IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GREGORY SALDAMANDO,

Respondent.

Supreme Court Case
No. SC20-844

The Florida Bar File
No. 2019-70,685(11C)

ANSWER BRIEF OF GREGORY SALDAMANDO

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STATEMENT OF THE CASE AND FACTS

A. Preliminary Statement

This case involves a fee dispute between Greg Saldamando, a plaintiff's attorney, and his clients in a sinkhole case. It evolved into a contentious disciplinary matter because of The Florida Bar's fixation with Scot Strems and the law firm he led, the Strems Law Firm. Mr. Saldamando worked for Mr. Strems during the relevant period. The Florida Bar has prosecuted multiple disciplinary cases against Mr. Strems, including one with similar facts and the same outcome (SC20-842). Displeased with the Referee's decisions in the Strems matters and the instant case, The Florida Bar seeks this Court's review.

B. Procedural History

On May 31, 2019, Eduardo Alvarez and Doris Herrera submitted an Inquiry/Complaint Form to The Florida Bar regarding Mr. Saldamando. (R-Ex. 35.) Mr. Saldamando responded in writing to the complaint (through counsel).[1] (R-Ex. 38.) The matter was

[1] The written response to The Florida Bar, submitted by Mr. Saldamando's counsel at the time, included facts and assertions that Mr. Saldamando did not authorize. (R-Ex. 37.)

assigned to The Florida Bar Grievance Committee 11C, and an investigating member was appointed. Mr. Saldamando fully cooperated with the investigating member during an interview on February 27, 2020. (ROR67.)

After a year in the investigation phase, The Florida Bar filed a Complaint against Mr. Saldamando on June 11, 2020. (Tab1.) The Florida Bar alleged violations of the following Rules Regulating The Florida Bar: 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); and 4-8.4(a) and (c) (Misconduct and Minor Misconduct). (Tab1.) After the Complaint was filed, Mr. Saldamando agreed to an interview with counsel for The Florida Bar. (ROR68.)

The Final Hearing took place during the week of April 5, 2021. (Tab22.) The Referee, the Honorable Dawn Denaro, found that The Florida Bar proved only a violation of Rule 4-1.4 (Communication) for not disclosing the full settlement details in an email to Ms. Herrera. (ROR45-47, 57.) The Referee found Mr. Saldamando not guilty of the other alleged violations. (ROR45.)

C. Factual Summary

1. Initiation of Legal Representation

Mr. Alvarez and Ms. Herrera, husband and wife, made an insurance claim for property damage in 2013 at their rental property in Southwest Ranches, Florida. (ROR2.) They first hired a public adjuster with whom Mr. Alvarez was previously acquainted. (ROR2.) The insurance company denied the claim outright, so the public adjuster referred Mr. Alvarez and Ms. Herrera to the Strems Law Firm. (ROR2.) Mr. Saldamando was not involved in the initiation of the representation or the pre-litigation phase. (ROR3.)

2. Terms of Legal Representation

The terms of the representation were outlined in a Contingent Fee Retainer Agreement, which Mr. Alvarez signed on March 20, 2014. (R-Ex. 3.) There is no evidence that Mr. Saldamando was involved in the drafting or signing of the retainer agreement. The fee agreement stated that the Strems Law Firm was to be compensated with 20% of the whole amount recovered if the recovery occurred prior to litigation. (R-Ex. 3.) Once litigation was initiated with the filing of a lawsuit, the Strems Law Firm was to be compensated pursuant to section 627.428, Florida Statutes. (R-Ex. 3.) The written

fee agreement stated that the Strems Law Firm was to be paid fees only in the event of a recovery for the clients. (R-Ex. 3.) The Strems Law Firm was also entitled to recover expenses incurred on behalf of the clients during the representation. (R-Ex. 3.)

3. Strems Law Firm Files Suit

The Strems Law Firm initiated suit against the insurance carrier for breach of contract on July 7, 2014, in Broward County Circuit Court, Case No. CACE14-013149. (R-Ex. 9.) The suit was amended in 2014 to add Ms. Herrera's name. (R-Ex. 10.)

4. Settlement Discussions

The insurance company denied the clients' claim after receiving a Geotechnical Engineering Testing and Evaluation Services Report ("the Tierra report") dated August 28, 2013. (R-Ex. 2.) After the Strems Law Firm filed the lawsuit, the insurance company made a proposal for settlement in the amount of $1,000.00, which Mr. Saldamando communicated to the clients by letter. (R-Ex. 11.) The $1,000.00 proposal was not accepted by Mr. Saldamando and the clients.

Mr. Saldamando then initiated a damage evaluation and settlement investigation by Florida Testing and Environmental, Inc.

(R-Ex. 14.) The cost of the work by Florida Testing and Environmental, Inc., paid for by the Strems Law Firm, was over $13,000.00. (R-Ex. 14, 15.)

The insurance company invoked its statutory prerogative for a neutral evaluation conducted by Dr. Bruce Nocita. (R-Ex. 16.) In his report dated May 18, 2018 ("the Nocita report"), Dr. Nocita concluded, consistent with the Tierra report, that there was no sinkhole activity on the clients' property. (R-Ex. 16.) In all, the insurance company filed a Defendant's Expert Witness Disclosure listing eight expert witnesses, which included the experts related to the Tierra and Nocita reports. (R-Ex. 18.)

On March 8, 2019, Mr. Alvarez executed an additional fee agreement with Mr. Saldamando; the agreement was also signed by Tampa attorney Aaron Kling on March 13, 2019. (R-Ex. 19.) The agreement stated that Mr. Kling would join as co-counsel and be entitled to 40% of any fees recovered (at no additional expense to the clients). (R-Ex. 19.) Mr. Kling, a plaintiff's attorney, is specialist in Florida sinkhole cases. (R-Ex. 47.)

On March 25, 2019, counsel for the insurance company received another expert opinion (Water Resource Associates) finding

a lack of sinkhole activity. (R-Ex. 20.) This opinion described the work conducted by the plaintiff's sole sinkhole expert as "absurd and purposefully misleading." (R-Ex. 20.) Three days later, counsel for the insurance company shared the new expert report with Mr. Saldamando and invited a pretrial demand. (R-Ex. 21.)

On April 17, 2019, The Florida Bar sent noteworthy guidance to Mr. Saldamando with a letter to a complainant with whom Mr. Alvarez and Ms. Herrera would find themselves similarly situated. (R-Ex. 26; ROR43-44.) That matter, The Florida Bar File No. 2019-70, 408, involved a complainant who became unhappy with his portion of a settlement only upon learning the global amount. (R-Ex. 26; ROR43-44.) The letter, which closed The Florida Bar File No. 2019-70, 408, stated, "you [complainant] agreed to the settlement amount but did not want to sign the settlement agreement because you wanted a portion of the attorney's fees and costs that he [Mr. Saldamando] was entitled to under Florida Statutes." (R-Ex. 26; ROR43-44.) The Florida Bar deemed continued disciplinary proceedings inappropriate. (R-Ex. 26; ROR43-44.)

In the instant case, the frequency of the parties' settlement discussions increased beginning in April 2019; trial was set in June

2019. The insurance company made a proposal for settlement for $50,000.00 on April 5, 2019. (R-Ex. 24.) Mr. Saldamando communicated the proposal for settlement to the clients by mail. (R-Ex. 28.) He also discussed it with Ms. Herrera by telephone. (T140.) The $50,000.00 proposal was not accepted by Mr. Saldamando and the clients.

