IN THE SUPREME COURT OF FLORIDA

1/19

THE FLORIDA BAR,

Complainant,

CASE NO. 91,550

vs.

KEVIN KITPATRICK CARSON,

Respondent.
_____/

ON PETITION FOR REVIEW
FROM THE RECOMMENDATION OF A REFEREE

INITIAL BRIEF OF RESPONDENT

KEVIN KITPATRICK CARSON
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SYMBOLS AND REFERENCES

In this brief, the respondent, Kit Carson, shall be referred to as "Mr. Carson".

The complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar". Staff Counsel for the bar shall be referred to as bar counsel.

The transcript of the referee hearing, held on February 20, 1998, shall be referred to as "TT" followed by the cited page number.

The transcript of the rehearing before the referee, held on September 30, 1998, shall be referred to as "RH" followed by the cited page number.

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

Mr. Carson's exhibits will be referred to as Respondent's Exhibit. ____, followed by the exhibit number.

STATEMENT OF THE CASE AND FACTS

The respondent (Kit Carson) and Steven Vasilaros met and came to know each other in 1986 or 1987, when Mr. Vasilaros worked at a civil law firm and Mr. Carson worked with the criminal division of the Attorney General's Office in Daytona Beach, Florida. A few years later, Mr Carson went into private practice (TT 207, Bar's Exhibit 3, page 32). Mr. Carson has been a police officer and is described as being "straight-laced" (TT 239). Having become friends, the two lawyers entered into a mutually advantageous referral relationship, whereby Mr. Vasilaros told Mr. Carson that he would pay Mr. Carson 25% of the attorney's fee for personal injury cases that he obtained as a result of referrals made by Mr. Carson to him (Bar's Exhibit 3, pages 19, 32). Mr. Carson did not handle these types of cases (Bar's Exhibit 3, pages 12, 33). This arrangement appeared to be common in the Daytona Beach area; so, Mr. Carson agreed to refer cases to Vasilaros. Mr. Carson assumed joint responsibility for the representation of clients in the cases he referred to Vasilaros. If Vasilaros needed help, all he had to do is give Mr. Carson a call and Mr. Carson would do whatever was within his power to help. If Vasilaros needed Mr. Carson to jump, Mr. Carson would ask "how high"? (TT 160, 206; Bar's Exhibit 3. pages 32-34, 44). Mr. Carson was available to consult with clients at all times (Bar's Exhibit 3, page 12). There was no requirement that Mr. Carson do any work on the referred cases or that the referral be by letter (Bar's Exhibit 3, pages 25, 32). Because Vasilaros' firm handled personal injury cases, it was agreed that

Vasilaros would have the responsibility for drafting contracts with clients (Respondent's Exhibit 8). This was also the customary practice in Volusia County (TT 125, 197). Vasilaros was the "captain of the ship" (TT 61).

Pursuant to the agreement of the parties, Mr. Carson referred cases to Vasilaros. Mr. Carson had an advertisement in the telephone book Yellow Pages (Bar's Exhibit 3, page 33). His office telephone number was (904) 255-CARE or (904) 255-2273 (See, Mr. Carson's business card, paper clipped to Respondent's Exhibit 8). Even though Mr. Carson did not advertise for personal injury cases, people would call Mr. Carson. Mr. Carson would refer these and other people to Vasilaros and advise them of his arrangement with Vasilaros (Bar's Exhibit 3, page 12, 33).

In October of 1992, Mr. Carson referred Jenine Fox to Vasilaros for representation. Vasilaros wrote Mr. Carson a letter thanking him for the referral and agreeing to pay him 25% of the attorneys fee in the case. Vasilaros also invited future referrals, saying, "I want to thank you for your kind consideration in referring this lady to me and of course, if I can be of any help to you in any future matters, please feel free to contact me." Vasilaros' law partner, Jonathan Rotstein, signed this letter (TT 155; Respondent's Exhibit 1).

In May of 1993, Mr. Carson referred Anthony Prenkiewicz to Vasilaros for representation. On June 8, 1993, Vasilaros wrote Mr. Carson a letter thanking him for the referral and agreed to pay him 25% of the attorneys fee in that case. Vasilaros, again invited

future referrals from Mr. Carson, saying, "thank you again for your kind cooperation, and if I can be of further service to you in the future, please contact me." Vasilaros' law partner, Jonathan Rotstein, signed this letter (TT 157-158, 206; Respondent's Exhibit 3; Bar's Exhibit 3, page 23).

In September, 1993, Mr. Carson was told by Vasilaros' partner, Jonathan Rotstein, that the Jenine Fox case had settled. Rotstein told Mr. Carson to make sure that Vasilaros paid Mr. Carson. Mr. Carson arranged a personal meeting with Vasilaros in which the Fox case was discussed. As it turned out, there was no division of the fee the Fox case. Vasilaros had already disbursed the settlement funds to Ms. Fox and had paid the entire attorneys fee to himself. This was reflected in the settlement statement. (TT 60-61, 157-158). Vasilaros apologized for the forgetting about Mr. Carson and assured Mr. Carson that it would not happen again (Bar's Exhibit 3, page 35). As an incentive for future referrals, Vasilaros gave Mr. Carson a gift of $650.00 out Vasilaros own funds (TT 158, RH 82). This was the sum that would have been due had a division of fee occurred (TT 64, 157-158).

