IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No.: SC20-844

v. Fl. Bar File No.: 2019-70, 685 (11C)

GREGORY SALDAMANDO,

Respondent.
_____/

THE FLORIDA BAR'S
INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STANDARDS IMPOSING LAWYER SANCTIONS

STATUTES

RULES

PRELIMINARY STATEMENT

A. Abbreviated Names

Gregory Saldamando will be referred to as Mr. Saldamando or the Respondent. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

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

References to specific pleadings will be made by Tab number in the Amended Index of Record. (Tab**).

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

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

The Bar's exhibits will be cited as (TFB-Ex-*) with specific reference to the transcript page number when needed. The exhibits accompanying the complaint will be cited as (EX-*). The Respondent's exhibits are cited (R-EX**).

The Bar provides an appendix of critical portions of the record to facilitate review. This brief cites to the appendix as (A**).

NATURE OF THE CASE

The Bar seeks review of the Report of Referee in this disciplinary proceeding in which Gregory Saldamando is the Respondent. Mr. Saldamando practiced law with Scot Strems. This review is similar to the review in Mr. Strems' case, SC20-842.

The Referee recommends that this Court find Mr. Saldamando guilty of a violation of Rule 4-1.4 concerning his failure to communicate with his client prior to agreeing to a global settlement of both the client's claim for sink hole damage under a homeowners insurance policy and his own claim for attorneys' fees. The Referee recommends a public reprimand for this violation. Mr. Saldamando has not sought review of the recommendations.

The Bar maintains that the clear and convincing evidence supports additional violations and that the resulting sanction should be a rehabilitative suspension or disbarment.

This case involves a "contingency" fee retainer agreement that contains different language than the agreement signed in SC20-842. The Bar contends that this agreement is not an authorized contingency fee agreement. Like the agreement in SC20-842, it should be expressly disapproved by this Court.

STATEMENT OF THE CASE AND FACTS

A. The insurance claim and the signing of the Strems Law Firm Contingency Fee Retainer Agreement.

Eduardo Alvarez and his wife, Doris Herrera, own a home on Southwest 188th Avenue in Southwest Ranches, Florida. (T34-35). Mr. Alvarez works for U.S. Customs and was stationed in the Bahamas for a period. The couple and their children returned to live in the home in 2014. (T34).

While they were living in the Bahamas, they rented the home. They learned in 2013 that the garage foundation had moved, and the property had tilted. (ROR-2)(T35-36). They believed the home had sustained sinkhole damage. (T36).

Mr. Alvarez hired a public adjuster, Reginald Ahmadee with GM & Associates because he knew Mr. Ahmadee from work. (T37). The public adjuster was unable to resolve the matter with Mr. Alvarez's homeowners insurance company while the couple still lived in the Bahamas, and he recommended the couple retain the Strems Law Firm. (T35).

Mr. Alvarez received the agreement to retain the law firm by e-mail. (T38). He discussed the agreement with Mr. Ahmadee, but with no one from the law firm. Mr. Alvarez did not really understand all of the agreement, but

he trusted Mr. Ahmadee. (T39). No one ever explained to him that the fee would be calculated differently depending on how the case was resolved. (T40). He signed the agreement on March 20, 2014. His wife actually never signed the agreement. (T41)(A6).

The "Contingent Fee Retainer Agreement" first addresses pre-litigation attorneys' fees, providing for a 20% contingency and highlighting that "THE CLIENT SHALL NOT PAY ATTORNEYS' FEES." (A4)

This first paragraph contains subparagraph (a) discussing fees post-litigation. In its entirety, this paragraphs states:

> a. **Litigation/Breach of Contract Actions**: Client hereby authorizes this Firm to file suit against Client's insurance carrier should said carrier deny, reject or under-pay Client's claim. If the payment of reasonable attorneys fees, to be paid by the Insurance Company is required to be determined by the Court or if settlement is achieved via negotiation with the Insurance Company, Attorney shall be entitled to receive all of such attorneys' fees, including any and all contingency risk factor multipliers awarded by the Court, or, if a settlement includes an amount for Attorneys' fees, Attorney shall be entitled to receive all of its expended and/or negotiated fees; **further, pursuant to 627.428, Florida Statutes, the Insurance Company is solely responsible to pay for the Client's attorneys' fees when and if, the Client prevails against the Insurance Company. NO RECOVERY, NO FEE.**

Thus, when the law firm files a pre-authorized lawsuit, the contract no longer provides for a percentage contingency fee. Instead, if a lawyer settles with the insurance company and the settlement "includes an amount for Attorneys' fees, the Attorney shall be entitled to receive all of its (sic)

expended and/or negotiated fees." The bold language assures the client that the insurance company will be "solely responsible to pay for the Client's attorneys' fees."

As we will later see, Mr. Saldamando negotiated a "global," undifferentiated settlement of both the clients' claim and his own fees. He negotiated first with his clients to learn the bottom amount that they were willing to accept if the offer was $100,000. He then negotiated with the insurance lawyer to obtain an offer of $157,500. Without disclosing the new global offer to his clients, he accepted it – attempting to give his clients only the bottom amount they had negotiated with him.

B. <u>The lawsuit to settlement.</u>

The lawsuit was filed on July 7, 2014, shifting the case out of the contingency fee agreement and into subparagraph (a). (TFB-ExA-1). Although it was filed in the name of Scot Strems, the complaint was prepared by Mr. Saldamando. (A51).

Early in the proceeding, discovery was not provided to the Defendants despite motions to compel and orders. (TFB-Ex. A-3 – A-8). Finally, the trial court stayed the proceeding until compliance with its orders. (TFB-Ex.A-7). It also imposed attorneys' fees on "Plaintiffs and/or their counsel," and prohibited the Plaintiffs from using in evidence any document that would

have been responsive to the earlier request for production. (TFB-Ex. A4-7). That stay was lifted two months later. (TFB-Ex. A-8).

Nearly three years after the filing of the lawsuit, Mr. Strems filed a notice for trial, to which the Defendant objected because discovery had yet to be provided and the case was still "in its infancy." (TFB-Ex. 9-10).

There is no dispute that the insurance company was vigorously defending this case on the theory that the damage was not caused by a sinkhole and, thus, was excluded from coverage. In March 2019, Mr. Saldamando entered into an agreement with Aaron S. Kling, an experienced sinkhole attorney, to assist with the trial of the case. Mr. Kling's co-counsel agreement gave him a 40% portion of any fee received in settlement, and the Bar does not claim there was anything inappropriate in Mr. Kling's agreement. (TFB-Ex. B).