On April 30, 2019, counsel for the insurance company conveyed an offer of $100,000.00 to settle the case. (R-Ex. 29.) This offer, like the others, was contingent on global acceptance by the plaintiffs, meaning the $100,000.00 had to be inclusive of all fees, costs, and interest. (T243.) Mr. Saldamando spoke with Ms. Herrera by telephone to communicate the $100,000.00 offer. (T338-339.) They spoke for more than 20 minutes over multiple calls. (R-Ex. 27.) Mr. Saldamando explained the status of the negotiations and asked for her minimum authority to resolve the case, net to her and Mr. Alvarez. (T338-339.) They discussed $65,000.00. (T338-339.) Mr. Saldamando believed Ms. Herrera gave him authority to settle for that amount, net to her and Mr. Alvarez. (R-Ex. 35.) As Mr. Kling confirmed, Mr. Saldamando explained to Ms. Herrera that he would continue to negotiate an amount higher than $100,000.00 to recover

a reasonable attorneys' fee and the costs incurred during the five-year representation. (R-Ex. 35; T338-339.)

After additional negotiation with counsel for the defense, Mr. Saldamando agreed to settle the case for $157,500.00. (R-Ex. 33.) The settlement allocation according to the fee agreements would have been $65,000.00 to Mr. Alvarez and Ms. Herrera; approximately $45,000.00 in legal fees to the Strems Law Firm; approximately $17,000.00 in costs (not including the public adjuster); and approximately $30,000.00 in legal fees to Kling Law, P.A. (R-Ex. 33.) At the time Mr. Saldamando agreed to settle the case, the Strems Law Firm had represented Mr. Alvarez and Ms. Herrera for over five years. (R-Ex. 3, 33.)

5. Fee Dispute

With a May 8, 2019 email to Ms. Herrera, Mr. Saldamando documented his authority to settle the case with $65,000.00 net to Mr. Alvarez and Ms. Herrera. (R-Ex. 31.) Ms. Herrera read the email but failed to respond. (T199.) On May 17, 2019, at the clients' request, Strems Law Firm personnel sent Ms. Herrera access to the entire case file. (R-Ex. 32.) On May 20, 2019, Mr. Saldamando

informed Mr. Alvarez of the global settlement amount ($157,500.00). (R-Ex. 35.)

On May 29, 2019, Mr. Saldamando met with Mr. Alvarez and Ms. Herrera at the Strems Law Firm's offices. (R-Ex. 33.) Mr. Alvarez and Ms. Herrera expressed dissatisfaction not with the $157,500.00 settlement amount, but rather the prospect of receiving $65,000.00 out of the global amount: "We told Mr. Saldamando we had no issue with the total settlement amount but only with the disbursement splits he had devised . . . ." (R-Ex. 35.) Mr. Saldamando maintained that he acted consistent with his authority and that the contemplated allocation of settlement funds was fair. (R-Ex. 35.)

The fee dispute was not resolved during the meeting. (R-Ex. 33.) Mr. Saldamando sent the clients an email later that day memorializing their respective positions, giving his analysis of the fee dispute, and identifying all options available to the clients. (R-Ex. 33.)

Two days later, as they had threatened at the meeting, Mr. Alvarez and Ms. Herrera sent a written complaint to The Florida Bar. (R-Ex. 35.) Given the obvious conflict of interest created by the complaint, Mr. Saldamando moved to withdraw as counsel. (R-Ex. 36.) Judge Martin Bidwell, the presiding judge in the underlying case,

entered an order in December 2019 stating that he would "conduct a further status, if necessary, once the parties have determined whether they will all agree to seek resolution of the dispute in the Florida Bar Arbitration Program." (ROR56 (citing TFB-Ex. P; R-Ex. 46).)

D. Witness Trial Testimony

1. Eduardo Alvarez

Eduardo Alvarez is a career law enforcement officer of the Department of Homeland Security. (T34.) He works with the United States Customs and Border Patrol. (T91.) Ms. Herrera, his wife, works in the real estate industry. (T116.)

On June 21, 2013, while they were living outside of the United States, Mr. Alvarez and Ms. Herrera complained that damage had occurred to a rental property they owned at 5851 SW 188th Avenue in Southwest Ranches. (T123-124.) They hired a public adjuster and made a claim against American Integrity Insurance Company for sinkhole damage; the claim was denied. (T123-124.) The adjuster referred them to the Strems Law Firm for likely litigation. (T125.) Ms. Herrera was primarily responsible for communicating with their legal counsel. (T42, 44.)

Mr. Alvarez and Ms. Herrera claimed water damage to the same property within one week of the sinkhole claim. (T94-95.) The public adjuster referred Mr. Alvarez and Ms. Herrera to the law firm of Ligman Martin for the water damage claim. (T94-95.)

The retainer agreement of the Strems Law Firm provided that if litigation ensued, fees would be recovered against the insurer pursuant to section 627.428, Florida Statutes. (R-Ex. 3.) The lawsuit filed by the Ligman Martin firm on behalf of Mr. Alvarez and Ms. Herrera referenced precisely the same statutory basis for recovery of fees. (R-Ex. 4.) Mr. Alvarez testified that neither law firm explained the circumstances or details of the fee agreement. (T99-100.) Mr. Alvarez claimed to have remained unaware of the meaning of the fee agreement terms until realizing that $157,500.00 had been authorized by American Integrity. (T39-40, 89.)

Mr. Alvarez spoke to Mr. Saldamando by telephone on May 20, 2019, during which Mr. Saldamando informed him of the particulars of the global settlement. (T75.) Mr. Alvarez testified that the May 29, 2019 email with Mr. Saldamando fairly and truthfully recounted their respective positions vis-à-vis the fee dispute. (T88.) He also testified that if Mr. Saldamando had communicated the content of the May

29, 2019 email earlier, he would have understood everything and it would not have led to an argument. (T104.)

2. Doris Herrera

Ms. Herrera is married to Mr. Alvarez. (T122.) She is a credit shy of having a bachelor's degree. (T122.) Ms. Herrera has been licensed as a real estate agent since 2007. (T122.) Ms. Herrera's primary language is English, and her second language is Spanish. (T178.) Mr. Saldamando spoke to Ms. Herrera in Spanish most of the time. (T194-195.)

Ms. Herrera testified that she and her husband were renting the property and living outside the country when both insurance claims arose. (T123-124.) The sinkhole claim was denied by the insurance company, which precipitated the engagement of the Strems Law Firm. (T124-125.)

Ms. Herrera read the contingent fee agreement from the Strems Law Firm, and while she did not sign it, she was comfortable with her husband signing it. (T178.) Neither Ms. Herrera nor her husband asked questions about the written fee agreement of any Strems Law Firm personnel at the time of engagement. (T178.)

Ms. Herrera also participated as a plaintiff-client in the Ligman Martin lawsuit that implicated section 627.428, Florida Statutes, as to attorney fees. (R-Ex. 4.) Ms. Herrera testified that she misunderstood how the Strems Law Firm would be paid for the representation. (T180.) Ms. Herrera thought the Strems Law Firm would be paid 20% of the total recovery regardless of when or how the case was resolved. (T179-180.)

Ms. Herrera communicated with Strems Law Firm personnel and had contact with a group of Strems Law Firm attorneys during the representation. (T184.) Mr. Saldamando had no interaction with Ms. Herrera or Mr. Alvarez until the lawsuit was filed. (T184.) Ms. Herrera was aware of the Florida Testing and Environmental evaluation initiated by Mr. Saldamando and acknowledged paying nothing of the more than $13,000.00 cost. (T186-187.) She testified that the Strems Law Firm never asked her or her husband to pay any costs in connection with the representation. (T187.)

Ms. Herrera called the $1,000.00 proposal for settlement a "spit in the face." (R-Ex. 13.) She agreed to the retention of Mr. Kling, understanding that Mr. Kling's fee would not cost her or her husband anything additional. (T190.) Ms. Herrera confirmed that Mr.

Saldamando communicated with her by phone, text, email, and U.S. Mail. (T191, 196.)

