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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 91,550

[TFB Case No. 97-31,222 (07C)]

v.

KEVIN KITPATRICK CARSON,

Respondent.

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The transcript of the final hearing held on February 20, 1998 shall be referred to as "TI", followed by the cited page number(s).

The transcript of the hearing held on September 30, 1998 shall be referred to as "TII", followed by the cited page number(s).

The Referee's Report Recommending Diversion to a Practice and Professionalism Enhancement Program dated April 16, 1998 will be referred to as "RRI", followed by the referenced page number(s).

The Referee's Report Recommending Diversion to a Practice and Professionalism Enhancement Program dated October 29, 1998 will be referred to as "RRII", followed by the referenced page number(s).

The bar's exhibits will be referred to as Bar Ex. ____, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

The respondent's Initial Brief dated December 23, 1998 shall be referred to as "RB", followed by the referenced page number(s).

This brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point Times New Roman.

TABLE OF AUTHORITIES

	<u>PAGE</u>
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TABLE OF OTHER AUTHORITIES

Rules Regulating The Florida Bar

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STATEMENT OF THE CASE

On May 28, 1997, the Seventh Judicial Circuit Grievance Committee "C" found probable cause against the respondent for violating R. Regulating Fla. Bar 4-1.5(f)(2) and 4-1.5(g). On October 7, 1997, the bar filed its formal Complaint against the respondent and an answer to the complaint was filed by the respondent's counsel on or about October 27, 1997. The Honorable Jean M. Johnson was appointed as referee to hear this matter.

Discovery was conducted in this disciplinary case. On February 12, 1998, the bar filed a Motion for Partial Summary Judgment and the respondent filed a motion to strike the bar's motion for partial summary judgment on or about February 16, 1998. The referee considered the bar's motion for summary judgment untimely as it was filed eight (8) days prior to the final hearing and no ruling was made on the motion. The final hearing was held on February 20, 1998. The bar submitted its Affidavit of Costs to the referee on March 11, 1998.

On March 20, 1998 the referee conducted a telephone conference with bar counsel and the respondent's counsel during which time problems with the final hearing transcription were discussed as well as the referee's proposed findings in this case. The March 20, 1998 telephone conference was not recorded by a court reporter. During the telephone conference, the referee indicated it was her

intention to refer the respondent to diversion to a practice and professionalism enhancement program as resolution of this case. On April 3, 1998, bar counsel forwarded a proposed Referee's Report Recommending Diversion to a Practice and Professionalism Enhancement Program and a copy of same was sent to the respondent's counsel. The bar's proposed report stated that the respondent's counsel and The Florida Bar concurred with the recommendation of diversion and also provided that \$2,336.07 in costs be assessed against the respondent pursuant to the bar's affidavit of costs previously submitted to the referee. By letter dated April 9, 1998 to the referee, the respondent's counsel objected to the assessment of costs against the respondent and also requested the referee delete a reference in the report, at paragraph three of the Narrative Summary, to the legal attempts of the respondent to collect a fee. Respondent's counsel did not file a motion nor did he request a hearing on either matter.

On April 16, 1998, the referee executed the Referee's Report Recommending Diversion to a Practice and Professionalism Enhancement Program as proposed by The Florida Bar without making any changes thereto. On April 30, 1998, the Supreme Court of Florida issued an order approving the referee's report and diverting this case to a practice and professionalism enhancement program pursuant to R. Regulating Fla. Bar 3-5.3. On or about May

12, 1998, the respondent, through his counsel, filed a Motion for Rehearing on the basis that there was no concurrence by the respondent with the referee's report. Also on May 12, 1998, the respondent filed, without counsel, a Petition for Review of Referee's Report. On May 15, 1998, the respondent filed a Notice of Discharge of Counsel wherein he terminated the representation of his attorney in this disciplinary case. On May 21, 1998 the Supreme Court approved the respondent's Notice of Discharge of Counsel.

On June 9, 1998, The Florida Bar submitted a Response to Petition for Review/Motion for Rehearing. On June 17, 1998, the respondent submitted a Motion to Strike The Florida Bar's Response to Petition for Review/Motion for Rehearing on the basis that the bar's response was untimely and that the bar was attempting to commit fraud upon the court by stating in its proposed referee's report that there was a concurrence of the parties when, in fact, the respondent had objected to the report. The Florida bar filed a response to the respondent's motion to strike on June 25, 1998.