Approximately three months later, in late 1993 or early 1994, Mr. Carson referred Mr. Franco to Vasilaros (Bar's Exhibit 3, pages 7, 32). The referral of the Franco case came about when Mr. Carson was defending Mr. Franco against criminal charges (TT 162). During the criminal case representation, Mr. Franco consulted with Mr. Carson regarding a potential claim against Mobile Oil Corporation involving the death of Franco's wife (Bar's Exhibit 3, page 6). As

a result of Mr. Carson's referral, Mr. Franco met with an attorney (Michael Politis) at Vasilaros' office. On January 26, 1994, Mr. Franco signed a contingency fee agreement with Vasilaros (Bar's Exhibit 3, pages 6-8, 11, 14, 87-88). Mr. Politis noted on the interview form that Mr. Franco had been "referred by Kit Carson" (Bar's Exhibit 3, page 14). Mr. Franco later met with Mr. Carson and informed him that Mr. Politis had been advised of his referral and that Politis had said "We'll take care of Kit (Bar's Exhibit 3, page 35).

On March 12, 1995, after a church service, Mr. Carson discussed Mr. Franco's case against Mobile Oil Company with him (Bar's Exhibit 3, pages 10, 36, TT 160-161).

The trial week for the Mobile Oil suit was scheduled for April 3, 1995, and Mr. Carson had learned from Mr. Franco that the case had settled. Mr. Franco was disappointed about the settlement; however, Mr. Carson assured Franco that Vasilaros was a person who knew what he was doing and that Franco should trust Vasilaros' judgment (TT 160-161). Mr. Carson contacted Vasilaros about the case. To Mr. Carson's surprise, Vasilaros claimed that he did not know that Mr. Carson had referred the case to him; but, he said would check on it (Bar's Exhibit 3, pages 37-38).

Later, Mr. Carson learned from Mr. Franco that Vasilaros had no intention of paying him any referral fee. Mr. Franco related that Vasilaros referred to a "statute" (Rule of Conduct) as the basis for not paying the fee (Bar's Exhibit 3, page 37). Since Mr. Carson did not practice personal injury law, he was not aware of

this Rule and, prior to Mr. Franco's statement, had no clue that anything was amiss (TT 163, 137; Respondent's Exhibit 8). Mr. Carson found the Rule and familiarized himself with it so that this kind of thing would not happen again (TT 163, 165, 172-173). Mr. Carson trusted and depended on Vasilaros to draft proper contracts. Mr. Carson did not authorize Vasilaros to do anything unethical (Respondent's Exhibit 8).

On April 25, 1995, Mr. Carson arranged a personal meeting with Vasilaros at Vasilaros' office. During the meeting, Vasilaros admitted that he had no doubt in his mind that Mr. Carson had referred him the case; stated that he appreciated Mr. Carson's referrals; thanked Mr. Carson for the referral; and, said that he didn't get a lot of referrals from other lawyers because a lot of lawyers don't like him. He also stated that his only concern about paying the referral fee to Mr. Carson was the Rule of Conduct. He concluded that he would speak with his partners about how to go about dividing the attorney fee, saying, "Where there is a will, there is a way." No funds relating to the Mobile Oil case had been disbursed at the time of this meeting (Bar's Exhibit 3, page 38).

On April 26, 1995, satisfied with his previous meeting with Vasilaros, Mr. Carson again referred Mr. Franco to Vasilaros. This referral related to suing Holly Spears, the girl who had brought false criminal charges against Mr. Franco. On May 3, 1995, Vasilaros wrote a letter thanking Mr. Carson for the referral and agreeing to pay 25% of any attorney fees recovered on the case (Respondent's Exhibit 2). Vasilaros had also agreed to prepare a

proper contingency fee contract to be signed by Mr. Carson, Mr. Franco and himself (TT 154-155, 200-201). A short time later, Vasilaros reneged on his agreement with Mr. Carson in the Spears case. Mr. Carson never received any fee in the Spears case (TT 62, 198, 222).

On May 16, 1995, Vasilaros wrote a letter to Mr. Carson and asked for input regarding how to go about a division of the attorney fee in the Franco v. Mobile Oil case. In the letter Vasilaros falsely claimed that he did not have any information in his file indicating that the case had been referred to him by the Mr. Carson. Vasilaros also falsely claimed that he had not been informed of the referral until after the case had settled (Bar's Exhibit 3, page 48; Respondent's Exhibit 4).

After receiving Vasilaros' May 16, 1998, letter, Mr. Carson contacted another personal injury attorney, Chobee Ebbets, to try to mediate the situation and to find a way to get Vasilaros to honor his agreement without violating any rules (TT 115; 202; Respondent's Exhibit 8). Ebbets was very surprised that Vasilaros was refusing to honor the agreement with Mr. Carson. Rather than pick up the telephone and call Vasilaros, Ebbets drove over to Vasilaros' office, unannounced. Ebbets had a personal meeting with Vasilaros. Vasilaros admitted owing money to Mr. Carson for the referral; but, claimed to be concerned about dividing the fee in a manner that would not violate any Rule of Conduct. He claimed that he did not know what to do about the oversight. During the conversation, Vasilaros agreed to prepare a stipulated set of

facts; submit them to the Mr. Carson and Mr. Ebbets; amend the stipulated facts if necessary; and, submit them to the Florida Bar or to a judge, depending on which course was decided. The purpose of this was to make sure that nothing unethical was being done and to protect the rules (TT 114-120, 137, 168-169).