The settlement discussions increased in April 2019, after she emailed Mr. Saldamando to say she and her husband "were thinking about settling for a bit less." (T192; R-Ex. 25.) Ms. Herrera received the $50,000.00 proposal for settlement letter from the Strems Law Firm. (T192.) That letter detailed the risk of the defendant recovering attorneys' fees and costs following rejection of the settlement offer if the matter goes to trial. (R-Ex. 28.) Mr. Saldamando recommended not settling for $50,000.00, and Ms. Herrera followed the recommendation. (T193.)

Mr. Saldamando called Ms. Herrera again to inform her the insurance company had again increased its offer. (T193.) They spoke for over 20 minutes that day. (T194; R-Ex. 27.) Mr. Saldamando spoke mostly in Spanish. (T194.) Ms. Herrera was driving a vehicle at the time. (T195.) They discussed a settlement in which she and her husband would receive $65,000.00. (T197-198.) Ms. Herrera acknowledged wanting the case settled but disputed other evidence that showed she gave Mr. Saldamando the authority to settle for $65,000.00 to her and Mr. Alvarez. (T197-200.)

With a May 8, 2019 email to Ms. Herrera, Mr. Saldamando documented his authority to settle the case with $65,000.00 net to Mr. Alvarez and Ms. Herrera. (T199; R-Ex. 31.) Ms. Herrera did not respond. (T199.) On May 29, 2019, Mr. Saldamando met with Mr. Alvarez and Ms. Herrera at the Strems Law Firm. (T203.) Mr. Saldamando held firm that Ms. Herrera had given him authority to settle. (T204.) His demeanor was such that he had done nothing wrong. (T203.) The fee dispute was not resolved during the meeting. (T203.)

Ms. Herrera testified that she reviewed the Strems Law Firm invoice for her matter, and that it was suspect because it contained a reference to a two-hour conversation between her and Mr. Saldamando that she believed did not take place because they never had a discussion that long. (T137.) The invoice does not have such an entry. (R-Ex. 54.)

3. Benjamin Keener, Esq.

Benjamin Keener is an attorney from Pinellas County licensed to practice law in the State of Florida and has been for 15 years. (T210.) His professional experience is primarily representing insurance companies in first-party insurance claims and includes

limited experience as a plaintiff's attorney in the same arena. (T210-211.) His practice in defending insurance companies routinely involves the process of "global settlements." (T243.) Mr. Keener has substantial experience in the defense of sinkhole claims. (T211.)

Mr. Keener became involved in this matter upon being retained by American Integrity Insurance Company to defend a lawsuit filed by Mr. Alvarez and Ms. Herrera. (T212.) When he began the representation of American Integrity, the insurance company had already denied the insurance claim, suit had been filed, and the insurance company had secured an inspection concluding that there was no sinkhole damage on the property. (T214.) Mr. Keener filed with the court, prior to trial, a Defendant's Notice of Expert Witnesses, which listed eight individuals who would offer expert testimony in favor of the defense. (R-Ex. 18.) Mr. Keener filed multiple motions for summary judgment and requests for rehearing and other efforts such as motions to strike. (T305-306.)

Mr. Keener knew Tampa attorney Aaron Kling for 11 years and acknowledged that Mr. Kling was an expert in plaintiff's sinkhole cases. (T285-286.) Mr. Keener has great respect for Mr. Kling's skills and considers him an excellent attorney. (T285-286.) Mr. Keener had

one-on-one communications with Mr. Kling regarding this matter. (T308.)

Mr. Keener testified that Mr. Saldamando and Mr. Kling were moving forward with trial preparation despite the numerous expert opinions asserted by the defense. (T288.) He testified that plaintiffs' counsel did not back away at all. (T288.) After much back and forth, Mr. Saldamando and Mr. Keener agreed to settle the case for $157,500.00. (T280.)

4. Aaron Kling, Esq.

Mr. Kling testified that he has been a member of The Florida Bar since 2010. (T323.) He represents plaintiffs, predominantly in sinkhole cases. (T322.) His credentials are detailed in R-Ex. 47. He has tried over 20 sinkhole cases since 2014. (R-Ex. 47.) He had co-counseled with the Strems Law Firm in other sinkhole cases before this one. (T327.) Mr. Kling has negotiated against insurance companies and is familiar with the common practice of insurance companies to settle cases "globally," as opposed to sequentially, settling the indemnity claim and then the attorneys' fees and costs. (T339-340.)

Mr. Saldamando asked Mr. Kling to consider joining as co-counsel for Mr. Alvarez and Ms. Herrera after the case was set for trial. (T349.) The clients formally engaged Mr. Kling in March 2019. (T328.) Mr. Kling familiarized himself with the evidence, particularly the expert opinions. (T332-335.) It is his opinion that this was a very challenging case for the plaintiffs. (T335.) He described this case a "double-denied," meaning the insurance company denied coverage and then the neutral evaluator confirmed the denial. (T328.) Mr. Keener is a terrific lawyer and he and his client put up a formidable defense. (T332-333.)

Mr. Kling testified that he had multiple phone calls with Ms. Herrera. (T337.) He did not speak to Mr. Alvarez until after the fee dispute arose. (T337.) Ms. Herrera voiced no complaints or dissatisfaction with Mr. Saldamando's work until after the fee dispute. (T337.) Mr. Kling testified to participating in a phone call with Mr. Saldamando and Ms. Herrera during which Mr. Saldamando explained the difficulties of the case and the $100,000.00 offer by the defense:

> Q. So to summarize that, do you recall Mr. Saldamando communicating to Ms. Herrera that a negotiation would have to

> continue so that both the attorneys' fees and the client's recovery would be satisfied, so to speak?
>
> A. Yes, so basically what occurred was we had a long conversation which the risks were established, and Ms. Herrera agreed to $65,000 to her, and for Mr. Saldamando to go out and get the rest of it, that they needed to settle the case.

(T 339.)

Mr. Kling described the settlement amount as "incredible." (T339.) Similar sinkhole cases usually settle for a global amount between $45,000.00 and $75,000.00 because of the risk to the plaintiffs of losing at trial and having to pay the opposition's fees and costs. (T339-340.)

Mr. Kling testified that he had never been interviewed about this matter by any representative of The Florida Bar.[2] (T352.)

5. Cris Boyar, Esq. (Expert)

By stipulation of the parties, Mr. Boyar's testimony from *The Florida Bar v. Scot Strems*, No. SC20-86, was entered into the record. (T352-353.) Mr. Boyar also submitted a memorandum and testified

[2] Continuing this theme, The Florida Bar's initial brief made no mention of Mr. Kling's critical testimony about the authority Ms. Herrera gave Mr. Saldamando to settle the case.

as an expert at the final hearing, having thoroughly reviewed the Strems Law Firm billing records and other pertinent documents. (T357-358.) Mr. Boyar is an expert in first-party property insurance litigation and has testified as a fee expert hundreds of times. (T403.) He did not charge a fee in connection with his work in the instant case. (T361.)

Mr. Boyar testified to the following applicable concepts, all of which are referenced in his memorandum (R-Ex. 48):

- The purpose of section 627.428, Florida Statutes, is to encourage prompt dispositions of valid insurance claims without unnecessary litigation, and it is meant to discourage insurance companies from contesting valid claims.
- When an insurer settles during suit, it must pay attorneys' fees and costs.
- Fees are mandatory.
- Whenever an insured prevails against an insurer, the court must award attorneys' fees. If the insurer believed in good faith that the benefits should not have been paid, the court still must award attorneys' fees.

- Alternative fee agreements are not only valid but common in first-party insurance litigation.
- There is no cap on the fees when there is an alternative fee recovery clause.
- Under section 627.428, there is no significant correlation between the amount of the recovery and the amount of attorneys' fees awarded.
- There is no requirement for either instantaneous or even contemporaneous time entries. They can be recreated, even years later.