By order dated September 2, 1998, the Supreme Court vacated its April 30, 1998 approving the referee's diversion recommendation and remanded this case to the referee "for a determination of whether these matters are contested and for resolution of any matters found to be in dispute." A hearing was held before the

referee on September 30, 1998 pursuant to the Court's September 2, 1998 order. On October 19, 1998, the bar submitted to the referee its Final Affidavit of Costs totaling \$2,956.05. The respondent submitted a Notice of Objection to Florida Bar's Final Affidavit of Costs on October 28, 1998. The bar filed a response to the respondent's notice of objection on November 2, 1998.

On October 29, 1998, the referee executed a second report recommending the respondent's diversion to a practice and professionalism enhancement program. In the report, the referee found that the respondent had failed to comply with the requirements of Rules 4-1.5(f) and (g); recommended that the respondent attend ethics school; and assessed costs against the respondent in the amount of \$2,956.05 pursuant to the bar's affidavit of costs. On November 25, 1998, the respondent filed a Petition for Review of the referee's October 29, 1998 report.

On December 4, 1998, the bar filed a Motion for Extension of Time to File Cross-Petition for Review and Response to Petition for Review requesting an extension until after the Board of Governors of The Florida Bar reviewed this matter at their meeting which was to begin on December 10, 1998. On December 7, 1998, the respondent filed a response to the bar's motion for extension of time. The Court granted the bar's motion on December 9, 1998 and the bar was permitted until after the Board of Governors' meeting to file a cross-petition for

review.

At their December 11, 1998 meeting, the Board of Governors determined a petition for review would not be filed by the bar in this matter. The respondent served his Initial Brief on December 23, 1998, and this brief is submitted in response.

STATEMENT OF THE FACTS

Between approximately 1992 and 1995, the respondent referred clients to attorney Steven Vasilaros [TI, pp. 45, 152-153]. During that period, the respondent did not handle civil cases as the focus of his law practice was criminal law [TI, pp. 150-153; Bar Ex. 3, p. 33]. The respondent and Mr. Vasilaros had an oral agreement where Mr. Vasilaros would pay the respondent a referral fee of 25% of any legal fees awarded in a personal injury case where Mr. Vasilaros represented the client [TI, pp. 152-153]. The respondent was not required to perform any services in connection with the representation for which he was receiving the referral fee [Bar Ex. 3, pp. 25, 32, 43-44].

In or around October 1992, the respondent referred Jenine Fox to Mr. Vasilaros for representation concerning her claim for personal injuries [TI, pp. 45, 155]. The respondent and Mr. Vasilaros entered into an oral agreement whereby Mr. Vasilaros would pay a referral fee of 25% to the respondent in connection with Ms. Fox's case if a favorable settlement or verdict was obtained [TI, pp. 45, 155, 162-163]. By letter dated October 29, 1992, Mr. Vasilaros acknowledged that upon successful completion of Ms. Fox's case, he would forward a 25% referral fee to the respondent [Respondent Ex. 1]. That letter was drafted by Mr. Vasilaros but signed by his associate, Jonathan Rotstein [TI, p. 75].

After the successful conclusion of Ms. Fox's civil case for personal injuries, Mr. Vasilaros paid a referral fee of \$650.00 to the respondent, which represented approximately 25% of the total attorney's fees recovered [TI, pp. 46, 64, 157-158]. Other than referring Ms. Fox to Mr. Vasilaros, the respondent performed no legal services for Ms. Fox in connection with her personal injury claim [TI, pp. 45-46, 155]. The respondent did not reduce the referral fee agreement in Ms. Fox's case to writing nor did Ms. Fox agree in writing to the payment of such a referral fee to the respondent [TI, pp. 45, 153, 162-164].

