnity and then let's go negotiate your fee?

A. No.

Q. Would that be -- do you usually make offers like that?

A. Never.

Q. You say never, but can you tell us why you never make offers like that?

A. Well, I should go back. It's not never, because there are times where an insurance company may want me to resolve indemnity and then we proceed to a fee hearing. So it's not never. It's not typical, I should say. But usually cases are resolved on a global basis inclusive of attorneys' fees and costs, just because it's cleaner, and it resolves everything at once, and it's just the way things are done. But I shouldn't say never. There are times that we resolve indemnity and then things go to a fee hearing, and then ultimately that's what happens, that things are done that way. So I misspoke. It's not never.

Q. Understood. And can you tell us, in terms of, and I'm asking for best estimate here, Mr. Feldman, in terms of a fraction or a percentage, how much of your settlements are on a global basis as you've described?

A. I would say, you know, roughly 95 percent, maybe more.

Trial Tr. 25:18-26:20 (Feb. 24, 2021).

Mr. Feldman testified as follows during cross-examination by Respondent's counsel, Mr. Kuehne, regarding settlement negotiations, in part:

Q. With regard to the negotiations to get to the $45,000 or ultimately the $50,000 that's written on the release, is it fair to say that your testimony is you don't have any recollection of what the discussions were?

A. That's very fair to say.

Q. You don't know if there was give-and-take, several conversations or one conversation?

A. I have no recollection of the settlement negotiations.

Q. You're not confident with whom you had those negotiations other than you, of course, negotiated with the Strems Law Firm?

A. Correct, and the e-mail confirming it, that we looked at earlier.

Q. Okay. Well, that confirms it was the Strems Law Firm. But the detail of how you got to the $45,000 is not anything that you have a recollection about?

A. None.

Q. But you do know that, because this was a global resolution, there was the understanding on your side and presumably on the other side, the insurance side, that whatever a claim for attorneys' fees is, will be encompassed in this number?

A. Yes.

Q. Whether you had discussions with a Strems representative of how much they incurred in attorneys' fees or how much they were asking for attorneys' fees, you don't have any recollection?

A. None.

Q. You don't have any recollection if there were discussions or what the amounts would be, if there were, of the costs incurred in this case?

A. I have no recollection of the specifics of the settlement negotiations, just a total number that was reflected in the e-mail.

Trial Tr. 65:17-67:2 (Feb. 24, 2021).

III. RECOMMENDATIONS AS TO GUILT

"[I]f a referee's findings of fact and conclusions concerning guilt are supported by competent, substantial evidence in the record, [the] Court will not reweigh the evidence and substitute its judgment for that of the referee." *The Florida*

Bar v. Kavanaugh, 915 So. 2d 89, 92 (Fla. 2005). In addition, Florida courts define the term "clear and convincing evidence" as follows:

> [c]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Charged Rules Regulating The Florida Bar.

The Florida Bar filed its Complaint on June 11, 2020 charging Respondent with the violation of Rules Regulating The Florida Bar: 4-1.1 (Competence); 4-1.2 (Objectives and Scope of Representation); 4-1.4 (Communication); 4-1.5 (Fees and Costs for Legal Services); 4-1.7 (Conflict of Interest; Current Clients); 4-1.8 (Conflict of Interest; Prohibited and Other Transactions); 4-8.1 (Bar Admission and Disciplinary Matters); and 4-8.4(a) and (c) (Misconduct and Minor Misconduct).

The Florida Bar has the burden to establish by clear and convincing evidence the alleged misconduct of the Respondent as outlined in the Complaint.

Charged Rules Regulating The Florida Bar Not Violated.

I recommend that Respondent be found **not** guilty of violating the following Rules Regulating The Florida Bar:

4-1.1 (Competence); 4-1.2 (Objectives and Scope of Representation); 4-1.5 (Fees and Costs for Legal Services); 4-1.7 (Conflict of Interest; Current Clients); 4-1.8

(Conflict of Interest; Prohibited and Other Transactions); 4-8.1 (Bar Admission and Disciplinary Matters); and 4-8.4(a) and (c) (Misconduct and Minor Misconduct).

The Florida Bar has failed to prove by clear and convincing evidence that Respondent violated the above Rules Regulating The Florida Bar in this matter.