C. Settlement negotiations.

Settlement negotiations did not begin in earnest until the spring of 2019. Mr. Keener, the insurance company's lawyer, explained that he increased a nominal offer to $50,000. (T226). This offer was a global, undifferentiated offer to settle all of the client's claims and the law firm's attorneys' fees and costs. (T224). This global settlement was a proposal for settlement, and "the Strems Law Firm" sent the clients a letter explaining the

impact of a proposal for settlement. The letter does not explain that the offer is inclusive of the law firm's fees or the impact that fees might have on the proposal at the end of a trial. (R-Ex 28).

Ms. Herrera was the primary client involved in the settlement negotiations. She recalled receiving the letter about the $50,000 offer. (T139). She called and called for Mr. Saldamando and when he finally called back, he advised her not to accept the offer because there was a chance of getting more. (T140). He did not discuss the fee that the firm would be entitled to receive if they accepted the offer. (T140).

In a string of text messages, Mr. Keener increased the offer to $75,000 on April 29, 2019. (T227)(R-EX 29)(A9). Mr. Saldamando responded with a $225,000 demand. (T228)(A10).

On April 30, Mr. Keener increased his global offer to $100,000 at 10:55 a.m. (T238). Ms. Herrera testified that she received a telephone call from Mr. Saldamando on April 30 while she was in her car. He told her that he thought he could get an offer of $100,000 from the insurance company. Initially she said she could not accept that. (T142). She explained that they would need at least "90-something" and needed to pay the public adjuster. (T142). "He kept saying, well, that doesn't cover my fees." (T142).

As her testimony explains, she continued to negotiate with him:

> *And, eventually, I said to him, well, if you get 100,000 maybe, maybe, we could do 65, and it would be I think fair to all of us. And then he did say that he would see about him paying the appraisal from the adjuster from his side.* (T142).

The Referee interrupted the questioning at this point to make certain the Referee understood the testimony. (T143-145). Ms. Herrera explained that Mr. Saldamando never said he actually had an offer of $100,000 and that he kept asking her for the "minimum you will take." (T144). She testified that she explained: "[I]t's not about my minimum. I've got to pay the people to fix the problem I have." (T144). She believed that Mr. Saldamando proposed the amount of $65,000 and that it was in the context of an offer from the insurance company of $100,000. (T145).

Ms. Herrera's communications with Mr. Saldamando involved several calls, each of a few minutes' duration. (T152). He did not discuss a counteroffer of $225,000 and she did not instruct him to settle her case for $65,000. (T152). He told her he would keep her advised of the settlement discussions. (T152).

After these conversations, the two lawyers continued their negotiations. Mr. Saldamando reduced his demand to $165,000, and Mr. Keener's final offer was $157,500. (T241). They settled for that global amount on May 7 about 5:00 p.m. (T242)(A13).

There are no documents establishing that Mr. Saldamando obtained authorization to settle from his clients. Mr. Keener did not agree to settle the clients claim for $65,000 with the rest going to the law firm as fees and costs; he had no discussion with Mr. Saldamando about how to split up the global offer. (T246).

Following her calls with Mr. Saldamando, the next thing Ms. Herrera received was an email on May 8, 2019, stating:

> *Doris:*
>
> *You and Eduardo agree to accept the $65,000 for you two, of which your PA will take whatever percentage you agree to. Please confirm. Thank you.* (TFB-EX G)(A16).

She testified that she had not so agreed earlier and that she did not confirm that agreement after receiving the email. (T153). The email does not actually say that Mr. Saldamando had settled the case, much less for $157,500.

On May 10, 2019, Mr. Saldamando sent an internal email to another staff member explaining that the split of the settlement would be $65,000 to the client, from which the public adjuster would receive 15%, and the law firm would get $92,500 for its fees and costs. (TFB-Ex F)(A22).

Mr. Alvarez testified that he had limited contact with Mr. Saldamando or anyone at the firm prior to the settlement; his wife had most of the contacts with the law firm. (T43-44). It is undisputed that he did not agree to the settlement personally.

D. The clients try to find out about the settlement.

Rather than respond to the email, Ms. Herrera started calling the Strems Law Firm for an explanation without success. She looked at the county clerk's website and learned that the case had been settled. (T154-55). She even tried to get information from Mr. Keener, who of course was unwilling to talk to her. (T155).

She explained her difficulties trying to communicate with Mr. Saldamando. She was always told he was in trial. (T155). The couple finally went to the law firm, but after a two hour wait, they talked to a paralegal who knew they would be getting $65,000, but did not tell them the case had settled for the much higher amount. (T156).

Eventually, on May 20, Mr. Alvarez had a telephone conversation with Mr. Saldamando where he learned that the total settlement amount was $157,500. (T67). Mr. Saldamando was claiming that the law firm's costs were nearly $200,000, and Mr. Alvarez asked to see a written breakdown of the law firm's claim. (T67).

They finally were able to schedule a meeting with Mr. Saldamando for early in the morning, but the night before at 10 p.m. they received a text cancelling the meeting. (T68-69,156-57). So, Ms. Herrera went to the law firm with a photo of Mr. Saldamando from the firm's webpage. As soon as she saw him, she called her husband to come from work. That is how they got to talk to him on May 29, 2019. (T157).

The meeting did not go well. (T157-161). Her full description of the meeting is in the appendix to this brief. (A29-39). He was unwilling to offer more to the couple and claimed his retainer agreement gave him total authority. They threatened to contact the Bar and he explained that then he would have to withdraw. They asked to talk to Mr. Strems, and Mr. Saldamando told them they could not talk to Mr. Strems because Mr. Saldamando was the one making the decisions. (A38).

Following the meeting, Mr. Saldamando sent them an email at 7:13 pm., which should be read in its entirety. (A24)(TFB Ex K). The email represents that the case was "settled based on your wife's authority for $65,000 clean to your wife, with the global amount being $157,500." At the end it tells them they will need "to agree that you will be receiving $65,000 clean" to settle with the insurance company.

The clients responded to this email disputing his version and claiming he had a conflict of interest. (A27). Following these events, the couple filed the complaint that initiated this proceeding. (Ex. A). Mr. Saldamando filed a motion to withdraw on June 18, 2019. (TFB-Ex A-1)(R-EX 36).