Unknown to Mr. Carson and Mr. Ebbets, Vasilaros disbursed all of the attorney's fee from his trust account to his law firm. Mr. Ebbets was real surprised when he learned that Vasilaros had backed out of the agreement (TT 114-120, 137, 168-169). In backing out of the agreement, Vasilaros did not submit a set of facts for review by Mr. Carson and Mr. Ebbets; but rather, he had his law partner, Michael Politis, unilaterally, filed a Motion For Determination of Division Of Attorney's Fees on November 2, 1995. In the motion, Vasilaros cited Rule of Professional Conduct 4-1.5(g) as the basis for determining whether he should pay Mr. Carson a fee in this case (Bar's Exhibit 2).

On January 24, 1996, a hearing was held on the Motion For Determination Of Division Of Attorney's Fees (Bar's Exhibit 3, pages 1-75). Michael Politis, Vasilaros' partner, was called as a witness by Bill Ogle, Mr. Carson's attorney. Politis was forced to admit that the Vasilaros firm actually did have Mr. Carson's name in the Franco file as the referring attorney (contrary to Vasilaros' earlier letter) (Bar's Exhibit 3, page 14). Politis testified (falsely) that the notation in the personal injury interview form, "referred by Kit Carson", was only for use in a "marketing" program for the Vasilaros & Politis law firm (Bar's

Exhibit 3, page 14).

During the hearing, Vasilaros admitted his referral relationship with Mr. Carson. He admitted that he had agreed to pay 25% of his fee to Mr. Carson for referrals (Bar's Exhibit 3, page 19). Letters from Vasilaros (described above), which showed a course of dealing (a referral relationship) between Vasilaros and Mr. Carson, were introduced into evidence at the hearing (Respondent's Exhibits 1, 2, 3). Vasilaros also finally admitted the he had a note that Mr. Carson had referred Mr. Franco to him (a fact that he had previously denied in a letter to Mr. Carson) (Bar's Exhibit 3, page 24, Respondent's Exhibit 4). Vasilaros chose to perjure himself and claim that he had no agreement to pay 25% of the attorney's fee in the Franco case to Mr. Carson (a position which was completely inconsistent with the admissions he had made to Chobee Ebbets) (TT 114-120).

On March 18, 1996, the lower court rendered its order denying Mr. Carson any portion of the fee in the Franco case. The lower court ruled that Mr. Carson had failed to prove that there was contract between Vasilaros and himself because he had failed to prove, by the greater weight of the evidence, that there was a meeting of the minds (Bar's Exhibit 2). Those who were familiar with the case and with Vasilaros were quite surprised by the ruling (Respondent's Exhibit 8). As a result, Mr. Carson never received any money in the case (TT 62, 178, 198).

On March 18, 1996, one of Mr. Carson's attorneys, Charles Holloman, filed a grievance against Vasilaros with the Florida Bar

alleging disbursement of disputed trust funds (TT 168). Mr. Holloman and Mr. Carson agreed that Mr. Holloman would file the grievance regarding the trust funds because we were concerned that Bar Staff Counsel would not take it seriously if Mr. Carson filed. As a victim in this incident, Mr. Carson believed that a Florida Bar investigator would contact him so that he could provide additional details, including the need to investigate Vasilaros (and possibly Politis) perjury. No investigator ever contacted Mr. Carson.

On April 3, 1996, Mr. Carson filed his Notice Of Appeal of circuit court's March 18, 1996 order. On October 15, 1996, the Fifth District Court of Appeal affirmed the order without opinion.

During the week of December 2, 1996, Mr. Carson contacted Mark Hall, the Chairman of the grievance committee which was handling the Vasilaros grievance. Mr. Carson asked about the hearing date for the grievance, which Mr. Hall advised was to be on December 11, 1996, and Mr. Carson expressed outrage that he had not been contacted. Mr. Hall suggested that Mr. Carson write a letter expressing Mr. Carson's concerns and that Mr. Carson shouldn't risk ticking off the investigating member. Mr. Carson hand delivered the letter to Mr. Hall's office on December 9, 1996. Within the letter, Mr. Carson added additional grievance matters to be considered by Assistant Staff Counsel Jan Wichrowski and the committee, including Vasilaros' perjury (TT 170-171, Respondent's Exhibit 8). Later, Mr. Carson learned that the hearing had been continued to January. Despite Mr. Carson's letter, he was never

contacted by any investigator or Jan Wichrowski about his additional allegations. Telephone calls to Wichrowski were never returned (Respondent's Exhibit 8)..

During the three and one half years since the closure of the Jenine Fox case, Mr. Carson had been doing pro bono work, helping clients, laughing, drinking, and tanning on Daytona Beach. Things seemed to be doing fine, until he received a package from Bar Staff Counsel in Orlando, Florida (TT 174).

The next Mr. Carson heard about the Vasilaros grievance was when, on the morning of February 10, 1997, he received a certified package, about two inches thick, with a letter dated February 7, from Wichrowski in which she accused Mr. Carson of entering agreements with Vasilaros to split fees in violation of our Rules of Professional Conduct. The documents in the package were actually documents that Mr. Carson had provided to Bar Staff Counsel through his attorney, Charles Holloman, as well as Mr. Holloman's briefs in Mr. Holloman's behalf in the appellate court. Mr. Carson could not believe his eyes. Mr. Carson was astonished, outraged, confused, hurt, and disheartened (TT 167, 171-172).

Mr. Carson called committee chairman Mark Hall about what happened to the Vasilaros grievance. Mr. Hall did not have the file with him and mistakenly advised Mr. Carson that there was a finding of no probable cause.