Mr. Boyar concluded that the fees calculated by Mr. Saldamando for the contemplated settlement were conservative in light of the time and labor required, the complexity of the case,[3] and the skill required to perform the legal services properly. (T406.) He testified that the total fee listed in the billing records was half of what

[3] These proceedings commenced six years after the sinkhole damage. In the face of almost insurmountable opposition, including numerous experts claiming there wasn't even sinkhole damage, the clients eventually recovered approximately $100,000.00. There was no harm to the clients, and their success was directly attributable to the efforts of Mr. Saldamando. (T406, 419-420.)

most lawyers would bill. (T409.) He opined that the Strems Law Firm would have been entitled to a significant multiplier. (T419.)

Mr. Boyar also testified:

> A. So let's say I talk to my client, and my client says, Cris, I need $1,000 in my pocket to settle it. I know I have $10,000 in costs. I know this particular insurance company is going to negotiate, no matter what number I give them, if I give them exactly what I want, they're going to come back with a lower number. So I'm going to use my discretion in making a demand that compensates both me and my client as the initial demand. In speaking to my client, I just want to make sure I know what their number is. What's your bottom line? So I want to make sure, whatever I settle for, they are fairly compensated. I don't know of any obligation for me to discuss my strategy with getting to the finish line with my client. My only obligation is to advise my client or ask my client what they want. What's your bottom-line number? How I get there or my strategy, not only do I not know of any rule that I have to share it with my client, but I don't know of any Bar rule that requires that either, and there's certainly no case law on that. That's what we call work product.

(T425.)

6. Adrian Arkin, Esq. (Expert)

The Florida Bar offered no expert testimony involving the facts of this case. By stipulation of the parties, Ms. Arkin's testimony from

The Florida Bar v. Scot Strems, No. SC20-86, was entered into the record. (T352-353.) The testimony in that case makes no mention of the instant case's facts.

E. Sanctions Hearing

The sanctions hearing was held before the Referee announced her findings. The Florida Bar submitted hundreds of pages of documents in aggravation, many of which related to cases with which Mr. Saldamando was not involved. The Referee did not comment on the documents in her report, though she found the only aggravating factor to be Mr. Saldamando's substantial experience in first-party insurance litigation. (ROR61.)

Mr. Saldamando called four witnesses to testify about his good character and submitted 23 character letters in mitigation. (ROR61-68.) The Referee found the live witnesses sincere and credible. (ROR61.) She highlighted exceptional language from the letters in her report. (ROR63-68.) The Referee found the following mitigating factors applicable: absence of a prior disciplinary record, absence of dishonest or selfish motive, full and free disclosure or cooperative attitude toward the proceedings, and character or reputation. (ROR67-68.)

STANDARD OF REVIEW

This Court's standard of review depends on whether the review is of findings of fact or of a recommended penalty.

The scope of review of findings of fact is far narrower than review of a recommended penalty. Determinations of fact include analyses of the weight to be given to certain evidence, the credibility of witnesses, and whether competent substantial evidence supports findings with respect to guilt or innocence and in aggravation or mitigation of a particular penalty. The wider latitude in review of penalties is due to the Court's obligation to ensure consistency in the application of penalties, protection of various public interests, and the constitutional responsibility to make the final determination of appropriate sanctions.

As trier of fact, the Referee has the obligation to weigh the evidence, determine its sufficiency, and determine the credibility of witnesses. The Court will not substitute its judgment for that of the referee unless it is clearly erroneous or lacking in evidentiary support. *Florida Bar v. Weiss*, 586 So. 2d 1051 (Fla. 1991).

The generally accepted statement of the standard of review is expressed in *Florida Bar v. Picon*, 205 So. 3d 759 (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 or substitute its judgment for that of the referee.

Id. at 764.

The referee's findings of fact are presumed correct. *See Florida Bar v. Vannier*, 498 So. 2d 896, 898 (Fla. 1986). The burden to show the findings of a report are erroneous is upon the party asking the Court to disturb those findings. *See* R. Regulating Fla. Bar 3-7.7(c)(5). "The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." *Florida Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007) (citing *Florida Bar v. Carlon*, 820 So. 2d 891, 898 (Fla. 2002)).

Review of recommended discipline or sanctions implicates a broader exercise of consideration by this Court. Although it requires a determination that facts exist which are established by competent substantial evidence, it does not contemplate a process of reweighing that evidence to get to a particular result. It is an evaluation of the

appropriateness of the sanction. Of course, deference is given to the Referee's findings with respect to aggravating and mitigating circumstances as constituting essential findings of fact. *See Picon*, 205 So. 3d at 765 ("In reviewing a referee's recommended discipline, the 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. At the same time, the 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 Florida Standards for Imposing Lawyer Sanctions." (citations omitted)).

As The Florida Bar acknowledges in its initial brief (Initial Br. 22), the Referee's findings of fact carry a "presumption of correctness . . . unless clearly erroneous or without support in the record." *Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). The Florida Bar further acknowledges in its initial brief (Initial Br. 22) that the standard applies equally in the review of findings of mitigation and aggravation. *See Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001); *see also Florida Bar v. Arcia*, 848 So. 2d 296 (Fla. 2003).

Consequently, The Florida Bar and Mr. Saldamando do not disagree on the standards of review, i.e., strong deference to findings of fact made by the Referee, yet wider latitude of review of sanctions. The findings with respect to aggravating and mitigating circumstances are factual determinations. "[T]he referee is in a unique position to assess witness credibility, [and] this Court will not overturn his judgment absent clear and convincing evidence." *Germain*, 957 So. 2d at 621.

"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 it is ultimately the Court's responsibility to order the appropriate sanction." *Id.* at 623 (citing *Florida Bar v. Miller*, 863 So. 2d 231, 235 (Fla. 2003); *Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). Generally, the Court will not second-guess a Referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida standards for imposing lawyer sanctions. *Miller*, 863 So. 2d at 235.

The Respondent highlights this point in light of the Court's decision in *Florida Bar v. Altman*, 294 So. 3d 844 (Fla. 2020), and the Court's analysis of The Florida Bar Standards. In *Altman* the referee

had recommended a public reprimand followed by five years of probation. The Court disapproved this recommendation and applied Standard 8.1, which provided that "absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer 'has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct.'" *Id.* at 847.

In this matter, the Referee found numerous mitigating circumstances and a complete absence of any prior misconduct.

A referee's finding of fact with respect to aggravation or mitigation in the application of the standards is entitled to a presumption of correctness and "should be upheld unless clearly erroneous or without support in the record." *Florida Bar v. Arcia*, 848 So. 2d 296, 299 (Fla. 2003) (per curiam). Equally important is the principle that the Referee's *failure* to find that an aggravating factor or mitigating factor applies is owed the same deference. *Florida Bar v. Morse*, 784 So. 2d 414, 415-16 (Fla. 2001) (per curiam); *Florida Bar v. Bustamante*, 662 So. 2d 687 (Fla. 1995) (per curiam); *Florida Bar v. Hecker*, 475 So. 2d 1240, 1242 (Fla. 1985) (per curiam).

There existed competent substantial evidence, as the Standards require, to support the Referee's findings with respect to one violation

and the lack of any other violations, and competent substantial evidence to support each mitigating circumstance defined under The Florida Bar Standards. Likewise, the Referee determined that competent substantial evidence did not exist to support any other aggravating circumstance, as the Bar suggests on review.

SUMMARY OF THE ARGUMENT

The Referee correctly concluded that The Florida Bar failed to prove violations of Rule 4-1.2, Rule 4-1.7, Rule 4-1.5, and Rule 4-8.4, and that a public reprimand is an appropriate sanction for the violation of Rule 4-1.4 that the Referee did find. The Bar's arguments to the contrary are unpersuasive.