Charged Rules Regulating The Florida Bar Violated.

I recommend that Respondent be found guilty of violating the following Rule Regulating The Florida Bar:

4-1.4 (Communication)

RULE 4-1.4 COMMUNICATION

(a) Informing Client of Status of Representation. A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The comment to Rule Regulating The Florida Bar 4-1.4 states, in part:

> [f]or example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless

> the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.

This Referee relied on testimonial and documentary evidence as clear and convincing evidence of this Rule violation.

Mr. Camejo testified, in pertinent part:

> Q. I know, okay. We can go to the e-mail. It's page I believe 10 of Composite E. Is this the instance you're referring to, Mr. Camejo, when Ken Novak gave you his cell number?
>
> A. Yes.
>
> Q. And did you let Mr. Strems know that Ken Novak was trying to get in touch?
>
> A. I know I advised Mr. Strems almost every each time that Ken reach out to me. Hey, what's the status? This client keeps inquiring. But if I told him, hey, here's his cellphone number, please call him? I don't recall if I did that.

Trial Tr. 23:12-23 (Feb. 23, 2021).

Mr. Feldman confirmed a global settlement with the breakdown instructions email of November 9, 2018. TFB Ex. G; Strems Ex. 23. Specifically, Mr. Feldman stated in the body of the November 9, 2018 email to Respondent: "to confirm we have reached a global settlement agreement in [the Nowak case] in the amount of $45,000." *Id.* In addition, Mr. Feldman requests "Plaintiff's settlement check instructions/breakdown" along with other details pertaining to final payment and settlement. After receiving this correspondence, Respondent forwarded the email to

staff members Laura Acevedo and Johanna Espinal with the following breakdown instructions:

> 22500 and 22500
> 22500 clean to client
> 4500 to LC

Strems Ex. 23. These instructions directed FPIC to make half of the proceeds ($22,500.00) payable to the SLF and half to the client, Ms. Nowak.

On November 12, 2018, Ms. Espinal emailed Mr. Feldman reflecting the settlement instructions with the same figures given to her by Respondent in his November 9, 2018 e-mail. TFB Ex. H.

At trial, both Nowak brothers testified that they were not aware of or consulted about the $45,000.00 offer, or about Respondent's proposed fee of $22,500.00. The record does not reflect whether Ms. Nowak was consulted about the $45,000.00 offer before the draft settlement documents were sent to her sons. In addition, Mr. Feldman testified that he did not have a role in the settlement breakdown and that those instructions came from SLF.

Vanessa Rodriguez

From: Scot Strems
Sent: Friday, November 9, 2018 5:15 PM
To: Laura Acevedo; Johana Espinal
Subject: FW: Nowak, Margaret v. Florida Peninsula Insurance Company (clam FPI079881)

22500 and 22500
22500 clean to client
4500 to LC

STREMS | LAW FIRM

Scot Strems
Attorney

www.stremslaw.com
Email: scot@stremslaw.com
E-Service: pleadings@stremslaw.com

From: Matthew Feldman <mfeldman@woodlawyers.com>
Sent: Friday, November 09, 2018 4:47 PM
To: Scot Strems <sstrems@stremslaw.com>
Cc: Yudy Abreu <yabreu@civildefenselaw.net>
Subject: Nowak, Margaret v. Florida Peninsula Insurance Company (clam FPI079881)

Good Afternoon Mr. Strems:

Please allow this to confirm we have reached a global settlement agreement in the subject matter in the amount of $45,000.00.

At your earliest convenience, please forward to me Plaintiff's settlement check instructions/breakdown. In addition, please provide a copy of the public adjuster's executed contract and W9, if applicable and a copy of your office's W9. In addition, please verify your client's current mortgagee.

Upon receipt of your settlement check instructions/breakdown and lien/mortgagee verification, we will prepare the settlement releases and stipulations for execution.

If you have any questions, please do not hesitate to contact me anytime.