Next, Mr. Carson called Jan Wichrowski about the no probable cause finding, the lack of investigation, and about her allegations against him. Mr. Carson's main concern, when he was talking to

Wichrowski, was what she was doing to him. No one was complaining against Mr. Carson and he felt he had done nothing wrong. Mr. Carson did not practice personal injury law. What Mr. Carson had done was depend on a person he considered to be his friend (Vasilaros) to protect Mr. Carson's interests and, unfortunately, Vasilaros had not done so and later chose to perjure himself. Mr. Carson never authorized Vasilaros to do anything to violate any rules of conduct nor did Mr. Carson intend to violate such a rule. Wichrowski told Mr. Carson that it was the grievance committee that had prompted her to go after him about a violation of a fee splitting rule. According to Wichrowski, the accusation was not her doing. Mr. Carson also expressed his displeasure about a finding of no probable cause regarding Vasilaros. When Mr. Carson told Wichrowski that he would be filing a grievance against her because that matter had not been properly investigated, she threatened him, saying she would make a note in the file that he had threatened her. With that, Mr. Carson hung up on her.

Mr. Carson next called Frank Gummy, a member of the grievance committee. Frank told Mr. Carson that it was actually Wichrowski, not the committee, that had initiated the complaint against him. Mr. Gummy said that Wichrowski had "indicated that other files can be opened" and that she had prompted the committee to ask her to look into Mr, Carson's "possible violation."

Later in the day, Committee Chairman Mark Hall called Mr. Carson back, saying that he had been mistaken when he told Mr. Carson that there had been a finding of no probable cause as to

Vasilaros and that probable had actually been found on Holloman's complaint against Vasilaros (Respondent's Exhibit 8).

During the week of February 10, 1997, Charles Holloman spoke with Assistant Bar Staff Counsel James Keeter about the allegations that had been brought against Mr. Carson by Staff Counsel. During that conversation Keeter said that he remembered Mr. Carson from a grievance committee hearing, back in 1996, where there had been a finding of no probable cause. Keeter told Holloman that Keeter didn't like Mr. Carson's attitude; Mr. Carson was remorseless; and, "we're going to teach him a lesson" (TT 185-186).

On February 24, 1997, Mr. Carson responded to Wichrowski's February 7 letter and stack of papers. In the letter he pointed out that no one had complained against him, that Wichrowski's letter was not based upon any specific complaint, and he denied that he violated any Rule of Conduct (Bar's Exhibit 8).

Mr. Carson waited to get a letter from Wichrowski, confirming that probable cause was found as a result of **both** his complaint and that of Mr. Holloman regarding Vasilaros. Mr. Holloman received a letter saying that probable cause had been found as to Holloman's complaint. No letter was received by Mr. Carson advising him of any findings as to his perjury complaint against Vasilaros.

Mr. Carson asked that Jan Wichrowski remove herself from his case; however, she refused to do so. Mr. Carson also asked that Bar complaint be transferred to the grievance committee that would normally handle complaints directed at him. This request was also denied. Wichrowski conducted her own investigation into Mr.

Carson's complaints about her, found herself not guilty, and determined that she would continue to intimidate Mr. Carson. (TT 189, 191, 215; Respondent's Exhibit 8).

On May 16, 1997, Mr. Carson mailed a grievance against Wichrowski to Staff Counsel John Berry in Tallahassee (TT 215-216; Respondent's Exhibit 8). Berry mailed the original grievance to Bar Staff Counsel in Tampa.

On June 1, 1997, Florida Supreme Court Justice Major Harding was quoted in The Florida Bar News as saying, "I hope that you walk away knowing this is a system made up of real people, not sphinxes on the Nile. Don't hold us to the standard of perfection. We are humans" (Respondent's Exhibit 6).

On June 5, 1997, Tampa Branch Staff Counsel, David Ristoff mailed Mr. Carson's original complaint against Wichrowski (including the business card that had been mailed to Berry) back to Mr. Carson, saying he would close the file if Mr. Carson did swear to it. On June 20, 1997, Mr. Carson mailed the original complaint back to Mr. Ristoff, in Tampa (TT 215-215, Respondent's Exhibit 8).

On July 10, 1997, Jan Wichrowski responded to Mr. Carson's grievence. In her response, Wichrowski claimed she had recused herself from further involvement in, and supervision of, the prosecution of Mr. Carson (Respondent's Exhibit 8). Interestingly, she had assigned the case to, of all people, James Keeter (R 219; Bar's Exhibit 11).

On July 31, 1997, Mr. Carson responded to Wichrowski's letter (Respondent's Exhibit 8).

On August 20, 1997, Tampa Assistant Staff Counsel, Brett Geer, (a member of the Bar for less than 2 years at the time) whitewashed Mr. Carson's grievance. Geer redefined the issues in Mr. Carson's complaint in a manner that would make Bill Clinton proud. He did not deal with the major issues of Mr. Carson's complaint--Wichrowski's failure to investigate Vasilaros' perjury and why Mr. Carson's case was not handled by the grievance committee that would normally hear inquiries about him (TT 179, Respondent's Exhibit 8).

On or about October 7, 1997, a formal Bar complaint was filed against Mr. Carson in the Florida Supreme Court. Mr. Carson's attorney, Charles Holloman, filed his answer to the complaint.

On February 20, 1998, a hearing on the complaint was held before a referee (TT 6-248).

On March 11, 1998, Ms. Savitz served an affidavit of costs in behalf of the Bar, reflecting total costs of $2,336.07.