The clients went to the first scheduled hearing pro se on the motion to withdraw, only to learn that it had been cancelled. (T164). The judge helped them reset that hearing, but Mr. Saldamando sent another attorney to the hearing. (T164). The judge required that Mr. Saldamando attend the hearing.

On October 23, 2019, Mr. Keener filed a motion to enforce the settlement agreement. (TFB-Ex A.1). With the help of Mr. Kling, the clients had already agreed on October 21 to accept the settlement with the insurance company at $157,500, and then resolve the split of this amount later with Mr. Saldamando. (R-42). On December 12, 2019, the court entered an order requiring the disputed funds, $80,000, to be placed in the registry of the court and granting Mr. Saldamando's motion to withdraw. (A47-48).

The clients then hired another attorney to help them resolve their dispute with Mr. Saldamando. (T168). He charged them a 15% contingency fee for his services. (T168). Mr. Kamilar represented the Strems Law Firm

in that matter and eventually the clients received $50,000 from the money in the registry. Mr. Alvarez estimated that with the $65,000 that they received before monies were placed in the registry, they netted approximately $100,000 by the time it was resolved in 2020. (T117).

E. The disciplinary proceeding

The Bar filed its complaint in this proceeding on June 25, 2020. (TAB1). The complaint alleged the basic facts of the dispute discussed in the preceding section. It also alleged that Mr. Saldamando had a pattern of conduct of settling cases by receiving a global settlement offer and allotting the client the minimum amount that the client had authorized. The complaint alleged violations of:

1. Rule 4-1.2 (Objectives and Scope of Representation),
2. Rule 4-1.4 (Communications),
3. Rule 4-1.5 (Fees and Costs for Legal Services),
4. Rule 4-1.7 (Conflict of Interest; Current Client),
5. Rule 4-1.8 (Conflict of Interest; Prohibited Transactions),
6. Rule 4-8.4(a) (Misconduct and Minor Misconduct).

The allegations of a pattern of conduct were based on information provided by Mr. Kamilar when responding to the initial inquiry. During this litigation, it became clear that Mr. Kamilar had sent that letter without

incorporating redline edits provided by Mr. Saldamando. The letter with Mr. Saldamando's intended edits is in the record as Respondent's Exhibit 37(a) and (b)(A40-46). The Court should consider this document and not the unedited document.

It should be noted that the contract discussed in the corrected letter is the wrong contract. It is the version of the contract in Case SC20-842, which provides for a 30% contingency fee option during litigation. The actual contract in this case provides for no contingency percentage once litigation is commenced. (A4).

In the draft letter, Mr. Kamilar had written that Mr. Saldamando had first settled the clients' claim for $65,000 and then had settled the fees for $92,500. Mr. Saldamando corrected this error explaining:

(I settled claim globally with carrier, both indemnity and stat fee and costs, but I had a mandate from client to get them at least $65,000 clean and of course an acceptable amount for our fees/costs.). (A45).

Thus, Mr. Saldamando claims his "mandate" was to get the clients "at least" $65,000 clean and an "of course an acceptable amount" for fees. It is undisputed, however, that he did not even attempt to negotiate an amount above $65,000 for them and never revealed the total amount of the settlement during these negotiations, much less obtained their acceptance of this amount.

In addition to the testimony of these witnesses, the Referee also heard the testimony of attorney, Cris Boyar, who typically provides expert testimony at fee hearings to set fees under section 627.428 when they are set by the Court. (T359, 403).

Mr. Boyar testified that he does his "very best" not to get involved in global settlement negotiations. (T394). He explained that global settlements are a "setup for disaster," "a minefield after minefield." (T394). He blamed this problem on the insurance companies who are trying to create a wedge between the attorney and the client. (T394). He was not an expert on lawyer ethics and did not discuss whether a plaintiff's attorney in this situation can simply explain to the insurance company that he cannot negotiate based on a global offer because it creates a conflict with his client. He justified Mr. Saldamando's settlement negotiations here because "the Florida Bar has no rule against global offers." (T395).

The Referee asked Mr. Boyar whether the settlement of a global offer did not require a careful discussion with the client. (T395-398). In agreeing with the Referee, Mr. Boyar explained:

> *You're right. That's literally how it happens. You say to a client, what's your bottom-line number? And then you do your very best to get them that bottom-line number.* (T398).

Mr. Boyar apparently thought that in these lawsuits there is no need to negotiate for a settlement better than the clients' bottom-line.

Similar to SC20-842, the sanctions hearing was held before the Referee announced her recommendations of guilt. Following all of the proceedings the Referee issued her 76-page report on April 29, 2021. (A78). Portions of the report are very similar to the report in SC20-842. The report has a very limited discussion of Ms. Hererra's testimony, but the Referee found her to be credible. (ROR8-10).

The Referee recommends a finding of guilt only on the Rule 4-1.4 (Communications) violation and, based on that violation, recommends a public reprimand.

SUMMARY OF THE ARGUMENT

It is undisputed that Mr. Saldamando violated Rule 4-1.4 because he did not adequately communicate with his clients. But the clear and convincing evidence establishes a violation of Rule 4-1.7 (Conflict of Interest; Current Client) because Mr. Saldamando was negotiating a global settlement under a retainer agreement that encouraged him to settle for his clients' bottom amount without even disclosing the final offer to his clients – in order to maximize the fee to the law firm. He violated Rule 4-1.2 (Objectives and Scope of Representation) by settling with the insurance company knowing his client needed more than $65,000, but without even trying to seek a higher amount for his client, and then by refusing to back out of his unauthorized settlement. He violated Rule 4-1.5 (Fees and Costs for Legal Services) because he was representing his clients with a "contingency" fee agreement without any percentage split or an ethical method to determine the fee if the matter was not presented to a judge. Finally, he violated Rule 4-8.4(a) (Misconduct and Minor Misconduct) by misrepresenting the facts of the settlement to his clients and by claiming Ms. Herrera authorized a settlement of $157,500, when he knew full well she did not.

Depending upon this Court's decision on these additional violations, the Bar submits that a sanction of at least a rehabilitative suspension is warranted and at most disbarment with leave to reapply in five years.

But this Court should also expressly address the contingency fee contract that Mr. Boyar claims violates none of the Rules of Professional Conduct. The concept of a contingency fee agreement was developed to allow a person, who could not afford to retain a lawyer, to pursue a good faith claim with the help of a lawyer willing to receive a fee only upon prevailing. It works because the lawyer gets paid more when the client gets compensated more. The lawyer has an incentive to achieve the best outcome for the client.