Sincerely

Matthew B. Feldman, Esquire
Wood & Associates
9200 South Dadeland Blvd., Ste 509
Miami, Florida 33156

(O) 305-670-3838
(F) 305-670-1903
(C) 305-519-8155
mfeldman@woodlawyers.com

From: Ken Novak ken@slccommercial.com
Subject: FW: Nowak 450 NW 69th Terrace, Margate
Date: Jan 21, 2019 at 6:17:04 PM
To: Johana Espinal settlement1@stremslaw.com
Cc: Dennis Nowak danowaklaw@gmail.com

Johana,
Please see the email chain below. It reiterates what my brother is referring to regarding settlement correspondence I have had with your firm. There was never any discussion of a settlement over the $30,000. And there was never a discussion of attorney fees in excess of $7,500.00

From: Ken Novak <ken@slccommercial.com>
Sent: Monday, October 22, 2018 1:09 PM
To: 'lea@stremslaw.com' <lea@stremslaw.com>
Cc: 'Dennis Nowak' <danowaklaw@gmail.com>
Subject: FW: Nowak 450 NW 69th Terrace, Margate

Hi Lea,

Please see the email chain below. When talking to Carlos Camejo on my mother's case I was under the impression that your firm had received an offer from the insurance carrier of $30k waiving the deductible but not the attorney fee. I told Carlos at that time that we would accept the $22,500 net to my mother unless he thought he could get the attorney fees on top of the settlement amount. He said that he would try to net the $30k after deductible and your firm's fees. Then I was informed that we were starting all over and that it could take another year to settle this case. Had I known that , I would have settled for the $22,500. I believe (correct me if I am wrong) that this case has been with your firm since hurricane Irma without resolve. I cannot wait another year to settle this case. We have already put 3 tarps on the roof at a cost of $1,000 each time, not to mention a mold issue due to their delay in settling, which I have not even assessed as of yet. As far as I can tell , mold is covered in their policy as well , and if they refuse to settle this in a reasonable manner I will engage a mold remediation company . I am sure this will add thousands to their settlement. If they really want to go to trial I will be happy to wheel my 340 lb emotionally challenged brother, who suffers from Type 2 diabetes, along with my pre-dementia 85 year old mother into the courtroom . I am sure the jury would love to see that. Please Let me know the course of action that is being taken by your firm to resolve this case as expediently as possible.

Ken Novak
772-341-9914

From: Ken Novak <ken@slccommercial.com>
Sent: Tuesday, October 16, 2018 6:32 PM

Fwd: 450 NW 69th Terrace/ Nowak

Dennis Nowak <danowaklaw@gmail.com>
Tue 2/23/2021 8:42 PM
To: Womack, John D <jwomack@floridabar.org>
See below.

Sent from my iPad

Begin forwarded message:

From: Dennis Nowak <danowaklaw@gmail.com>
Date: January 24, 2019 at 8:41:45 AM EST
To: scot@stremslaw.com
Subject: Fwd: 450 NW 69th Terrace/ Nowak

I noticed that you were not copied on this and wanted to make sure you were aware of it. You will want to talk to me before the end of the day tomorrow.

Sent from my iPad

Begin forwarded message:

From: Dennis Nowak <danowaklaw@gmail.com>
Date: January 22, 2019 at 8:33:33 AM EST
To: Johana Espinal <settlement1@stremslaw.com>
Cc: Ken Novak <ken@slccommercial.com>, "pnovak@slccommercial.com" <pnovak@slccommercial.com>, Laura Acevedo <LAcevedo@stremslaw.com>, Lea Castro <lea@stremslaw.com>
Subject: Re: 450 NW 69th Terrace/ Nowak

My mother will not be signing these documents. I addition, you should 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 awarded fees not negotiated settlements. So unless you are telling me that this case went to judgment, the fee statute you refer to is irrelevant. Also, even that statute only provides for a reasonable attorneys fee. In your engagement agreement, you quantified that as 30% of the recovery. In this case that equals $15,142.80, not the $22,500 you are claiming. That leaves $29,857.20 (which incidentally is close to the $30,000 net that the continued negotiation was supposed to accomplish) which is what we want the settlement documents to provide. Any prior outstanding proposals of a compromise amount are rescinded. Please govern yourselves accordingly.