On March 20, 1998, the referee arranged an unreported, impromptu, telephone conference between Mr. Carson's attorney, Charles Holloman, Assistant Bar Staff Counsel Patricia Savitz, and herself. The conference was called to discuss discrepancies and pretty bad inaccuracies in the written record by the court reporter of the February 20, 1998, referee hearing. Parts were missing. Some parts seemed like they were from another hearing. References to "Snoopy" were all over the trancscript (RH 19) The referee wanted the record to be accurate when in went to the Supreme Court (RH 19, 25, 33). The referee indicated that she felt that this case warranted nothing more than diversion to a practice and

professional enhancement program and that she thought that she needed bar approval for diversion. She felt like there was a technical minor violation of the rules (RH 20, 35). Bar counsel still insisted on a public reprimand. The referee reminded bar counsel that she had not written her report and recommendation and said, "We all know what happened here. I think that this is appropriate and this is what I want to do" (RH 20). The referee pointedly asked bar counsel how they justify disparate treatment between Vasilaros and Mr. Carson (RH 44). The referee indicated to bar counsel that if bar counsel did not agree to diversion, she would write a report and recommendation that might not reflect well on The Florida Bar (RH 23). With that, bar counsel said she would go to her superior and ask approval; but, she did not think she would have any difficulty getting approval (RH 20). Mr. Holloman thought that the referee was going to prepare the report (RH 22).

On April 3, 1998, Savitz submitted a proposed order to the referee, with a computer disc. In the proposed order, all costs were to be charged to Mr. Carson. On April 9, 1998, Mr Holloman faxed and mailed a letter to the referee and Savitz, objecting to the proposed order. On April 16, 1998, the referee signed the proposed order, over Mr. Holloman's and Mr. Carson's objection; however, she failed to delete language indicating a concurrence with the proposed report from the order (See, Respondent' motion to strike, etc., dated June 17, 1998).

On April 30, 1998, the Clerk of the Florida Supreme Court entered an order approving the "uncontested" report of the referee.

On May 12, 1998, Mr. Carson's attorney served a motion for rehearing and Mr. Carson filed a petition for review.

During the week of May 18, 1998, the Florida Bar offered to settle the case with Mr. Carson. The offer was accepted and Mr. Carson mailed a stipulation to Orlando Bar Counsel.

On May 26, 1998, the Florida Bar filed a letter stating that it would not appeal the referee's April 16, 1998, recommendation.

On June 9, 1998, Assistant Bar Staff Counsel Savitz reneged on the settlement and filed a Response To Petition For Review/Motion For Rehearing. While speaking with Mr. Holloman, she said, "What goes around, comes around" (See, Respondent's motion to strike, etc., dated June 17, 1998).

On June 17, 1998, Mr. Carson served a Motion To Strike the Florida Bar's Response To Petition For Review/Motion For Rehearing.

On June 25, 1998, Mrs. Savitz responded to Mr. Carson's Motion to Strike.

On September 2, 1998, this court granted Mr. Carson's motion for rehearing and remanded the case back to the referee. The motion to strike was denied.

On September 30, 1998, a second hearing was held before the referee in Jacksonville, Florida (RH 17-85).

On October 19, 1998, Mrs. Savitz served a second affidavit of costs in behalf of the Bar, reflecting total costs of $2,956.05.

On October 28, 1998, Mr. Carson served a notice of objection to the final affidavit of costs.

On October 29, 1998, the referee dated her second referee's

report. This report was filed on November 12, 1998.

On November 2, 1998, Mrs. Savitz responded to Mr. Carson's objection to the final affidavit of costs.

On November 25, 1998, Mr. Carson served his petition to review the second report of the referee.

On December 11, 1998, the Florida Bar announced, for a second time, that it would not seek a review of the referee's report.

SUMMARY OF ARGUMENT

I. The Florida Bar failed to prove that a division of the attorneys fees occurred in any of the cases in which it charged Mr. Carson with violating the rules relating to the division of fees between two law firms. Bar counsel had the burden of proof. The clear and convincing evidence standard has not been met.

II. Since the bar failed to prove its case, no costs should be assessed against Mr. Carson. Further, even if the bar were to have proved its accusations, this is the kind of case where no costs or sanction should have been imposed or costs should have been apportioned between the bar and Mr. Carson. To impose all costs on Mr. Carson would be an abuse of discretion.

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE BAR PROVED A DIVISION OF ATTORNEYS FEES BETWEEN LAWYERS IN DIFFERENT FIRMS BY CLEAR AND CONVINCING EVIDENCE.

This court has for review a referee's report where the referee recommended that Mr. Carson's case be diverted to a practice and professionalism enhancement program the effect of which would be that the file would be closed without the imposition of a disciplinary sanction and said diversion would not constitute a record of professional misconduct. In her narrative summary, the referee concluded that Mr. Carson had violated Rules 4-1.5(f) and 4-1.5(g) of the Rules of Professional Conduct by participating in the division of fees between lawyers in different firms where there was no written contract signed by the client and the participating attorneys. The referee found that the testimony was unrebutted that the clients knew of the arrangement between the referring attorney, Mr. Carson, and the trial attorney, Steven Vasilaros, and that the clients consented to it. On December 11, 1998, the Florida Bar filed a letter announcing that it would not appeal this recommendation.