But Mr. Saldamando's retainer agreement – indeed the agreement for the entire Strems Law Firm – is designed to respond to settlement offers to achieve the minimum amount the client will accept while providing the maximum amount for the lawyers. This is particularly true when the settlement is a global settlement. The omission of a contingency percentage means that Mr. Saldamando gets paid more if the client gets paid less. His agreement gives him an incentive to negotiate his own client down to a lower settlement in order to increase his own payment. It contains an unwaivable conflict from the moment the lawsuit is filed.

Once a claim is in litigation where section 627.428, Florida Statutes, mandates an attorneys' fee from the other side on settlement, this Court should plainly hold that the retainer agreement can allow for a contingency percentage of the total settlement as the attorney's fee, but it cannot allow for a method where the lawyer sets his own fee or negotiates against his client to determine the fee.

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

This is an original proceeding filed in this Court as the court of first instance. "Standards of review" used to evaluate a trial court's final judgment do not apply here.

It is still useful to consider the decision-making process governing this Court's ultimate determination after the Referee's report is filed.

1. Findings of Fact

As this Court explained in *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016): "This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)." *See also The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); *The Florida Bar v. Parrish*, 241 So. 3d 66, 72 (Fla. 2018); *The Florida Bar v. Vining*, 721 So. 2d 1164, 1167 (Fla. 1998); *The Florida Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla. 1998); *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996).

2. Credibility

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

3. Recommendation of Discipline

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

> In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See The Florida Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). At the same time, this Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the standards. *See The Florida Bar v.*

Alters, 260 So. 3d 72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008).

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

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

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

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

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

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

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

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

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

ARGUMENT

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

The ethical obligations of an insured's lawyer during settlement negotiations are easier to understand if one understands the several methods that can be used when settling an insurance claim for a client, and when settling a related claim for attorney's fees. There are several completely ethical methods to determine the fees owed to the lawyer. A written engagement typically needs to cover more than one method and explain those methods clearly to the client.

Pre-litigation. For claims that are resolved prior to litigation, there is generally no right to receive fees from the insurance company. *See Fla. Life Ins. Co. v. Fickes*, 613 So. 2d 501, 504 (Fla. 5th DCA 1993). The lawyer and the client can negotiate a fee agreement that is based on a contingency fee, an hourly fee, a flat fee, or even some combination of these approaches. This case does not involve a claim settled prior to litigation, and the 20% contingency fee provided in the contract does not raise the ethical concerns created by subparagraph (a).

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

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

Despite the language of this statute, the case law generally treats a payment after the filing of a lawsuit as a confession of judgment that results in a statutory right to fees. *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1219 (Fla. 2016); *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218-19 (Fla. 1983).

Because the statute contemplates a judgment "in favor of the client," the fee award technically belongs to the client, but the lawyer has some legal interest in the fee. *See e.g.*, *Forthuber v. First Liberty Ins. Corp.*, 229 So. 3d 896, 899 (Fla. 5th DCA 2017) ("As the plain language of section 627.428 clearly establishes, the fees owed under the statute belong to 'the *insured* not the insured's attorney.' "), quoting *Fortune Ins. Co. v. Gollie*, 576 So. 2d 796, 797 (Fla. 5th DCA 1991); *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1267 (11th Cir. 2000) ("§ 627.428 entitles the insured and not the attorney to the recovery of those fees."); *but see State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993) (holding that litigating the amount

of fees under section 627.428 “inures solely to the attorney’s benefit and cannot be considered services rendered in procuring full payment of the judgment”); *Brown v. Vermont Mut. Ins. Co.*, 614 So. 2d 574, 582 (Fla. 1st DCA 1993) (holding that insured’s prior counsel may continue litigation in the name of the insured despite the holding in *Gollie* when the insured settled with the insurance company without notice to the insured’s prior counsel).

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

Without regard to the specific language of the retainer agreement, there are basically four methods to determine fees. The first three methods are two-step models, and the fourth method is a “global” settlement model:

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

(2) If the client’s case is resolved in court by the judge or jury, the attorney and the insurance company can then settle the

remaining claim for fees and the attorney is paid the amount of that settlement.

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

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

There rarely are issues that create professional conduct problems for attorneys arising out of the two-step processes described in the first three methods so long as the retainer agreement is clear. It is noteworthy that Mr. Kamilar's letter was drafted to claim the firm used method three when they actually used none of these methods.

Mr. Boyar is correct that the global settlement method creates minefield upon minefield. That is particularly true with the retainer agreement signed by the clients in this proceeding that does not provide for a contingency percentage. While Mr. Boyar is critical of the insurance

company's lawyer who offers a global settlement, it is important to understand that the insurance company's lawyer normally does not know the terms of the agreement between the insureds and their attorney, which is subject to an attorney-client privilege. *See Tumelaire v. Naples Estates Homeowners Ass'n, Inc.,* 137 So. 3d 596, 598 (Fla 2d DCA 2014).

A global settlement after the commencement of litigation presents no ethical problem if the plaintiff's attorney has a contract agreeing to take a percentage of the total settlement. Because the global settlement is undifferentiated and because technically the fees are payable to the client under the text of section 627.428, it is entirely appropriate for the lawyer to agree to take a percentage of the total amount offered. This contingency fee method can be negotiated at the inception of the relationship with the client. This approach also assures that the lawyer has an incentive to obtain the best possible result for the client.

In a case like this one, where there is no contingency provision, the only way the insurance company's lawyer knows the offer creates a conflict between the plaintiffs and their counsel is if the plaintiffs' attorney tells the insurance company's lawyer that the global offer creates a conflict. Mr. Saldamando did not tell Mr. Keener that the offer created a conflict, and Mr. Keener explained that he normally made global offers in these cases.

If Mr. Saldamando had told Mr. Keener that he could not negotiate a global settlement under the terms of his retainer, and Mr. Keener (and the insurance company) persisted in making only global offers, that might very well create a professional conduct issue for Mr. Keener or an unfair claim practice for the insurance company.[1] But that is not what happened here. Mr. Keener had no basis to know that Mr. Saldamando had an inherent conflict created by the law firm's standard agreement.