Sent from my iPad

The evidence indicates that the Respondent did not communicate the $45,000.00 offer and did not respond to Mr. Dennis Nowak's email regarding the $45,000.00 settlement. TFB Trial Ex. D. The Respondent negotiated a settlement

without Ms. Nowak's sons' knowledge. The record is unclear as to whether Ms. Nowak was made aware of the $45,000.00 settlement figure at issue prior to its acceptance by the Respondent. During this time period, Ms. Nowak was still involved in her case, as indicated by Mr. Dennis Nowak's testimony that he checked with her regarding her availability to sign the settlement documents. Further, he stated that his mother would have called him to ask him about the settlement documents before signing them. Therefore, he asked for a copy of the settlement documents beforehand.

A notice of lack of prosecution was filed on June 20, 2019, and was not communicated to the Nowaks. TFB Ex. L. Additionally, a notice of settlement was filed without the client's consent or authorization on June 28, 2019. TFB Ex. M.

Based on the evidence, the Respondent violated Rule 4-1.4 regarding the negotiation of the settlement by clear and convincing evidence.

In conclusion, I find that The Florida Bar has met its burden by clear and convincing evidence that the Respondent has violated the above mentioned Rule Regulating The Florida Bar.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standard of Section 7 of *Florida's Standards for Imposing Lawyer Sanctions* prior to recommending discipline:

7.1 DECEPTIVE CONDUCT OR STATEMENTS AND UNREASONABLE OR IMPROPER FEES

Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving deceptive conduct or statements, improper division of fees, or unreasonable or improper fees.

* * *

(b) Suspension. 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.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer negligently 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.

The comment to Standard 7.1 states, in part:

> [p]ublic reprimand is appropriate in most cases for a violation of a duty owed as a professional. Usually there is little or no injury to a client, the public, or the legal system, and the purposes of lawyer discipline will be best served by imposing a public sanction that helps educate the respondent lawyer and deter future violations. A public sanction also informs both the public and other members of the profession that this behavior is improper.

I find this standard is relevant in evaluating the allegations contained in the complaint.

In *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005), the court determined that a public reprimand was warranted when a respondent collected a clearly excessive fee by improperly withholding 53% of net recovery for fees when

the respondent was only entitled to 40% of any recovery amount pursuant to a contingency fee contract with the client.

In the instant case, there was a communication breakdown as to the $45,000.00 settlement offer that resulted in reliance on Mr. Camejo relaying the client's $22,500.00 bottom line. The Respondent negotiated a settlement and unilaterally decided on the fee he would take from that settlement. Accordingly, Respondent violated Rule 4-1.4 as to the negotiation of the settlement. However, Ms. Nowak was not injured by the fee dispute. The rejected settlement amount of $45,000.00 would have yielded Ms. Nowak $22,500.00. The approved final settlement yielded Ms. Nowak $31,500.00. The actual cost of the roof replacement was between $12,500.00 and $13,500.00.

V. AGGRAVATING AND MITIGATING FACTORS

I considered the following factors prior to recommending discipline:

1. 3.2 Aggravation:

a. Prior Disciplinary Offenses, Standard 3.2(b)(1). The Respondent is currently under an emergency suspension for another matter. Emergency suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Fla. Stds. Imposing Law. Sancs. 2.4. At the time of the conduct at issue, the Respondent was a lawyer in good standing. The conduct at issue

occurred prior to the SC20-806 June 5, 2020 Emergency Suspension in another pending matter.

b. Vulnerability of the Victim, Standard 3.2(b)(8). Ms. Nowak was 84 years old. She is not the Complainant in this matter. Her son, Dennis Nowak, Esq. is the Complainant.

c. Substantial Experience, Standard 3.2(b)(9). The Respondent is an experienced first party insurance attorney.

2. 3.3 Mitigation:

The Respondent presented witnesses and submitted a multitude of documents in support of mitigation of the sanctions.

Melissa Giasi, Esq., Annette Goldstein, and Faheem Mujahid testified on behalf of the Respondent. This Referee found all three of the Respondent's mitigation witnesses credible. They spoke of his character, generosity, honesty, faith, and the love his wife and two little girls.

Melissa Giasi, Esq. is a Florida licensed attorney that is board certified in real estate and appellate practice. She testified that she provided trial support and appellate services for SLF. She made appearances in court at times as co-counsel for SLF on various matters, including motions for summary judgment, appeals, and sanctions.