The Bar does not challenge the Referee's finding that Mr. Saldamando did not participate in the drafting, presentation, or execution of his employer's fee agreement with his clients. (ROR18.) The Bar nevertheless asks this Court to declare that fee agreement to be prohibited on its face because, according to the Bar, it created an inherent conflict with the client from the moment it was signed. This argument is both waived and wrong on the merits. The Bar did not present this theory to the Referee. Further, there is nothing wrong with a fee agreement that provides for a contingency-percentage fee

in the event of a presuit resolution and for a fee determined in accordance with section 627.428, Florida Statutes, after suit is filed.

The Referee's finding that the Bar failed to prove the other purported violations by clear and convincing evidence is supported by competent substantial evidence. With respect to the alleged violations of Rule 4-1.2 (Objectives and Scope of Representation) and Rule 4-1.5 (Fees and Costs for Legal Services), the Referee correctly found that Mr. Saldamando was authorized to accept the settlement and that the Strems Law Firm's fee was not obtained by fraud and was not otherwise improper. (ROR19, 34.) With respect to Rule 4-1.7 (Conflict of Interest; Current Clients), the evidence supports the Referee's finding that there was no conflict that "effectuate[d] the foreclosure of alternatives that would otherwise be available to the Clients" or "materially interfere[d] with the Respondent's independent professional judgment in considering alternatives." (ROR39.) Competent substantial evidence also supports the Referee's finding that the Bar failed to prove a violation of Rule 4-8.4(a) and (c) (Misconduct) by clear and convincing evidence.

Finally, the Referee's recommendation of a public reprimand has a reasonable basis in existing case law and the applicable

Standards and therefore should not be second-guessed. The evidence supports the Referee's finding that Mr. Saldamando at most negligently failed to communicate with his clients. Further, Mr. Saldamando's conduct did not cause his clients actual or potential injury. Indeed, the evidence shows that Mr. Saldamando obtained an "incredible" result for his clients. (T39-40.) The Referee was therefore correct to recommend a public reprimand.

ARGUMENT

I. The Bar's argument that the fee agreement is prohibited is neither adequately preserved nor defensible on the merits.

The Bar does not challenge the Referee's finding that Mr. Saldamando "did not participate in the drafting, presentation, or execution" of the fee agreement between the Strems Law Firm and the clients. (ROR18.) Nevertheless, raising a theory it did not present to the Referee, the Bar insists that this Court should reach out to declare that agreement, and every similar agreement, to be prohibited on its face, regardless of the circumstances. (Initial Br. 36-37.) The Court should decline to do so.

The contingent fee agreement at issue in this case provided for a fee of 20% of any recovery obtained without the need to file a

lawsuit. (A4.) If a lawsuit had to be filed, however, the fee would be determined in accordance with section 627.428, Florida Statutes:

> 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 the Client's attorneys' fees when and if, the Client prevails against the Insurance Company.**

(A4 (emphasis in original).) The agreement made clear that if the clients recovered nothing, they would pay no fee: "**NO RECOVERY, NO FEE.**" (A4 (emphasis in original).)

Section 627.428, Florida Statutes, the statute referenced in the fee agreement, authorizes an award of attorneys' fees in favor of insureds who prevail against their insurers in litigation:

> 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 . . . 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.

§ 627.428(1), Fla. Stat.

As the Bar acknowledges (Initial Br. 25), payment of an insured's claim pursuant to a settlement after a lawsuit has been filed is treated as "the functional equivalent of a confession of judgment" that triggers entitlement to fees under section 627.428. *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1219 (Fla. 2016). Section 627.428 does not apply, however, if the insured's claim is resolved without the need to resort to litigation. *See Fla. Life Ins. Co. v. Fickes*, 613 So. 2d 501, 504 (Fla. 5th DCA 1993) ("[A]ttorney's fees under section 627.428 cannot be awarded where no suit is filed prior to payment of the full amount of the proceeds due under the insurance policy.").

The purpose of the statute is "to afford a level process and make an already financially burdened insured whole again, and to also discourage insurance companies from withholding benefits on valid claims." *Johnson*, 200 So. 3d at 1209. This need to "level the playing field so that aggrieved insureds can find competent counsel to represent them" is especially pronounced "in small cases . . . , 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." *Forthuber v. First Liberty Ins. Corp.*, 229 So. 3d 896, 900 (Fla. 5th DCA 2017) (per curiam). For that reason, there is nothing improper about a fee recovery in first-party insurance litigation that exceeds the amount recovered by the client for the underlying indemnity claim. *See State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836 (Fla. 1990) (upholding a fee award of $253,500 in a case in which the attorney prevailed on a $600 indemnity claim).

The fee agreement at issue here properly invoked this statutory scheme. If the claim was resolved without filing a lawsuit, the agreement provided for a fee of 20% of the recovery. (A4.) If suit was filed, the fee was to be paid by the insurer and determined in accordance with section 627.428. (A4.) The fee agreement thus communicated the basis for the fee and, as the Referee found, complied with the Rules Regulating The Florida Bar. (ROR18.) The Bar failed to prove otherwise by clear and convincing evidence.

The Bar now contends for the first time, however, that the fee agreement is prohibited on its face because it "inherently creates conflicts with the client" either "from the inception of the attorney-

client relationship" or, at the latest, "from the inception of litigation." (Initial Br. 31.) Nowhere does the Bar's Complaint allege such an inherent conflict. Indeed, at the final hearing before the Referee, the Bar argued that it was the allegedly "unauthorized settlement"—reached five years after the fee agreement was executed—that "placed Respondent in conflict with his clients." (T13-14.) The Bar cannot now ask this Court to find an ethical violation it failed to present to the Referee. *See, e.g.*, *Picon*, 205 So. 3d 764 (concluding that an argument was not "preserve[d] . . . for review in this Court" because it was not "present[ed] . . . to the referee").

In any event, the Bar's position is untenable. The Bar cites no case holding that a fee agreement like the one at issue here "inherently" creates an impermissible conflict.

Indeed, the Bar's position cannot be reconciled with its own acknowledgement that three of the four methods it lists for determining fees "rarely" give rise to "professional conduct problems." (Initial Br. 27.) Nothing in the fee agreement at issue here "inherently" forces an attorney and client into a position in which the sole method the Bar deems problematic—a global settlement—becomes inevitable.

The mere possibility that a fee agreement like the one at issue here could, under some circumstances, cause a client and attorney's interests to diverge does not make it somehow uniquely improper. There is no foolproof fee structure that can guarantee perfect alignment of the interests of an attorney and his client, no matter what circumstances arise. Nor do the Rules Regulating The Florida Bar require an attorney to reach that unattainable ideal.

The Bar acknowledges, for example, that an agreement granting an attorney a percentage of the recovery in the event of a global settlement is permissible. (Initial Br. 19, 28.) But such an agreement could easily drive a wedge between an attorney and client if the client's indemnity claim is small but the attorney has devoted substantial time and resources to the case, since the client will likely be eager to accept a much smaller settlement than the attorney will be comfortable with. *Cf. Forthuber*, 229 So. 3d at 900 (observing that "in small cases . . . 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").

That mere possibility, the Bar seems to recognize, does not show that a contingency-percentage fee agreement "inherently creates

conflicts . . . from the inception of the attorney-client relationship." (Initial Br. 31.) Thus, even on the Bar's view that a global settlement under the fee agreement at issue here raises ethical problems, it cannot be maintained that the agreement "inherently creates conflicts with the client from the inception of litigation," much less "from the inception of the attorney-client relationship." (Initial Br. 31.)