Alternate fee recovery clauses to permit a higher fee from the insurance company. When a lawyer has a contract that results in a lower fee if paid by the client than the fee awardable under section 627.428, sometimes insurance companies or other parties who owe the fee under another fee-shifting provision will argue that the fee they should be required to pay should not exceed the fee the lawyer would charge his client. *See Forthuber*, 229 So. 3d at 899-900 (noting such arguments raised by insurer and rejecting them because "[t]he fee agreement between a lawyer and client, no matter how reasonable, does not control the amount of fees

[1] This is not a case in which the defendant is demanding a waiver of the attorney fee and the statute makes fees discretionary. *See Evans v. Jeff D,* 106 S.Ct. 1531 (1986). The fees here are mandated by statute, but without an assignment of fees to the attorney in the retainer agreement, the fees statutorily belong to the client.

assessed against a third-party under a fee-shifting statute" in the context of an alternative fee agreement); *Royal Belge v. New Miami Wholesale, Inc.*, 858 So. 2d 336, 338 (Fla. 3d DCA 2003) (holding that a court cannot award attorney's fees under section 627.428 in an amount that exceeds the fee agreement between the attorney and client in the context of an agreement that provided only a fee based on a fixed percentage of the recovery); *Kaufman v. MacDonald*, 557 So. 2d 572 (Fla.1990)(allowing fee in excess of the contingency percentage when the contract allowed a higher amount from the court).

Alternate fee recovery clauses are used to make it clear that the attorney can get more from the insurance company than the attorney would charge his client. *First Baptist Church of Cape Coral, Fla., Inc. v. Compass Constr., Inc.*, 115 So. 3d 978, 981-82 (Fla. 2013); *Forthuber*, 229 So. 3d at 899-900. There is nothing wrong with such provisions, so long as the fee is actually coming from the insurance company as a separate and distinct payment to the attorney after the attorney has negotiated for the best outcome achievable for the client.

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

Although Mr. Saldamando violated Rule 4-1.4 because he did not communicate with his client before settling this case, he committed other violations as well. His worst violations arise because his contingency fee contract inherently creates conflicts with the client from the inception of litigation, if not from the inception of the attorney-client relationship. These conflicts are worse because of the practice of negotiating global settlements.

The critical language in Mr. Saldamando's "Contingent Fee Retainer Agreement," (A4), is easier to understand if it is examined sentence-by-sentence, beginning with sentence two of subparagraph (a).

Sentence 2 (stopping at the semi-colon).

> *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, or, if a settlement includes an amount for Attorneys' fees, Attorney shall be entitled to receive all of its (sic) expended and/or negotiated fees;*.

This long and confusing portion of the sentence is comparable to sentences two and three in the law firm's later contract that was used in the case underlying Mr. Strems' proceeding, SC20-842.

So long as this sentence applies to fees set by the court, or to fees negotiated separately following settlement of the client's claim, this sentence is not a problem. The proper, ethical function of such a sentence, properly written, is merely to serve as an "alternate fee recovery clause," making clear that the law firm is entitled to receive an award of fees from the insurance company that can be greater than the fee that would be charged to the client. So long as that is all such a clause is used for, there is nothing improper about an "alternative fee" language.

But Mr. Saldamando interprets this sentence to mean that he is "entitled to receive all of [his] expended and/or negotiated fees" in a global settlement. This presents two major problems. First, the "fees" are not separately "negotiated" with the insurance company during settlement negotiations based on a global settlement. The insurance company offers a lump sum and takes no position how Mr. Saldamando divides this money with his client. Second, if the offer is a global settlement, the contract does not even explain how to calculate the "expended and/or negotiated fees"[2] at the time of the settlement or even the hourly rates that will be used to

[2] This Court has explained in most colorful terms that "and/or" is an "inexcusable barbarism." *See Cochrane v. Fla. E. Coast Ry. Co.*, 145 So. 217, 218, 107 Fla. 431, 435 (Fla. 1932).

calculate this fee. The client would never know how much of a global settlement he or she would eventually receive when entering into the retainer agreement. Even when the global offer is made, there is no method for Mr. Saldamando to show the client an agreed upon billing amount. He is inherently postured to negotiate against his own clients to obtain his fee from the joint offer.

But even if the negotiations do not involve a global offer, the conflict still exists with any process that does not sufficiently separate the negotiations for the client's payment from the negotiations for the attorney's fee. Thus, even if the insurance company had actually offered Mr. Saldamando a $157,500 settlement, divided into two parts – $65,000 for his client and $92,500 for his law firm – he is placed in the posture of trying to convince his client to take the minimum amount in order to receive the larger amount for himself. He knows that if he demands more for his client, the insurance company is likely to take part or all of that amount from the portion allocated to his fees. Moreover, without an assignment of the fees from his client, it was actually the client who had the right to receive the entire $157,500. It was Mr. Saldamando who needed to obtain approval of his client to accept the amount offered as a fee from his client; not vice-versa. Here, Mr. Saldamando, even on the day after the unauthorized settlement,

did not disclose to his clients the total amount of the settlement or the amount he was taking for the law firm, because he knew this knowledge would upset them, and they would object to the proposed fee.

Sentence 2 (the final clause).

> **further, pursuant to 627.428, Florida Statutes, the Insurance Company is solely responsible to pay for the Client's attorney's fees when and if, the Client prevails against the Insurance Company. NO RECOVERY, NO FEE.**

This bold portion of the contract is a reasonably accurate statement about the contents of section 627.428. But it is not an accurate statement of what really happens when Mr. Saldamando allows the insurance company to offer a global, undifferentiated settlement. In that context, the client is being offered a lump sum that legally belongs to the client, and Mr. Saldamando is negotiating against his client to maximize his fee by obtaining a minimum or bottom-line demand from his client. This final clause of the sentence is misleading so long as Mr. Saldamando is negotiating his claim and his clients' claim simultaneously.

The missing sentence discussed in Mr. Kamilar's letter.

The alternative fee clause with the client that is contained in the letter submitted by Mr. Kamilar to the Bar, even with Mr. Saldamando's

corrections, is the sentence most discussed in SC20-842, the similar proceeding involving Mr. Strems. (A44).

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

This brief will not repeat the discussion of the problems with this sentence that are presented by the Bar in Mr. Strems' proceeding. But at least this later contract, more or less, continued to be a contingency fee agreement containing a stated percentage.

Here, Mr. Saldamando's "Contingency Fee Retainer Agreement" ceases to have a percentage contingency fee when litigation commences. Rule 4-1.5(f) provides that the written agreement "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." The rule does not permit a "contingency" fee agreement in which the lawyer determines his own fee in a global settlement to the detriment of the client. The percentage method described in the rule creates an incentive to seek the best result for the client. The contract used by Mr. Saldamando created precisely the opposite incentive. The method to determine the fee must be pre-established and ethical, which is not the case here.