Annette Goldstein is the Respondent's former high school teacher that has kept in touch over the years with him. She said she is heartbroken to see what he is going through. She recalled him being a special child with a life's dream of becoming an attorney. She described him as an all-around solid man that loves his daughters. She urged this Referee to give him a second chance.

Faheem Mujahid is a sports psychologist, nutritionist, and coach. He spoke of the Respondent's strong faith in God and unsolicited generosity.

This Referee considered the following documents submitted by the Respondent in support of mitigation:

1. Israel Reyes Letter, dated September 23, 2020;
2. U.S. Sailing Center, Miami Letter;
3. Shake-A-Leg Miami Letter;
4. Young Women's Preparatory Academy Letter;
5. Breathe Life Miami Letter;
6. Strategic Workshop Report Prepared for Strems Law Firm;
7. Email from Cynthia Montoya, dated October 31, 2017;
8. Strems Law Firm Pleading Organization Policy;
9. Strems Law Firm Introduction to Litigation;
10. Strems Law Firm Coverage;
11. Email from Cynthia Montoya, dated February 22, 2017;
12. Email from Scot Strems, dated February 19, 2018;
13. Email from Scot Strems, dated January 17, 2018;
14. Email from Scot Strems, dated March 27, 2018;
15. Email from Christopher Aguirre, dated October 3, 2017;
16. Email from Christopher Aguirre, dated December 21, 2017;
17. Welcome to Strems Law Firm Training, Litigation Department;
18. Welcome to Strems Law Firm Training, Pre-Litigation Department;
19. Strems Law Firm Meeting Cadences;
20. Strems Law Firm Team Organizational Charts;
21. Brenda Subia Letter, dated September 22, 2020;
22. Email from Carlos Izaguirre, dated September 21, 2020;

23. Christopher A. Narchet, Esquire, Letter;
24. Cynthia Montoya Letter, dated September 21, 2020;
25. Danny Jacobo, Esquire, Letter;
26. Deborah Guzman, CMHC, Letter;
27. Diana M. Zapata Letter;
28. Edwin Grajales Letter;
29. Georgina Rojas Letter, dated September 21, 2020;
30. Hunter Patterson, Esquire, Letter;
31. Jacklyn Espinal Letter, dated September 22, 2020;
32. Jacqueline Sosa Letter;
33. Jelani Davis, Esquire, Letter, dated September 23, 2020;
34. Johana Espinal Letter;
35. Luz Borges, Esquire, Letter, dated September 22, 2020;
36. Maria Mondragon Letter, dated September 22, 2020;
37. Michael Patrick, Esquire, Letter, dated September 23, 2020;
38. Michelle Cardona Letter, dated September 23, 2020;
39. Monica Rodriguez Letter, dated September 22, 2020;
40. Nelson Crespo, Esquire, Letter, dated September 22, 2020;
41. Nicolle Barrantes, Esquire, Letter, dated September 22, 2020;
42. Pandora Castro Letter, dated September 22, 2020;
43. Romina Mesa, Esquire, Letter;
44. Rosalyn Leon Letter, dated September 22, 2020;
45. Shavelli Calvo Letter;
46. Vanessa Rodriguez Letter, dated September 22, 2020;
47. Xochitl Quezada, Esquire, Letter;
48. Annette Goldstein Letter, dated September 20, 2020.

This Referee finds the following mitigating factors:

a. Absence of dishonest or selfish motive, Standard 3.3(b)(2).

There was no evidence that the Respondent would benefit personally in Ms. Nowak's matter. The funds would be provided to SLF.

b. Timely good faith effort to make restitution or rectify consequences of misconduct, Standard 3.3(b)(4).

The fee dispute was resolved prior to The Florida Bar filing the Complaint against the Respondent. Strems Law Firm absorbed the costs that were payable by Ms. Nowak and ended the fee dispute with her children with the assistance of Mark Kamilar, Esq. Paragraph 45 of The Florida Bar's Complaint is incorrect.

c. Character or reputation, Standard 3.3(b)(7).

See above – list of submitted letters referencing substantial charitable donations and character witness testimony. In addition, the Strems Law Firm, experienced in first party property insurance claims, was staffed by skilled lawyers and paraprofessionals.