In any event, the Bar's contention that a global settlement under the fee agreement at issue here inevitably creates a conflict is not supported by the record. The Referee correctly found that the Bar failed to prove by clear and convincing evidence that an impermissible conflict arose. (ROR39-40.) As the Referee put it, no purported conflict regarding the Strems Law Firm's fees either "effectuate[d] the foreclosure of alternatives that would otherwise be available to the Clients" or "materially interfere[d] with the Respondent's independent professional judgment in considering alternatives." (ROR39.)

The Referee's finding on this issue was supported by competent substantial evidence. In particular, Mr. Boyar testified that Mr. Saldamando's conduct in negotiating the settlement was consistent

with the common, ethically appropriate practice in first-party insurance cases. (T401-402.)

The Bar's arguments to the contrary rest on unsupported speculation. The Bar offers the baseless supposition that Mr. Saldamando, a busy trial lawyer, must have had illicit motives for failing to give his clients a full breakdown of the settlement the day after it was reached. (Initial Br. 33-34.) The Bar also conjectures that a prior complaint considered by the Referee involved a "two-step settlement" rather than a global settlement. (Initial Br. 36.) Neither of these arguments finds support in the record.

The Bar also appears to suggest that the fee agreement violates Rule 4-1.5 because it purportedly does not give a method for determining the fee. (Initial Br. 36-37.) That argument mischaracterizes the agreement, which provides for the fee to be determined in accordance with section 627.428 if a recovery is made after the filing of a lawsuit.

In any event, it is undisputed that Mr. Saldamando had nothing to do with the "drafting, presentation, or execution" of the fee agreement. (ROR18.) Even if the Bar could show that some other attorney violated Rule 4-1.5 by negotiating and executing the fee

agreement, Mr. Saldamando did not. Accordingly, the Bar's contention that the Strems Law Firm's fee agreement is prohibited should be rejected and the Referee's findings upheld.

II. The Referee correctly determined that the evidence does not support additional violations.

The Referee, a circuit judge of the Eleventh Judicial Circuit, spent countless days presiding over these and related proceedings. Evidence presented in any Strems matters was not presented in the Saldamando case, and it would be wrong to impute any responsibility for the behavior of another attorney to Mr. Saldamando when evidence of that misbehavior was not presented, notwithstanding The Florida Bar's effort to impute some general "Strems misconduct" to Mr. Saldamando. The Bar alleged in its Complaint:

> 10. Furthermore, this pattern of misconduct is remarkably similar to that described in *Florida Bar v. Scot Strems*, Case No. SC20-806 (the "Nowak Case"). In that case (as in this one), [the Strems Law Firm] obtained bottom-liminal authority from its client based on one settlement offer, negotiated a second, far higher settlement offer *without* notifying the client, and then attempted to keep 100% of the settlement proceeds above the original minimal authority.

(Tab1 (footnote omitted) (emphasis in original).)

No evidence of any alleged misbehavior of Scot Strems was introduced in Mr. Saldamando's trial, and there can be no imputation of responsibility to Mr. Saldamando for Mr. Strems's behavior. Nevertheless, the matters presented by both The Florida Bar and the Respondent Strems in SC20-1729 and SC20-806 provided an opportunity for the Referee to become educated in extensive detail about first-party litigation against insurers, fee agreements, and extended expert testimony regarding the appropriateness or inappropriateness of professional behavior in these contexts.

Having heard, reviewed, and analyzed all of the foregoing, the Referee found that the Bar had proved only one Rule violation, which related to communications with a client. The Florida Bar now urges that the Referee, after all the efforts described above, somehow erroneously failed to conclude that Mr. Saldamando violated several other Rules Regulating The Florida Bar. This is an unfair argument because a critical conversation between Mr. Saldamando and his clients was attended by a third attorney (Mr. Kling) (T339), whose testimony was determined by the Referee to be credible (ROR11) and which The Florida Bar took no issue with in its initial brief.

The Florida Bar knew of Mr. Kling's existence, and knew that he was a Florida Bar member in good standing and was involved in these matters. The Bar never attempted to interview him before instituting the formal proceedings and never attempted to interview him before his testimony in the trial, despite having been informed that he would be a witness. No explanation was ever offered to the Referee nor has there been one here.

The Referee found that Mr. Saldamando had taken the initiative to direct his attorney (Mr. Kamilar) to correct the attorney's intended response to The Florida Bar when first required. (ROR14-15.) His attorney failed to do so, and evidence was received of Mr. Saldamando's efforts to ensure that this accurate information was provided to the Bar. (T299-301; R-Ex. 37(a), (b).) The Referee correctly acknowledged that Mr. Saldamando's lawyer failed to do so. (ROR15; R-Ex. 37(b).) The Florida Bar learned of Mr. Saldamando's efforts to be truthful in responding to The Florida Bar, but nevertheless continued to pursue a claim that Mr. Saldamando's answer to The Florida Bar was deceptive. The Referee further found that the Bar was put on notice as to what had actually happened when Mr. Saldamando filed his answer to the complaint, yet the Bar never

changed its position in pursuing Mr. Saldamando for deception. (ROR15.) It is the backdrop of these events, coupled with the total failure of The Florida Bar to investigate the lawyer present during the critical conversations between Mr. Saldamando and his clients, that troubled the Referee.

There was received in evidence as Respondent's Exhibit 26 a letter from The Florida Bar dated April 17, 2019, copied to Mr. Saldamando, advising that almost identical events occurred between Mr. Saldamando and a different client in earlier first-party litigation. The Florida Bar concluded that this did not violate any Rule Regulating the Florida Bar. Here, the Bar urges this Court to find a host of violations that the Referee rejected.

It is fundamentally unfair for Mr. Saldamando to have to defend against a claim that he was "just another Strems firm lawyer" when no evidence was presented of any Strems firm activities or conduct. This is exacerbated by The Florida Bar's failure to present expert testimony refuting Mr. Saldamando's expert, and to offer only a transcript of the Bar's purported expert in a "Strems trial." The Florida Bar's purported expert offered no opinions regarding any conduct by Mr. Saldamando. This left the Referee with the

unrebutted testimony and opinions of the expert (Boyar) offered by Mr. Saldamando, and the Referee expressly found that this witness was "credible and knowledgeable." (ROR13.)

A. Rule 4-1.2, Objectives

Rule 4-1.2 requires a lawyer to abide by a client's decisions concerning the objectives of the representation. As the Referee concluded, based on competent substantial evidence, Mr. Saldamando abided by Rule 4-1.2 in every respect. It is actually only Rule 4-1.2(a) (lawyer to abide by client's decisions) about which the Bar now complains.

The Referee found the following:

a. Mr. Saldamando was "impliedly authorized to carry out the representation" of the clients;

b. Mr. Saldamando was authorized to settle the case;

c. Mr. Saldamando abided by the "client's decision whether to settle a matter" by moving forward based on the client's authorization;

d. The client authorized the retention of co-counsel (Mr. Kling) to assist with the case and trial;

e. Mr. Saldamando abided by the "client's decision" when he engaged Mr. Kling to use his formidable reputation and substantial knowledge in Florida sinkhole litigation when faced with an extremely difficult case where the claim was denied by the insurer and several expert opinions denied sinkhole causation (T386-387; R-Ex. 18);

f. Mr. Saldamando accepted a global settlement offer on behalf of the clients;

g. Mr. Saldamando directed his office to send the client a copy of the entire case file.

(ROR19-20.)

The foregoing accentuates that the sole issue in this matter was one of communication. There was no misrepresentation, no fraud, no deliberate ignorance of the client's objectives, and no effort to pursue recovery of fees upon determination that a conflict existed with the client.

The complaint by Mr. Francisco Heredia to The Florida Bar (ROR43-44; R-Ex. 26) tracks the complaint in this matter. It says that Mr. Saldamando had settled a matter with an attorneys' fees

recovery significantly higher than the client's recovery. The precise complaint is found in the first paragraph of the correspondence. (ROR42-43; R-Ex. 26.)