In or around late 1993 or early 1994, Abel Franco, whom the respondent represented in a criminal matter, requested that the respondent handle a civil claim against Mobil Oil Corporation (hereinafter referred to as "Mobil") [TI, p. 162; Bar Ex. 3, pp. 5-6]. The respondent advised Mr. Franco that he did not handle civil claims and referred Mr. Franco to Mr. Vasilaros [Bar Ex. 3, pp. 12-13]. On or about January 26, 1994, Mr. Franco retained Mr. Vasilaros' firm to handle his civil claim against Mobil for the wrongful death of Mr. Franco's wife [Bar Ex. 3, pp. 6, 11]. Mr. Franco executed a contingency fee contract with Mr. Vasilaros' law firm. The respondent did not execute this fee contract nor did the contract mention whether the respondent was entitled to a referral fee [Bar Ex. 3, p. 11]. Mr. Franco never entered into a written referral fee agreement with the respondent in

connection with Mr. Franco's claim against Mobil [Bar Ex. 3, pp. 11, 25-26, 39, 42-43].

Mr. Vasilaros' law firm filed an action on Mr. Franco's behalf that was styled Franco v. Mobil Oil Corporation, Case No. 94-30317-CICI, in the Seventh Judicial Circuit Court in and for Volusia County, Florida [Bar Ex. 1]. Mr. Vasilaros successfully settled Mr. Franco's claim in or around April 1995 for the approximate amount of \$336,000, but did not advise the respondent of the settlement or forward any funds to him as payment of a referral fee [TI, pp. 12, 47-48, 178]. The respondent learned of Mr. Franco's settlement from Mr. Franco in or around April 1995 [TI, p. 163; Bar Ex. 3, p. 37]. The respondent then contacted Mr. Vasilaros to inquire about the payment of a referral fee [Bar Ex. 3, p. 37-38]. Mr. Vasilaros refused to pay the respondent a referral fee because the agreement has not been reduced to writing and signed by the client, Mr. Franco, and the respondent had taken no interest in the case until the settlement funds were disbursed [Bar Ex. 1; Bar Ex. 3, pp. 25-26; TI, pp. 48-49].

On or about November 2, 1995, Mr. Vasilaros' partner, Michael Politis, filed a motion for determination of attorney's fees in Mr. Franco's case to ascertain whether the respondent was entitled to a referral fee [Bar Ex. 1]. On or about March 18, 1996, the circuit court ruled that, because the referral fee

agreement between the respondent and Mr. Vasilaros was oral, the respondent was not entitled to receive a referral fee in the matter [Bar Ex. 2]. The trial court's order was upheld on an appeal to the Fifth District Court of Appeals [RB, p. 9; TI, p. 14].

In or around April 1995, the respondent referred Mr. Franco to Mr. Vasilaros for a second civil matter (hereinafter referred to as the "Spears matter") [TI, pp. 62, 67-69, 200]. By letter dated May 3, 1995, Mr. Vasilaros acknowledged the respondent's referral of Mr. Franco in the Spears matter and advised the respondent that he would pay a referral fee of 25% in connection with such case if the case resulted in a favorable settlement or verdict [Respondent Ex. 2]. Mr. Franco never agreed in writing to pay the respondent a referral fee in connection with the Spears matter [TI, pp. 90-91; Bar Ex. 3, pp. 28-30]. The respondent performed no legal services in connection with the Spears matter [TI, pp. 68-71; Bar Ex. 3, pp. 29-30, 44].

On or about March 18, 1996, the respondent, through his counsel, Charles R. Holloman, Jr., filed a bar grievance against Steven Vasilaros alleging Mr. Vasilaros' failure to disburse a 25% referral fee to the respondent in the Franco v. Mobil Oil case [Bar Ex. 4]. The Seventh Judicial Circuit Grievance Committee "C" found probable cause against Mr. Vasilaros for improper fee-splitting, and

subsequently Mr. Vasilaros entered into a consent judgment at the referee level for diversion to the bar's practice and professionalism enhancement program [TI, p. 53; TII, p. 43]. During the course of the grievance committee's investigation into Mr. Vasilaros' conduct, the committee directed bar counsel to open a file and investigate the respondent's conduct in regard to improper fee-splitting, which resulted in the instant matter [Bar Ex. 12; Bar Ex. 13; RB, p. 10]. During the course of these proceedings, the respondent filed a bar grievance against Branch Staff Counsel Jan Wichrowski, the bar counsel who handled the grievances against Mr. Vasilaros and the respondent [Respondent Ex. 8]. In or around May 1997, Ms. Wichrowski transferred the handling of the respondent's case to another bar counsel [RB, p. 13; Bar Ex. 11]. On August 20, 1997, the Tampa Branch Office of The Florida Bar dismissed the respondent's grievance against Jan Wichrowski [RB, p. 14].