The accusations in this case date back to a referral that was made as far back as 1992. Mr. Carson's dilemma came to the attention of bar staff counsel when, on March 18, 1996, Mr. Carson's attorney, Charles Holloman, filed a grievance in behalf of Mr. Carson, alleging that Vasilaros had disbursed disputed trust funds in violation of the rules of conduct. Mr. Holloman did not complain about Mr. Carson; nor has any other person complained about Mr. Carson's conduct in this case. It was only after 11

months from the date of Mr. Holloman's complaint that Mr. Carson was drawn into the fray. Bar staff counsel, on its own, initiated the charges against Mr. Carson (using the same materials that were provided by Mr. Carson and Mr. Holloman) only after Mr. Carson complained that he had not been contacted by a bar investigator about Vasilaros' conduct and he complained about perjury by Vasilaros. As of the writing of this brief, bar staff counsel has refused to conduct an investigation into Vasilaros' perjury.

Rule 4-1.5(g) provides as follows:

> (g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of Subdivision (f)(4)(D). A division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:
>
> > (1) the division is in proportion to the services performed by each lawyer; or
> >
> > (2) by written agreement with the client:
> >
> > > (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and
> > >
> > > (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

The critical element of this rule in this case is the division of fees between lawyers who are not in the same firm.

In the complaint in this case, bar staff counsel charged that Mr. Carson participated in the improper division of fees in three separate cases, in violation of the Rules of Professional Conduct. There are three cases that form the basis for bar counsel's allegations. These are: (1) Franco v. Mobile Oil (the Mobile Oil case), (2) Franco v. Spears (the Spears case), and (3) the Fox

case. It is Mr. Carson's contention that there is insufficient evidence to conclude that there was a division of the attorneys fees in these cases and that he should have been found not guilty of all allegations. The conclusions of the referee are not supported by competent and substantial evidence. Bar staff counsel has failed to meet the clear and convincing evidence standard.

Mr. Carson does not dispute the referee's finding of fact that the clients knew of th referral arrangement and consented to it or the finding that he was unaware of the portion of the rule relating to written contracts pertaining to the division of fees between different law firms.

In the Mobile Oil case, the evidence showed that Mr. Franco had retained Mr. Carson, in the autumn of 1993, to defend him against criminal charges brought against him by the State upon a complaint made by Spears (of the Spears case). In about December, 1993, Mr. Franco also asked Mr. Carson to represent him in a suit arising from the murder of his wife. Pursuant to a referral arrangement that Mr. Carson had with Steven Vasilaros, Mr. Carson referred Mr. Franco to Vasilaros. In the arrangement, Mr. Carson assumed joint legal responsibility for the representation and he was to receive 25% of the attorney's fee in the case. Mr. Carson advised Mr. Franco of the arrangement and remained available to consult with him. Mr. Vasilaros was to prepare the contingency fee contract. Mr. Franco consented to this arrangement and, in January, 1994, Mr. Franco signed a contingency fee contract with the Vasilaros' law firm. Around the month of April, 1994, it

appears that Vasilaros became aware of the writing requirements of Rule 4-1.5(g). As a result, Vasilaros claimed that he began to include referral contracts for the division of fees in a packet that automatically was sent to a referring attorney (a fact that contradicted his partner, Politis', 1996 hearing testimony that the "referred by" section of the client interview form was only used for some sort of "marketing" program). Mysteriously, no such contract was sent to Mr. Carson, even though he was listed as the referring attorney in the case interview form. About a year passed and the case settled in April, 1995. It was Mr. Franco who called Mr. Carson because he was disappointed about the settlement.

When Mr. Carson first called Vasilaros about the settlement of the Mobile Oil case, Vasilaros claimed that he was unaware that Mr. Carson had referred Mr. Franco to him. In a meeting at his office, Vasilaros admitted to Mr. Carson that he owed 25% of the fee to Mr. Carson; however, he claimed that he was concerned about the written contract requirement of Rule 4-1.5(g). Vasilaros did not tell Mr. Carson that Vasilaros had learned about the rule about a year before Mobile Oil settled. Vasilaros claimed that he wanted to find a way to pay Mr. Carson without violating any rule. Later, Vasilaros wrote Mr. Carson a letter and (significantly) invited Mr. Carson's input on how to go about a division of the fee, claiming that he wanted to be fair to Mr. Carson. In the letter, Vasilaros falsely claimed that he had no information in his file that Mr. Carson was the referring attorney in Mobile Oil. Mr. Carson contacted Chobee Ebbets, an "AV" rated board certified civil trial

attorney who practiced personal injury law in Daytona Beach. Mr. Ebbets had a personal meeting with Vasilaros. During this meeting, Vasilaros once again admitted that he owed money to Mr. Carson and he agreed to draft a set of facts to be stipulated to with Mr. Carson and submitted to a judge or the bar in an attempt to facilitate the payment of Mr. Carson and comply with bar rules. The stipulation would have amounted to a ratification of a contract. It would have been simple enough for all to sign a fee division contract; but, instead of drafting the stipulation, Vasilaros dragged his feet.

Unknown to Mr. Carson and Mr. Ebbets, Vasilaros disbursed all of the attorney's fee from his trust fund to his law firm. This put him in the position of, if he admitted that there was a contract with Mr. Carson, he might be ordered to prepare the fee division contract and pay money that he had already spent.