The Florida Bar recounted that the client (Mr. Heredia) had agreed to the settlement amount "but did not want to sign the settlement agreement because he wanted a portion of the attorney's fees and costs that he was entitled to under Florida Statutes." (This is an obvious reference to the first-party insurance fee statute.) The Florida Bar concluded in rejecting the complaint:

> After careful consideration, I conclude that there is insufficient evidence from the materials provided that Mr. Saldamando has violated any of the rules adopted by the Supreme Court of Florida which govern attorney discipline. Accordingly, continued disciplinary proceedings in this matter are inappropriate and our file has been closed effective April 16, 2019.

(ROR42-44; R-Ex. 26.)

Here the Referee highlighted the language of this letter by noting:

> If the Bar seeks to discipline a lawyer, it is required by Supreme Court ruling to show, by 'clear and convincing' evidence that there has been a violation of one or more of the Rules Regulating The Florida Bar. Clear and convincing evidence has been defined as

> 'evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, with hesitancy of the truth of the precise facts in issue.' The burden proof [sic] is heavier than the burden of proof required in an ordinary civil trial.

(ROR42 (quoting ROR44; R-Ex. 26).)

The finding of a communications violation under Florida Bar Rules is the sole factor that distinguishes this matter from the complaint by Mr. Heredia. It would be fundamentally unfair to any Florida lawyer to be told by The Florida Bar that behavior is acceptable and does not constitute a violation of Bar Rules only to then be forced to defend oneself against the same factual scenario.

The Referee's determination that Mr. Saldamando did not violate Rule 4-1.2 cannot be clearly erroneous.

B. Rule 4-1.7, Conflict with Current Client

The Bar ignores record evidence that as soon as the client in this matter announced that the positions of the client and her attorney were adverse, Mr. Saldamando promptly moved to withdraw from further representation. (ROR25; R-Ex. 36.)

Mr. Saldamando never sought to enforce any settlement not approved by the client, and after moving to withdraw from further

representation, deferred to co-counsel (Mr. Kling) the responsibility to resolve the matter with the former client. Mr. Kling is the same co-counsel whom the Referee acknowledged was credible (ROR11); whose existence and participation was known to the Bar before instituting these proceedings; who was never contacted or interviewed by the Bar prior to the trial below; and who confirmed in his testimony that Mr. Saldamando was correct and truthful in his description of the conversations with the former client.

Mr. Boyar testified at length as an expert regarding fees, conflicts with clients, and first-party insurance litigation. He testified that Mr. Saldamando did not violate any Rules regarding conflicts of interest or any other Rules. (*See, e.g.*, ROR12-13; T401-402.) The Bar offered no testimony from any expert regarding any of these matters, despite knowing that Mr. Boyar would be testifying. The Referee found Mr. Boyar credible, a finding that should be accorded complete deference. (ROR13.)

The Referee rejected the claim that Mr. Saldamando violated Rule 4-1.7 and further discussed in detail the history from the May 29, 2019 meeting between Mr. Saldamando and the clients until the conclusion of the resolution of the fee dispute. (ROR39-40.) It is not

only expected of Florida lawyers, as Mr. Saldamando did here, to consider withdrawal when a conflict between the attorney and client develops, but here Mr. Saldamando went further. He secured arrangements with Mr. Kling, his former co-counsel, with whom the clients enjoyed an excellent relationship, to facilitate the disbursement of the undisputed proceeds and ensure that the disputed proceeds were dealt with by the court. This is precisely the result that Rule 4-1.7 would contemplate.

The Florida Bar now contends that the very nature of the underlying fee agreement constitutes a conflict. This runs counter to the letter of The Florida Bar received into evidence as Respondent's Exhibit 26 and discussed in detail by the Referee. (ROR42-44.) It also ignores record evidence that this particular client had retained a different law firm, prior to retaining the Strems Law Firm, and entered into a similar contract that invoked section 627.428, Florida Statutes. The client claimed not to be familiar or understand that contract either. (T98-100.) It is certainly not a basis to ascribe misconduct responsibility to Mr. Saldamando as the Bar now seeks.

Mr. Saldamando was not the attorney who reached the fee agreement with the client, but in fact assumed responsibility for the

case subsequently. There is no basis to ascribe the responsibility to Mr. Saldamando that the Bar now does.

C. Rule 4-1.5, Fees

The Florida Bar immediately concedes that the fee awarded in this matter was not improper as excessive. The Bar acknowledges that this was a complex sinkhole claim with a dispute over the existence of damage caused by a sinkhole. (Initial Br. 44.)

The Bar here contends that the fee agreement is nevertheless "prohibited" because it is a contingency fee agreement that does not contain a percentage split or a "preestablished ethical method" to determine the fee. This ignores the unrefuted testimony that this contract is not prohibited by existing Rules because of omitted information. The fact that the Bar may have difficulties with the provisions of section 627.428, Florida Statutes, establishing the recovery of fees in first-party insurance claims does not create a Florida Bar Rule violation committed by Mr. Saldamando. Mr. Saldamando's expert, Mr. Boyar, specifically testified that "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." (ROR33 (emphasis added).) (As stated above, the Bar also ignores that another firm, on behalf of the same clients, filed a lawsuit that referenced precisely the same statutory basis for recovery of fees as did the Strems Law Firm's fee agreement. (R.-Ex. 4.))

The Referee specifically found that the clients were not provided a closing statement because the matter was unresolved (ROR34), that the retainer agreement was not "illegal or prohibited" (ROR34), and that the agreement did not violate any Rules Regulating The Florida Bar. Also of significance is the finding that the agreement was not for an illegal purpose. (ROR34.)

The critical dynamic in play is that when the client and the attorney developed a conflict over the issue of fees, and the conflict became apparently unresolvable, Mr. Saldamando promptly moved to withdraw from further representation. This is what the profession asks of its lawyers.

The Referee found that Mr. Saldamando had not engaged in any intentional misrepresentation or fraud upon the client as proscribed by Rule 4-1.5(a)(2). (ROR34.)

Mr. Boyar's testimony, adopted by the Referee, was that Mr. Saldamando's non-disclosure of the insurance company's increase of its offer was not a violation of Florida Bar Rules. The Referee appropriately "found Mr. Boyar, an experienced plaintiff's first-party property lawyer, trial litigator and fee expert, to be both credible and knowledgeable." (ROR13.)

D. Rule 4-8.4(a)(c), Misconduct

The Florida Bar surprisingly suggests that this Rule is violated by Mr. Saldamando having engaged in some form of conduct involving "dishonesty, fraud, deceit, or misrepresentation." The Referee rejected this argument. The entire matter is perhaps encapsulated by the May 29, 2019 email from Mr. Saldamando to the client referenced by the Referee (ROR22-25; R-Ex. 33) and The Florida Bar in its initial brief (Initial Br. 46). There was no misrepresentation in the email, and in fact it accurately summarized the circumstances which existed at the time in the attorney-client relationship. It confirmed Mr. Saldamando's willingness to withdraw from further representation. It memorialized the precise conclusion reached by the Referee, which is that the communications reached a

poor level of understanding for which the Referee recommended a public reprimand—nothing more, nothing less.

Had Mr. Saldamando sought to enforce the proposed settlement and recover the fees at issue, in the face of the clients' failure to agree or consent, one might argue that such was improper. But that did not happen. Mr. Saldamando never sought to enforce the settlement and instead moved to withdraw.