On October 29, 1998, the referee issued a report, for the second time, recommending the respondent's diversion to a practice and professionalism enhancement program (ethics school). In her report, the referee found that the respondent failed to comply with the requirements of R. Regulating Fla. Bar 4-1.5(f) and (g); that there was an oral agreement for referrals in contingent fee cases; that the respondent had made referrals and had received money under this

oral agreement; and that the respondent pursued entitlement to the referral fees through the courts. Further, the referee found that it was the respondent who brought this matter to the attention of The Florida Bar and that the respondent admitted he was ignorant of the ethical requirements of written contracts signed by the client and the participating attorneys [RRII, p. 1]. The referee also assessed the bar's costs against the respondent in the amount of \$2,956.05. In his petition for review of the referee's report, the respondent disputes the referee's findings of fact regarding whether there was a division of fees between lawyers in different firms, and he disputes the referee's assessment of costs.

SUMMARY OF THE ARGUMENT

The respondent contends that the referee's finding that the respondent violated R. Regulating Fla. Bar 4-1.5(f) and 4-1.5(g) regarding improper referral fees is erroneous or lacking in evidentiary support. However, the record shows that the respondent failed to comply with all of the elements of Rules 4-1.5(f) and (g) concerning referral fees. The evidence of the respondent's lack of compliance comes mainly from the respondent's own admissions and testimony. There is no dispute that the respondent referred at least three civil cases to attorney Steven Vasilaros. It is also undisputed that no referral fee contracts were generated or executed by the attorneys or the clients. The respondent acknowledges on the record that he received a referral fee from Mr. Vasilaros in one of the cases he referred. Accordingly, the referee's finding of an improper referral fee is clearly supported by the record.

The assessment of costs in bar disciplinary cases rests with the discretion of the referee. In the present case, the referee found that the respondent engaged in misconduct and appropriately assessed the bar's costs against the respondent. The bar's costs are proper pursuant to the Rules Regulating The Florida Bar and the respondent has failed to show an abuse of discretion in the referee's assessment of same.

ARGUMENT

POINT I

THE REFEREE'S FINDING OF AN IMPROPER REFERRAL FEE IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The respondent contends The Florida Bar charged him with improper referral fees in the matters of Jenine Fox, Franco v. Mobil Oil, and Franco v. Spears, and that there was insufficient evidence for the referee to conclude that there was a division of attorney's fees in those cases. In seeking to overturn a referee's findings of fact, the respondent must show them to be clearly erroneous or without support in the record. The Florida Bar v. Porter, 684 So. 2d 810 (Fla. 1996); The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986). In this case, the referee's findings are clearly supported by the record and it is the respondent who is in error.

In the referee's October 29, 1998 report recommending diversion, the referee found that the respondent "had an oral agreement for referrals in contingent fee cases, has made referrals and has [sic] had received money under this oral agreement, and has pursued entitlement to referral fees through the courts." [RRII, p. 1]. The respondent objects to the finding that he received money under the oral referral agreement. He contends that he never received any payments for his referrals and therefore, there was no division of fees between

lawyers in different firms and, thus, no violation of R. Regulating Fla. Bar 4-1.5(g). On the contrary, the record clearly shows that the respondent was paid a \$650.00 referral fee by Steven Vasilaros in the Jenine Fox case. However, the respondent now argues at pages 24-25 of his initial brief that the \$650.00 payment was a “gift” by Mr. Vasilaros equivalent to 25% of the fee in the Fox case “to show his good faith and to encourage Mr. Carson to continue making referrals.” That is not what the respondent testified to at the final hearing on February 20, 1998 in this matter. Upon questioning by bar counsel, the following testimony was elicited from the respondent:

Q Well, what you’re telling us then, so that I’m clear, is that you were paid monies by Mr. Vasilaros regarding the Fox case.

A Right.

Q Okay. Would you agree, sir, that that was the referral fee you were entitled to on the Fox case?