VI. CASE LAW

I considered the following case law prior to recommending discipline:

In *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005), the contingency fee contract provided that the attorney's fee would be the greater of either the amount awarded by the court or 40% of the recovery amount. The court did not award any fees and the attorney withheld 53% of the net recovery for his fees. The referee recommended that the attorney be found guilty of violating Rule of Professional Conduct 4–1.5(a), which provided that an attorney shall not enter into an agreement for, charge, or collect a clearly excessive fee.

As to discipline to be imposed, the referee recommended: (1) public reprimand; (2) restitution; (3) revocation of Florida Bar Board Certification in Civil

Trial Law; and (4) payment of the Bar's costs. In recommending imposition of the above disciplinary measures, the referee considered the following aggravating factors: 9.22(b) Dishonest or selfish motive; 9.22(g) Refusal to acknowledge wrongful nature of conduct; 9.22(h) Vulnerability of victim; 9.22(i) Substantial experience in the practice of law; and 9.22(j) Indifference to making restitution.

In addition, the *Kavanaugh* Court considered several mitigating factors and stated, in pertinent part:

> we also agree that several mitigating circumstances are reflected on the face of the record. . . . In addition, Kavanaugh contends that even after the higher fee was deducted from the settlement amount, Pollack still had an excellent result. At the hearing below, the referee stated: "Upon hearing the case, I can tell you this. I think Mr. Kavanaugh got an exceptional result for his client. There isn't any doubt about that . . . I think that an excellent result was obtained by Mr. Kavanaugh."

The Florida Bar v. Kavanaugh, 915 So. 2d 89, 94 (Fla. 2005).

In consideration of the recommended sanction, the Court in *Kavanaugh* stated:

> the recommended sanction of a public reprimand has a reasonable basis in existing case law. *See Fla. Bar v. Hollander,* 594 So. 2d 307 (Fla. 1992) (imposing a public reprimand in an excessive fee case arising from a fee dispute involving a contingency fee agreement); *Fla. Bar v. Johnson,* 526 So. 2d 53 (Fla. 1988) (imposing a public reprimand in an excessive fee case arising from a fee dispute involving trust account violations).

Id. at 93.

Moreover, the Court concluded:

> in light of the aggravating and mitigating circumstances reflected in the record, the recommended sanction of a public reprimand [had] a reasonable basis in the Standards for Imposing Lawyer Sanctions.

Id.

Furthermore, the *Kavanaugh* court considered Kavanaugh's contention that even after the higher fee was deducted from the final settlement, the client had an excellent result. The Referee in *Kavanaugh* agreed and stated: "[u]pon hearing the case, I can tell you this. I think Mr. Kavanaugh got an exceptional result for his client. There isn't any doubt about that . . . I think that an excellent result was obtained by Mr. Kavanaugh."

In the instant case, the rejected settlement amount of $45,000.00 would have yielded a check for indemnity to Ms. Nowak for $22,500.00. The approved final settlement yielded a check for indemnity to Ms. Nowak of $31,500.00. Ms. Nowak's son, Kenneth Novak, testified that the roof was replaced for between $12,500.00 and $13,500.00, arguably an excellent result.

In *Florida Bar v. Shoureas*, 892 So. 2d 1002 (Fla. 2004), the Court rejected disbarment in favor of a three-year suspension for a lawyer who failed to act with reasonable diligence and to communicate with clients but did not have dishonest or selfish motive and was inexperienced in the practice of law. *Id.* at 1008–09. In the instant case, there was a communication breakdown as to the $45,000.00 settlement

offer, although the Respondent is an experienced attorney. However, the evidence does not support the Respondent having a selfish or dishonest motive.

In *The Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011), attorney Adorno settled the lawsuit for $7 million on behalf of seven class action plaintiffs, even though those plaintiffs had damages collectively of only $84,000.00, and thereafter abandoned his obligations to the thousands of individuals who would have been part of the class. The settlement of $7 million resulted in a fee to the law firm of $2 million. *Id.* After considering "the factual findings, the totality of the misconduct, the rules violated, the Standards, and case law," the Court concluded that a three-year suspension was the appropriate sanction. *Id.* Proving rehabilitation, Mr. Adorno is currently a member in good standing with The Florida Bar.