The significant conversations at issue between Mr. Saldamando and the clients took place by telephone in late May 2019. The Florida Bar has completely ignored that Mr. Kling participated in those conversations and Mr. Kling reinforced precisely the account provided by Mr. Saldamando in his May 29, 2019 email to the clients. "[T]his Referee finds Mr. Kling to be well-credentialed and credible." (ROR 11.) Had the Bar exercised any effort in this matter to question Mr. Kling, once it became aware of his existence, these proceedings may never have commenced.

III. A public reprimand is reasonable based on the facts and the law and is consistent with the applicable Standards.

The facts, Standards, and case law support the Referee's recommendation of a public reprimand. The Referee considered the

purposes of discipline as enumerated in *Florida Bar v. Poplack*, 599 So. 2d 116, 118 (Fla. 1992) (citing *Florida Bar v. Lord*, 433 So. 2d 983 (Fla. 1983)). The Referee found that based on the testimony and evidence presented at trial, Mr. Saldamando negligently violated a professional duty with his failure to fully communicate with the clients about a settlement. The Standards support a public reprimand based on negligent conduct, which will accomplish the necessary rehabilitation for Mr. Saldamando.

A. Standards

The Referee considered Standard 6.2, which addresses abuse of the legal process. A public reprimand is appropriate "when a lawyer negligently fails to comply with a court order or rule and causes injury or potential injury to a client or other party or causes interference or potential interference with a legal proceeding." The Referee's Report cites *Florida Bar v. Barcus*, 697 So. 2d 71 (Fla. 1997), which involved a respondent receiving a public reprimand when a difficult client matter was handled inappropriately, but which was devoid of a pattern of neglect. The Referee found Mr. Saldamando negligently failed to fully communicate the settlement agreement with his clients.

Standard 7.1 recommends a public reprimand "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 Bar argues the Court should consider subsections (a) and (c), which provide for suspension or disbarment due to knowing or intentional violations. Those subsections do not apply here. The record evidence shows that Mr. Saldamando maintained attentive communication with his clients through five years of litigation. Although Mr. Saldamando had a duty to disclose the settlement, failure to relay the details of the final settlement amount immediately did not cause the clients actual or potential injury. After Mr. Saldamando's May 29, 2019 meeting with the clients, he laid out the available options if the fee was disputed, which is evidence that his conduct was simply negligent and not knowing or intentional.

The Bar argues that the Referee should have considered Standards 4.3, 4.6, and 6.1 at the sanctions hearing, highlighting the subsections dealing directly with disbarment or suspension. The Referee correctly declined to apply these Standards because there was no evidence supporting the application of these Standards.

The Bar did not present evidence to suggest Mr. Saldamando failed to avoid a conflict of interest. "During the duration of the case, the Respondent was challenged by three expert evaluations that determined no sinkhole activity and one of the plaintiff's expert evaluations was not considered a worthy opinion." (ROR3-4.) Mr. Saldamando negotiated a settlement in a difficult case in which his clients could have ended up with nothing. The Referee properly omitted Standard 4.3.

The Referee correctly declined to apply Standard 4.6 because there was no evidence of fraud, deceit, or misrepresentation. Mr. Saldamando was actively negotiating under the belief that the clients had given him authority to settle the matter at their bottom line of $65,000. There was no deception or misrepresentation to the clients. Mr. Saldamando ultimately informed the clients of the negotiated settlement, and as soon as a "disconnect" arose over the fee, he informed the clients of the appropriate alternatives.

The Bar argues that the Referee should have applied Standard 6.1. The Referee correctly found that "[n]ot relaying the details of the final settlement amount accepted on the Clients' behalf immediately or during the May 8, 2019 bottom-line confirmation email did not

cause any actual or potential harm to the Clients." (ROR20.) Mr. Saldamando met with the clients and subsequently emailed all available options. The Global Release of Claims and Settlement Agreement had not been signed. No evidence was presented showing that anything done by Mr. Saldamando caused potentially serious injury to a client or adverse effect on the legal proceeding. This was not a knowing withholding of information, and Mr. Saldamando took the proper remedial action.

B. Mitigating and Aggravating Factors

The Referee applied four mitigating factors, including Standard 3.3(b)(1) (absence of prior disciplinary record), Standard 3.3(b)(7) (character and fitness), Standard 3.3(b)(2) (absence of a dishonest or selfish motive), and Standard 3.3(b)(5) (full and free disclosure).

This sinkhole case was difficult because "the claim was denied by the insurer and several expert opinions denied sinkhole causation." (ROR19 (citing R-Ex. 18).) Mr. Saldamando was an associate with the Strems Law Firm, and the Bar presented no evidence that Mr. Saldamando would benefit personally from any settlement. The Referee found that the Strems Law Firm "was 'impliedly authorized to carry out the representation' of Mr. Alvarez

and Mrs. Herrera" and that Mr. Saldamando was authorized to settle the case. (ROR19.)

The only aggravating factor the Referee found was Mr. Saldamando's experience in the legal profession. The Bar claims, however, that Mr. Saldamando had a dishonest or selfish motive. The evidence presented at trial does not support this contention.

Mr. Saldamando called Mr. Boyar to testify. Mr. Boyar reviewed Mr. Saldamando's timesheets and testified that the fees were "extremely conservative." (ROR33; T406.) There was no evidence presented to challenge Mr. Boyar's testimony and no evidence that the fee was excessive. A clearly excessive fee would implicate a dishonest or selfish motive.

When the fee dispute arose, Mr. Saldamando clearly informed the clients of the alternatives, including allowing the Court to determine the reasonableness of the legal fees and costs. (ROR21-25.) Mr. Saldamando made no attempt to take possession of the funds of the proposed settlement and later withdrew from the representation. The Referee correctly found that "the fees and costs were not sought or secured by [the Strems Law Firm] or the Respondent by means of intentional misrepresentation or fraud."

(ROR34.) The evidence presented shows that Mr. Saldamando had no selfish or dishonest motives.

The Bar argues that there are multiple offenses involved. But competent substantial evidence supports the Referee's finding that the Bar proved only one Rule violation by clear and convincing evidence—Rule 4-1.4 (Communication). The complaint before the Referee involved only one offense: one instance of miscommunication with a client.

The Bar argues that the Referee should have considered Standard 3.2(b)(3), pattern of misconduct, referring to the global settlement and contingent fee retainer agreement. The Referee correctly determined that the retainer agreement is not illegal or prohibited and "does not violate any Rules Regulating The Florida Bar." (ROR34.)

The Referee considered all appropriate aggravating and mitigating circumstances presented by both parties, giving each the appropriate weight based on the evidence presented at trial. The Referee's findings should be upheld.

C. Case Law

The Referee relied on *Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005). In that case, a public reprimand was issued for an excessive fee exceeding 53% of the allowable contingency fee when there was no alternative fee contract and no other statutory basis existed to determine the allowable fees. *Id.* at 94.

The Referee also relied on *Florida Bar v. Shoureas*, 892 So. 2d 1002 (Fla. 2004), which the Bar admits involves "many of the same violations argued by the Bar." (Initial Br. 54.) The *Shoureas* case involves a lawyer failing to act with reasonable diligence and failing to communicate a settlement with the clients, but with no dishonest or selfish motive. *Id.* at 1008-09.

The Referee discusses *Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011), in which a three-year suspension was upheld for collusion in a class action case to settle for the benefit of the class representatives without protecting class members and while hiding the terms of the settlement agreement. The Referee correctly recognized that the facts of the *Adorno* case "far surpass the [Strems Law Firm's] fee dispute case at issue." (ROR72.)

The Referee appropriately considered all case law the parties proffered along with the proposed mitigating and aggravating factors, which led to the recommendation of a public reprimand. The Court should accept the recommended sanction.

CONCLUSION

Mr. Saldamando asks this Court to approve the Referee's findings and recommended sanction of a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail this 22nd day of October, 2021 to

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and does not exceed the word count limit requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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