A Well, you know, I -- that’s the way I interpreted it.

Q Okay.

A You know, I’m just kind -- I’ve kind of wondered if maybe a person can give a gift for a referral. I don’t know. **But my honest interpretation is that was the payment to me for the referral.**

Q Your entitlement.

A Well, our agreement, yes.

[TI, p. 158]. (Emphasis supplied).

Mr. Vasilaros also testified at the final hearing that the \$650.00 he paid the respondent was based upon 25% of the fee he received in the Jenine Fox case [TI, p. 64]. For the respondent to now argue that the \$650.00 referral fee he received was a “gift” is disingenuous at best. The respondent has acknowledged on the record that he did no work in the Jenine Fox case other than to refer the matter to Mr. Vasilaros [TI, p. 155]. It is also undisputed that there was no written referral fee agreement or contract signed by Ms. Fox [TI, pp. 45, 153, 162-163]. Accordingly, the respondent violated the provisions of Rule 4-1.5(g) in his receipt of a referral fee from Mr. Vasilaros in the Fox case, and the referee’s finding in that regard is correct.

It is apparent from the respondent’s initial brief that he rejects any finding of misconduct by the referee and suggests that the findings and recommendations in this case are essentially unfair as he was the person who brought this matter to the attention of The Florida Bar through his grievance against Steven Vasilaros. On the contrary, the referee’s recommendation of diversion to ethics school is an equitable resolution of this matter. The record in this case revealed that Mr. Vasilaros also received diversion to ethics school for his part in the improper referral fee relationship [TI, p. 53; TII, p. 43]. Provided the respondent

successfully completes the diversion program, there will be no disciplinary sanction reported in his permanent bar record [See R. Regulating Fla. Bar 3-5.3(i)]. The record in this case clearly reflects the respondent's violation of the provisions of Rules 4-1.5(f) and (g) and the referee's diversion recommendation is appropriate under the circumstances.

POINT II

THERE WAS NO ABUSE OF DISCRETION IN THE REFEREE'S ASSESSMENT OF COSTS AGAINST THE RESPONDENT.

In bar disciplinary proceedings, the taxation of costs is within the referee's discretion. The Florida Bar v. Nunes, 661 So. 2d 1202 (Fla. 1995); The Florida Bar v. Miele, 605 So. 2d 866 (Fla. 1992). In the instant matter, the bar submitted its final affidavit of costs to the referee on October 19, 1998 which totaled \$2,956.05. The referee assessed those costs against the respondent in her October 29, 1998 report. The costs incurred by the bar include bar counsel travel costs at the grievance committee and referee levels; court reporters' fees and transcription costs; an administrative fee; and copy costs. All of those costs are proper and taxable under R. Regulating Fla. Bar 3-7.6(o). The respondent has not shown where any of the bar's costs were unnecessary, excessive or not properly authenticated. It should be noted that as a result of the respondent's rejection of the referee's first diversion recommendation, this case was remanded to the referee for another hearing, thereby incurring additional bar counsel travel and transcript costs.

The respondent suggests that because the bar failed to prove its allegations against him, he should not be assessed costs. As previously discussed, the record clearly shows the respondent engaged in the misconduct for which he was

charged. But for the respondent's misconduct, no complaint would have been filed and no costs incurred. Miele, supra. The respondent has failed to show an abuse of discretion in the referee's assessment of the bar's costs against him.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the record in this case, the referee's findings of fact, and the recommendation of diversion to a practice and professionalism enhancement program (ethics school), and approve the referee's diversion recommendation and the assessment of the bar's costs against the respondent which totals \$2,956.05.

Respectfully submitted,

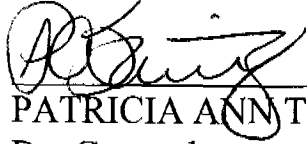
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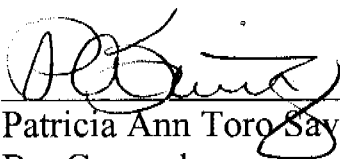
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Kevin Kitpatrick Carson, 315 South Palmetto Avenue, Daytona Beach, Florida, 32114; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 13th day of January, 1999.

Respectfully submitted,



Patricia Ann Toro Sayitz
Bar Counsel