Finally, after some pressure from Mr. Ebbets about the stipulation, Vasilaros persuaded his partner (Politis) file a motion for determination of division of attorney's fees and set the motion for hearing. Thus, it was Vasilaros who brought the matter into court, not Mr. Carson. During the hearing, the judge placed the burden of proof on Mr. Carson. Mr. Ebbets did not testify in this hearing. To Mr. Carson's (and his attorney's) surprise, Vasilaros perjured himself and claimed that he did not view Franco as a referral from Mr. Carson and that he did not owe Mr. Carson anything, a position that was clearly inconsistent with what he had previously told both Mr. Ebbets and Mr. Carson. As a result of

Vasilaros' false testimony, the circuit judge ruled that Mr. Carson had failed to prove a meeting of the minds and that he should receive no portion of the fee. Thus, in Mobile Oil, the evidence is undisputed that there was no division of the fee and, therefore, no violation of Rule 4-1.5 (f) or Rule 4-1.5(g).

In Spears, Mr. Carson referred Mr. Franco to Vasilaros, a second time. Mr. Franco had been found not guilty of all charges brought against him by Spears. Mr. Franco wanted to sue Spears and attempt to regain his financial losses incurred as a result of the criminal trial. This referral came about after Mr. Carson's meeting with Vasilaros on April 25, 1995. In that meeting, Vasilaros admitted that he owed Mr. Carson 25% of the fee in Mobile Oil and claimed that he would find a way to pay Mr. Carson's portion the fee. Satisfied with Vasilaros' promise, Mr. Carson sent Mr. Franco to him. At this point, both lawyers were aware of Rule 4-1.5(g). Vasilaros was to provide the proper contract to be signed by Mr. Franco, Mr. Carson and himself. Later, Vasilaros refused to send a written contract to Mr. Carson which would have provided for the division of the attorneys fee between them. Vasilaros actually waived the taking of any fee in the case. Thus, in the Spears case, the evidence is undisputed that there was no division of the fee and, therefore, no violation of Rule 4-1.5 (f) or Rule 4-1.5(g).

Once the thin veneer of bar staff counsel's false accusations of improper fee splitting in the Mobil Oil and Spears cases is removed, the true motive for prosecuting Mr. Carson becomes

apparent. Mr. Carson had come to bar counsel for help. They were going to jump on Mr. Carson like a Sumo wrestler (TT 233-234). They had the will and they were going to find a way. That way was, to paraphrase a country song by Randy Travis, "diggin' up bones." The bones were the Fox case (TT 243).

In October, 1992, almost four and one half (4-1/2) years before bar counsel began scrutinizing Mr. Carson's legal career, Mr. Carson had referred Jenine Fox to Vasilaros for representation (Respondent's Exhibit 1). In 1993, while working out with weights at the Daytona Gym, Vasilaros' law partner, Jonathan Rotstein, asked Mr. Carson if Vasilaros had paid him in the Fox case. Mr. Carson had not been told that the case had settled. Mr. Carson arranged a meeting with Vasilaros. During the meeting Mr. Carson learned that the Vasilaros law firm had taken the full amount of the attorney's fee for itself. There was no division of the attorney's fee in Fox between the Vasilaros law firm and Mr. Carson (TT 59-61; 157-158). All of the fee was paid to Vasilaros' law firm and Fox was paid her share based upon the settlement statement (TT 61). Bar counsel never produced this settlement statement in the grievance committee or referee proceedings because it contained exculpatory evidence which would hurt their case. Bar counsel had the burden of proof. Once again, bar counsel failed to prove a division of the fee in the Fox case by clear and convincing evidence.

Factually, what happened in the Fox case was that after Vasilaros discovered his oversight, he voluntarily gave a gift to

Mr. Carson out of his own (law firm) pocket to show his good faith and to encourage Mr. Carson to continue making referrals (TT 158; RH 82). Bar counsel had the burden of proof and did not show otherwise. That gift was the equivalent of 25% of the fee in the Fox case. There is no rule or statute that prohibits such gifts. If a person wants to give away their money, that is their private right, subject to federal gift taxes. Even bar counsel, Mrs. Savitz, admitted in her closing argument before the referee that there was no intention by Mr. Carson to circumvent any rule in this case (TT 246).

What happened in Fox was an honorable resolution of an oversight. Or perhaps Vasilaros did not feel like losing a friend over $650.00. What happened in Mobile Oil was the work of a cheat, a perjurer, who used his superior knowledge to take advantage of a friend (TT 236-237). For Vasilaros, keeping all of the $117,288.57 fee in the Mobil Oil case was worth trashing a friendship.

What would have been the honorable thing to do in the Mobile Oil case? Imagine someone you trusted sitting in front of you holding a suitcase with $30,000 in it and saying, "Gee, amigo, I would like to share this with you; but (smile), I didn't put your name on the contract (prepare a proper contract). I've been aware of this for a year; but, tough luck. Gotcha, man." Since all that is required is the writing, what two honorable lawyers would do would be to acknowledge the oversight and sign and ratify the contract. This honorable act would fulfill the writing requirement for a division of fee and be consistent with the applicable rules.

An honest lawyer would not commit perjury to avoid his promise.

We have heard the lament, "A man's word used to be his bond." A person's word, a lawyer's word, is supposed to be their bond. Lawyer's have a duty of the "punctillo of honor most sensitive" toward each other. Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 629 So.2d 947, 953 (Fla. 4th DCA 1993). This kind of strong value, or public policy, goes by the wayside when courts are seen as unwilling (not unable) to enforce it. Courts, today, suffer skepticism from the public they serve because of this perception. It is an ancient requirement that judges "shall judge the people with just judgment". Deuteronomy 16:18. Yet, even some judges question whether this is being done in our modern, enlightened, society. See, Barclay v. State, 470 So.2d 691 (Fla. 1985)(Justice Adkins, dissenting, "The conclusion of the majority is not only shocking, it is shameful to the judicial system").