The Referee concluded that the evidence did not prove that the "contingent fee retainer agreement in this matter is illegal or prohibited," and further concluded that the "agreement itself does not violate any Rules Regulating The Florida Bar." (ROR34). Mr. Boyar, of course, had testified that in his opinion the contract did not violate the Florida Rules of Professional Conduct. (T397). But on its face, the "Contingency Fee Retainer Agreement" is not an authorized fee contract under Rule 4-1.5, and on its face it creates a conflict with the client. That conflict is severe when the lawyer negotiates either a global settlement or a simultaneous settlement of the client's claim and his own separate claim for attorneys' fees.

The Referee was clearly influenced by Mr. Saldamando's argument that the Bar had not prosecuted an earlier complaint that he regarded as identical. The Referee actually inserted the entire letter from the Bar to that client in the Report. (ROR43). But the letter reflects that "the judge has authorized the insurance company to pay Mr. Saldamando $59,000." (ROR43). Thus, that settlement does not appear to be a global settlement, but rather a two-step settlement involving a decision by the judge. The Bar is not contending that such two-step settlements are inherently a conflict.

In this case, while it is important that Mr. Saldamando be appropriately sanctioned for his misconduct, it is even more important that this Court

prohibit contracts like the one at issue here. Contracts that allow the lawyer to negotiate the fee as part of the final settlement negotiations without the knowledge of the client, much less without a clear and pre-established method for determining the fee in a written retainer agreement, should be prohibited in the strongest terms.

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

A. Rule 4-1.4, Communication

The Report of Referee extensively explains this recommendation, which Mr. Saldamando does not contest. (ROR45-57). This rule requires a lawyer to promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the rules. That includes settling a case after the other side increases the offer from $100,000 to $157,500.

Mr. Saldamando also needed to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" before he agreed to a settlement and afterwards when the client refused to confirm the settlement.

He needed to "keep the client reasonably informed about the status of the matter," and yet he did not actually tell them that the $100,000 offer had been extended or tell them of the 50% increase in the offer thereafter. He

did not inform them of the notice in the court file informing the court that the case had settled even though he had received no confirmation from them of their willingness to settle for $65,000 and had not even told them that he had agreed on their behalf to a settlement. Earlier, he had not informed them of the stay order, which imposed a sanction and excluded evidence. (T49-50). Mr. Saldamando knew he was in a "high volume" law firm, and that he did not have time to talk to all of his clients despite the complexities created by the firm's retainer agreements.

B. Rule 4-1.2, Objectives

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

Before the offer was increased from $100,000 to $157,500, while representing that the $100,000 offer was essentially a hypothetical offer that the insurance company might make, Mr. Saldamando had negotiated his own client down to $65,000 while knowing she was hoping for a net settlement more in the range of $90,000 because the repairs would cost more than that.

Even though it appears that Mr. Saldamando thought he was under the terms of the firm's later contract allowing for a 30% contingency fee, he did not return to his clients with the good news that the offer had increased by $57,500, and suggest a split of $100,000 to the client and $57,500 to his law firm. He ignored the clients' objective and settled the case without disclosing the increase in the offer.

When he found out that his clients would not agree to the offer, he did not attempt to achieve their objectives by notifying Mr. Keener that he had been mistaken and that he did not have authority to settle the case for $157,500. Instead, he stuck with his position that he could unilaterally impose a fee against the global settlement that was comparable to the fee that would be imposed upon an insurance company under section 627.428. Ultimately, that required the clients to hire a new lawyer, pay an additional 15% contingency, and extend the time to receive a fair settlement.

The Referee discusses her recommendation on this violation in the Report. (ROR18-20). The Report reasons that Mr. Saldamando was "impliedly authorized" by Mrs. Herrera to settle the case. But the clear and convincing evidence is flatly to the contrary. She was not advised that the first offer had actually been made, let alone that it had been substantially

increased in the second offer. She had discussed the minimum amount she would take in hypothetical terms in the context of a likely $100,000 offer.

Moreover, the Referee relies on Mr. Saldamando's email on May 29, 2019, presenting "all available options" to the clients. (ROR20). But that email is the strongest evidence of a misrepresentation violating Rule 4-8.4. (A24). That email begins:

> *As discussed in the meeting today with you and your wife, this was case (sic) settled based on your wife's authority for $65,000 clean to your wife, with the global amount being $157,500.* (A24).

But it is undisputed that such a global amount was not disclosed or discussed with Ms. Herrera. The rest of this email demonstrates the full scope of his conflict with his clients during settlement negotiations because of his need to maximize the law firm's share. At the end of the email, responding to the clients' request for what would be required to proceed with the settlement, he claims they will need to agree to receiving $65,000. He does not suggest they could settle with the insurance company, place the disputed amount in his trust account, and resolve that dispute in some expedited manner.

The clear and convincing evidence demonstrates that Mr. Saldamando did not abide by his client's objectives because they interfered with his objectives. This Court should find a violation of this Rule.

C. Rule 4-1.7, Conflict with current client

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

As explained in the preceding section, the conflict was born when the client signed Mr. Saldamando's standard contact. Like the contract in Mr. Strems' case, it is hard to imagine the conversation necessary to explain this contract to a potential client in order to obtain informed consent as that concept is explained in the Preamble to the Rules of Professional Conduct:

> *My retainer agreement says that after a lawsuit is filed my fee is not based on a percentage of the total settlement with the insurance company. If a settlement includes an amount for attorneys' fees, I'm entitled to receive all of my expended and/or negotiated fees. This can include a contingency risk multiplier factor. When the insurer offers a global settlement, which it usually does, I'm entitled to receive my fees from the global settlement without court approval. Once you tell me what your*

bottom line "clean" is, I will try to get a higher global offer to increase my fee instead of your settlement. Is that okay with you?

Of course, this contract was sent and returned by email; the fees were not explained in person. If the potential client had been encouraged to seek independent counsel on this contract, no lawyer would advise a client to sign this. It is an unwaivable conflict because no discussion could reasonably explain this prior to obtaining written consent.

And the discussion with the client should actually disclose:

When the insurer offers a global settlement, that settlement belongs to you, and I will need to negotiate with you for my fair share of the global settlement.

But Mr. Saldamando would certainly never agree to that oral understanding without a pre-established method to set his fee.

The conflict comes to a full head when Mr. Saldamando is negotiating with his own client to get her demand lower in order to increase his own fee. If he was not going to insist that the insurance company engage in a two-step negotiation or have his fee set by the court, because his contract is not a percentage contingency fee agreement, he needs to advise Ms. Herrera

that she should consult her own lawyer when negotiating with him to divide money between her and his law firm.