The facts and circumstances of the *Adorno* case far eclipse the Respondent's fee dispute case at issue. *See id.*

VII. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

The purposes of discipline, as enunciated in *The Florida Bar v. Poplack*, 599 So. 2d 116, 118 (Fla. 1992) (citing *The Florida Bar v. Lord*, 433 So. 2d 983 (Fla. 1983)) should be considered in evaluating the recommended discipline. These purposes are: (1) "the judgment must be fair to society . . . by protecting the public from unethical conduct and at the same time not denying the public the services of

a qualified lawyer;" (2) the sanction "must be fair to the respondent," punishing for ethical breaches and yet encouraging reformation and rehabilitation; and (3) the sanction "must be severe enough to deter others who might be . . . tempted to become involved in like violations." *Id.*

Generally speaking, the Florida Supreme Court "will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw." *The Florida Bar v. Lecznar,* 690 So. 2d 1284, 1288 (Fla. 1997).

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

VIII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

After the finding of guilt and prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following personal history and prior disciplinary record of the Respondent:

Year of Birth: 1981

Age: 39

Date Admitted to Bar: September 25, 2007

Prior Discipline: The conduct at issue occurred prior to the SC20-806 June 5, 2020 Emergency Suspension in another pending matter. At that time, the Respondent was an attorney in good standing with The Florida Bar.

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

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

Administrative Fee [Rule 3-7.6(q)(I)]	$1,250.00
Attendance of Court Reporter:	
November 4, 2020	90.00
November 13, 2020	90.00
February 22, 2021	556.25
February 23, 2021	500.00
February 24, 2021	500.00
February 24, 2021 (depo of Lea Castro)	80.00
February 25, 2021	500.00
February 25, 2021 (depo of Cris Boyar)	150.00
February 26, 2021	500.00
March 1, 2021	500.00
March 2, 2021	500.00
March 3, 2021	250.00
March 4, 2021	500.00
March 5, 2021	500.00
March 10, 2021	90.00
Transcripts:	
Excerpt of Carlos Camejo 2/23/21	1,144.00
Excerpt of Matthew Feldman 2/24/21	880.00
Deposition of Cris Boyar 2/25/21	731.00
Excerpt of Cris Boyar 2/26/21	1,278.75
Deposition of Adrian Arkin 2/26/21	537.00
Excerpt of Adrian Arkin 3/1/21	453.75

Excerpt of Cris Boyar 3/1/21		1,394.25
Excerpt of Adrian Arkin 3/2/21		886.50
Excerpt of Cris Boyar rebuttal 3/4/21		66.00
Excerpt of Adrian Arlin 3/4/21		676.50
Investigative Costs:		2,523.00
	TOTAL:	**17,127.00**

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

Dated this _____ day of March, 2021.

_____

Hon. Dawn Denaro, Referee
MDC Children's Courthouse
155 N.W. 3rd ST, Miami, FL 33128

X. CONCLUSION

In conclusion, this Referee finds that her recommended discipline has a "reasonable basis in existing caselaw" and that it would appropriately balance the seriousness of the conduct with the measures taken by Respondent in resolving the

fee dispute. *Lecznar,* 690 So. 2d at 1288.

Dated this _____ day of March, 2021.

_____

Hon. Dawn Denaro, Referee
MDC Children's Courthouse
155 N.W. 3rd ST, Miami, FL 33128

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee, has been furnished this _____ day of March, 2021, to the Honorable John A. Tomasino, Clerk, Supreme Court of Florida, via eportal filing; and a true and correct copy has been provided by email to: John Derek Womack, Esquire, Bar Counsel, The Florida Bar, jwomack@floridabar.org; Jennifer Falcone, Esquire, Bar Counsel, The Florida Bar, jfalcone@floridabar.org; Arlene Kalish Sankel, Esquire, Chief Branch Discipline Counsel, The Florida Bar, asankel@floridabar.org; Benedict Kuehne, Esquire, Counsel for Respondent, ben.kuehne@kuehnelaw.com; Nelson Diaz, Esquire, Counsel for Respondent, ndiaz@lnllawgroup.com; and Scott Tozian, Esquire, Counsel for Respondent, stozian@smithtozian.com.

_____

Hon. Dawn Denaro, Referee
MDC Children's Courthouse
155 N.W. 3rd ST, Miami, FL 33128