The Rules of Professional Conduct were designed to raise the professionalism of the practice of law, not to trip up lawyers, and not to lower the responsibilities of lawyers toward each other below even the "morals of the marketplace." These rules should not be too readily construed as a license for attorneys to breach a promise, go back on their word, or decline to fulfill an obligation, in the name of legal ethics. They should not be allowed to perpetuate injustice. This is the wisdom in the preamble to Chapter 4 of the Rules of Professional Conduct and cases such as Mark Jay Kaufman, P.A. v. Davis & Meadows, P.A., 600 So.2d 1208 (Fla. 1st DCA 1992).

The courts are supposed to be open to every person for redress of injury. "Justice" is supposed to be administered in the courts. See, Art. I, Section 21 Fla. Const. It makes no exception for lawyers. To deny access to the courts is to promote disrespect for the courts.

This appears to be a case of the first impression before this court. Bar members can be educated without hurting the reputation of Mr. Carson. Lawyers are not perfect. Mr. Carson recognized his imperfection. As Justice Harding has said, lawyers are "real people, not sphinxes on the Nile." Lawyers are "humans". That is why we call our profession the practice of law.

Mr. Carson's suggested approach is a common sense approach to lawyer imperfection. There is no guidance for honest (yet imperfect) lawyers who wish to be true to their promises and obligations. Mr. Carson mentioned that his father has said that where money is involved, we are going to have cheats. And there is nothing we can do by rule or anything else to prevent that (RH 77-78). This is true particularly when scalawags can get away with perjury or cheating others. There has been absolutely no affront to considerations of public policy in this case. The clients knew of and approved of the agreements.

Bar counsel's approach is to apply a wooden forfeiture rule, to deny access to the courts, and to promote disrespect for the courts. Searcy, supra, upon which bar counsel has relied in the past, actually does not support the bar's position. It warns against it. Such wooden rules will be ignored when they force an

unjust result. The bar's approach promotes cheating by Vasilaros, as in the Mobile Oil case, and injustice.

Bar counsel has also, in the past, relied on Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1996), and The Florida Bar v. Rubin, 709 So.2d 1361 (Fla. 1998). Rubin was decided after the referee hearing in Mr. Carson's case. Chandris, became final after the hearing in the Mobile Oil case.

Both Chandris and Rubin are distinguishable from Mr. Carson's case. First, bar counsel has failed to prove that there was any division of a fee in Mr. Carson's case. Chandris involved an out of state lawyer, who was not licensed to practice in Florida, using a written contract that did not comply with Florida rules. That lawyer was fired by the client and the lawyer sought to enforce the contract against the client after he had been fired (that contract was silent as to the division of fees between the two law firms). It was a case of the first impression under Florida law. In Mobile Oil, there was a complying agreement which had been approved by the client; there was deliberate deception and obstruction by Vasilaros (including inviting suggestions from Mr. Carson that Vasilaro, quite obviously never intended to adopt); the matter was lawyer to lawyer; and, all that had to be done was sign or ratify the contract or stipulated facts. The goal in Chandris was to avoid unregulated contracts from out of state lawyers. Bar counsel's interpretation of Chandris is that the preamble to Chapter 4 of our Rules of Conduct has been amended without notice and without the opportunity for bar members to comment. This interpretation leads

to further dissatisfaction with the legal profession and a result that is contrary to justice. In Rubin the lawyer claimed that he did not need a written contract. There was no evidence of client approval. In Mobile Oil, Mr. Carson (with the help and advice of Chobee Ebbets, a personal injury attorney) was trying to protect and comply with the rules.

Another consideration is the chilling effect of bar counsel's actions on members of the bar who want to report lawyer misconduct. Mr. Carson went to the bar for help in this case. Must a member worry that 3 or 4 years ago he was imperfect in some small and unknown way? Are lawyers to be held to the standard of perfection? Should the bar member have to worry that his career, dreams, and reputation in his community will be ruined, even when he has discovered and remedied his imperfection? Should a bar member with a desire for public service have to worry that his good name will be stained and fodder provided for the news media or the negative campaign of his opponent? Should the bar member worry that his past life will be fly-specked and that he and his family may be subjected unneeded stress when he is trying to improve the profession? Should a member be afraid to speak freely or advocate a defense because of fear of retaliation by bar counsel or a court. Shouldn't a member be able to trust and believe that the bar is there to help him? Must we live a "don't trust anyone" life?

The Florida Bar News often carries a slogan, "The Florida Bar working for you." We appreciate being helped, not hurt.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED RESPONDENT TO PAY THE COSTS OF THIS MATTER.

On October 29, 1998, the referee dated her report and recommended Mr. Carson pay the costs of this matter in the amount of $2,956.05. On October 28, 1998, Mr. Carson had mailed his objection to bar counsel's affidavit of costs.

Since, pursuant to the arguments in Point I, above, the bar has failed to prove its allegations against Mr. Carson, no costs should be assessed against him.

Alternatively, it is clear that the bar took an excessively broad approach in this case. The bar should be required to bear its own costs. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

CONCLUSION

Based upon the arguments presented herein, Mr. Carson respectfully prays that this honorable court set aside the recommendation of the referee and that the proceedings against him be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Initial Brief of Respondent has been furnished by mail ~~/delivery~~ to Patricia Savitz, Assistant Bar Staff Counsel, 1200 Edgewater Drive, Orlando, FL 32804, this 23 day of December, 1998.

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COUNSEL FOR RESPONDENT