The Report of Referee focuses on the period beginning on May 29, 2019, when the clients waited at the office with a photograph of Mr. Saldamando in order to compel him to have a meeting with them. It emphasizes that Mr. Saldamando attempted to withdraw after the clients filed this Bar complaint.

But, as explained above, this is a case in which the conflict arose much earlier because the settlement negotiations were "materially limited . . . by a personal interest of the lawyer." Rule 4-1.7(a)(2). As the comments to the rule explain: "The lawyer's own interests should not be permitted to have adverse effect on representation of a client."

The conflict began no later than the inception of the lawsuit that eliminated the contingency percentage. In this high-volume practice, where he negotiated many settlements, Mr. Saldamando had to understand this conflict existed long before the negotiations for these clients.

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

D. Rule 4-1.5, Fees

This is not a case where the Bar is arguing that the $92,500 fee is improper under this rule because it was excessive. This was a complex sinkhole claim with a dispute over the existence of damage caused by a sinkhole. The net fee is not excessive for purposes of the rules.

But a lawyer may not enter into a fee agreement that is "prohibited." See Rule 4-1.5(a). And a contingency fee agreement must either contain a percentage split or a pre-established ethical method to determine the fee. It cannot be an agreement to decide fees at the end on a vaguely explained method in the event of settlement. Despite Mr. Boyar's legal opinion, this contract is prohibited by the existing rules because it does not "include the percentage or percentages that will accrue to the lawyer in the event of settlement" or any other ethical method to calculate the fee. Rule 4-1.5(f)(1).

Moreover, when the client is not regularly represented by the lawyer, the basis for the fee must be communicated to the client. Rule 4-1.5(e)(1). Even if this fee structure were permissible, it is not presented in a fashion where a client would understand the fee structure and it was never explained in person. The explanation in the contract misleads the client as to what will occur when the lawyer negotiates a global settlement.

A fee also violates this rule if it is "secured by the attorney by means of intentional misrepresentation or fraud upon the client . . . as to either entitlement to , or amount of, the fee." Rule 4-1.5(a)(2). Mr. Saldamando was attempting to secure a fee of $97,500 after negotiating the client down to a $65,000 payment, by seeking their confirmation of the settlement he had already made with Mr. Keener. He did not disclose that the insurance company had increased its offer by 50%. In this context, that was obviously a material fact.

The Bar submits that the evidence is clear that this material fact did not just slip Mr. Saldamando's mind. He did not tell his clients of this large increase in the offer because they would have wanted an increased payout that he did not want to give them. He was attempting to secure his fee by means of a fraudulent omission to his own clients.

The clear and convincing evidence demonstrates a violation of Rule 4-1.5.

E. Rule 4-8.4(a) & (c) Misconduct.

Rule 4-8.4 prohibits a lawyer from violating the Rules of Professional Conduct by his or her own acts or through the acts of another. It also prohibits conduct involving "dishonesty, fraud, deceit, or misrepresentation."

In the preceding subsection D, this brief discusses Mr. Saldamando's material omission of the 50% increase in the settlement offer when he sought confirmation of the settlement from his clients. The Bar submits that act is a violation of this rule.

Moreover, on May 29, 2019, following the meeting with his clients, Mr. Saldamando sent them an email claiming he settled "based on your wife's authority for $65,000 clean to your wife, with the global amount being $157,500." (A24). Even if Mr. Saldamando were confused about whether her discussion of $65,000 – when she was not even informed of an outstanding $100,000 offer – was "authority," he knew that neither client knew about the $157,500 offer. The email is an act of dishonesty; it is a misrepresentation, which Mr. Saldamando introduced into evidence in this case.

And at the end of the email, when the client wants to know what is "required to proceed with the settlement" with the insurance company, he does not tell them that a settlement could occur with the disputed funds placed in trust for a resolution of the dispute between the clients and Mr. Saldamando. Instead, he tells them that in order to settle "[y]ou will also need to agree that you will be receiving $65,000 clean so we can advise the insurance company of how much to issue you the check for." (A25). Mr.

Saldamando clearly knows that a settlement with the carrier did not require telling the insurance company to send his client a check for $65,000. This was a patent misrepresentation to the client that complicated the case for months, even requiring the insurance company to move to enforce the settlement against his clients.

IV. A public reprimand is not supported by the Standards.

The Referee is recommending a public reprimand in this case. This recommendation is based on Standard 6.2, which recommends that sanction for negligent conduct failing to comply with court orders or rules, and on Standard 7.1(c), which provides for a public reprimand for negligent conduct violating a professional duty. (ROR58-60). Although the Bar maintains that Mr. Saldamando's conduct includes knowing and intentional conduct, a public reprimand would be clearly insufficient even if this conduct were negligent in light of the additional violations discussed earlier,

The Bar recognizes this is Mr. Saldamando's first disciplinary proceeding, and there is no evidence that he wrote or implemented the retainer agreement used by Mr. Strems' law firm. But he is an experienced lawyer who had worked for Mr. Strems so long that he was allowed to settle his own cases. The conflict demonstrated here is not a one-time event; it was a standard procedure.

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

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

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

If recommends suspension:

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

Mr. Saldamando knew that he was negotiating with clients to get to the bottom-line they would take "clean" – not the best settlement he could get for them – in order to maximize the fee he received. He negotiated the settlement without informed consent from the client and refused to back out of it or alter its structure. The clients had to hire separate counsel in order to resolve this matter months later when they needed money to repair their home. This Standard applies to support a suspension or even disbarment.

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

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

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

It is the Bar's position that Mr. Saldamando deceived these clients when he did not disclose the actual offer of $100,000 or the increase to $157,500. That deception was at least knowing at the time of the settlement, and was intentional on the next day when he sought "confirmation" of the $65,000 settlement.

Standard 7.1. As explained above, the Referee relied on Standard 7.1(c), which recommends a public reprimand for negligent conduct violating a professional duty. But subsections (a) and (b) provide for suspension or disbarment when the violation is knowing or intentional. Disbarment is appropriate when a lawyer intentionally violates a professional duty with the intent to obtain a benefit for the lawyer or another and causes potentially serious injury to a client or the legal system. Suspension applies for a knowing violation that causes injury to the client or the legal system.

The Bar submits that by the time of the May 29 email, at the very latest, Mr. Saldamando's conduct was intentional and that the delay of the settlement and need for the client to hire separate counsel was a serious injury.

Standard 6.1. Finally, Standard 6.1 addresses situations where a lawyer improperly withholds material information. It recommends disbarment when the withholding of information causes potentially serious injury to a client or a potentially serious adverse effect on the legal proceeding. It recommends suspension when the conduct is knowing without regard to injury. Again, this standard recommends at least a suspension for the matters Mr. Saldamando withheld from his client.

B. The applicable mitigating and aggravating circumstances.

Mitigating Circumstances. The Referee found the following mitigating circumstances for Mr. Saldamando:

(1) Standard 3.3(b)(1), absence of prior disciplinary record;

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

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

(4) Standard 3.3(b)(5), full and free disclosure

The Bar does not contest the finding of no prior record. And there was competent evidence of his character from co-workers, clients, and even

judges. It is noteworthy that one of the satisfied clients had a case where the attorneys' fees were still being litigated, which means the settlement was not a global settlement. (ROR62). It is also noteworthy that the record contains evidence of judges who imposed *Kozel* or other sanction orders against Mr. Saldamando, in addition to the sanction imposed in these clients' case. (TFB-EX, D-M). Thus, his fitness viewed by judges seems to be a mixed bag.

The Referee also found there was no evidence that Mr. Saldamando was dishonest or selfish in this case because he was a salaried associate. But Mr. Saldamando was dishonest even if he did not own a portion of the law firm, and his own emails show he was insistent that the firm, which paid his salary, receive the $92,500. Selfishness for a contingency lawyer does not necessarily require personally receiving a profit.

As to full and free disclosure, Mr. Saldamando was cooperative during this proceeding. But in responding to the client's bar inquiry/complaint, even in his redline edits, he did not take the time to determine which standard fee agreement applied to this fee dispute. This is not a factor that should receive much weight here.

Aggravating Circumstances. The Referee found only one aggravating circumstance, substantial experience in the law. Mr. Saldamando was

licensed in September 2007 at the same time as Mr. Strems and had worked with him for years.

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

(1) Standard 3.2(b)(2), dishonest or selfish motive. For the same reasons it is not a mitigating factor, it is actually an aggravating factor.

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

(3) Standard 3.2(b)(3), pattern of misconduct. It is clear from the letter prepared by Mr. Kamilar, the testimony of Mr. Keener and Mr. Boyar, that this global settlement for the bottom amount for the client and the maximum amount for the law firm is not a one-time accident. This is the standard operating procedure, which Mr. Saldamando regards as an acceptable level of ethical practice. At least on one occasion he has sued a client in this situation – amending the complaint to remove the claim that his fee was separately negotiated. (TFB-Ex. N).

The Bar submits that the balance among these factors, even without adding the additional factors that the Bar did prove, does not support any downward adjustment for the sanction. When selfish motive is moved from one side of the scale to the other, and multiple offenses and pattern of misconduct are added, these factors weigh in favor of an increased sanction.

C. The case law and the three purposes of sanctions support a longer suspension or disbarment.

The Referee's discussion of the case law is extremely similar to the discussion in Mr. Strems' case, SC20-842. (ROR68-72). The Referee relies on *The Florida Bar v. Kavanaugh,* 915 So. 2d 89 (Fla. 2005). In that case, the lawyer exceeded the percentage in his contingency fee contract. And in this case, the contingency fee contract had no percentage at all. The Referee thought the $157,500 settlement was similar to the exceptional outcome in *Kavanaugh,* and it may have been if it had been disclosed to the client and ethically divided. Instead, this result required Mr. Saldamando's clients to hire another lawyer and pay another fee to get a fair share of the settlement.

The public reprimand in *Kavanaugh* in 2005 was intended to stop the kind of problems that are systemic with Mr. Saldamando. The case supports a greater sanction today.

The Referee relies on *The Florida Bar v. Shoureas*, 892 So. 2d 1002, 1003 (Fla. 2004) in which this Court imposed a three-year suspension. The parties did not argue this case. It does involve many of the same violations argued by the Bar, but the facts are significantly different. It is unclear why the Referee thought it supported a public reprimand in this case.

The Bar suggested that *The Florida Bar v. Kane,* 202 So. 3d 11 (Fla. 2016) was a case to consider in determining the proper range for the sanction here. It involved global settlements where the lawyers did not communicate with the clients and had a conflict arising from the fee they took for themselves. Admittedly, the lawyer tried to short-change co-counsel and the case involved many more clients. But here it was co-counsel, Mr. Kling, who was left to help the clients resolve this. Although there is only one couple in this case, the global settlement model in this case was not limited to them; it was a standard business model. *Kane* supports a long suspension or disbarment in this case.

The Bar also suggested that *The Florida Bar v. Garland*, 651 So.2d 1182 (Fla. 1995) was an older case with relevance for the sanction here. The fee in *Garland* was not excessive under the then-existing rules for probate, but the lawyer obtained the fee by misrepresentations to his clients. He exaggerated the hours he expended on the file in order to pay himself

more. Certainly, the factual contexts are not identical, but Mr. Saldamando misrepresented facts to his clients and used a hypothetical scenario to settle the case for a 50% greater global amount without giving another penny to his client and without budging when they protested. The two-year suspension in 1995 in *Garland* certainly suggests that a long suspension or even disbarment is appropriate today. The public reprimand proposed by the Referee for only one violation is certainly not the reasonable sanction supported by the case law.

The three purposes of sanctions are to protect the public, to deter similar future conduct by the Respondent and other lawyers, and to punish the lawyer while allowing for rehabilitation. Mr. Saldamando was engaged in a high-volume practice that aimed to give the client the bottom amount they would settle for in order to give the law firm the maximum fee. The public needs to be protected from lawyers who will engage in such patent conflicts of interest. Other lawyers need to be deterred from the temptation of using this method to maximize their profits. And Mr. Saldamando may be capable of rehabilitation but much more than a public reprimand is needed to accomplish that. The Bar recommends a long rehabilitative suspension or disbarment with leave to reapply in five years.

CONCLUSION

The Court should find Mr. Saldamando guilty not merely of the violation of Rule 4-1.4, but of the four additional violations discussed in this brief. It should impose an appropriate sanction for all of these violations, which should be at least a rehabilitative suspension and at most disbarment.

This Court should expressly address the fee contract at issue in this case and prohibit this contract.

The Court should award the costs recommended in the Report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 27th day of August, 2021 to:

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