IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLES JAY KANE,

Respondent.

_____/

Supreme Court Case
No. SC13-388

The Florida Bar File
No. 2008-51,559(17B)

INITIAL BRIEF OF THE FLORIDA BAR

Ghenete Elaine Wright Muir, Bar Counsel
The Florida Bar
Ft. Lauderdale Branch Office
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 550728
gwrightmuir@flabar.org

Alan Anthony Pascal
Chief Branch Discipline Counsel
The Florida Bar
Ft. Lauderdale Branch Office
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 961663
apascal@flabar.org

Adria E. Quintela, Staff Counsel
The Florida Bar
Lakeshore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 897000
aquintel@flabar.org

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390
jharkness@flabar.org

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PRELIMINARY STATEMENT

The Complainant, The Florida Bar, is seeking review of a Report of Referee recommending a three year suspension and is seeking disbarment.

Complainant will be referred to as The Florida Bar or as The Bar. Charles Jay Kane, Respondent, will be referred to as Respondent. Other persons will be referred to by their respective surnames.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number (e.g., RR 1).

References to specific pleadings will be made by title. References to the transcript of the final hearing are by symbol TR, followed by the volume, followed by the appropriate page number (e.g., TR 1).

References to the transcript of the Sanctions Hearing are by symbol TR followed by Sanctions Hearing and by the appropriate page number (e.g., TR Sanctions Hearing 1).

References to Bar exhibits shall be by the symbol TFB Ex followed by the appropriate exhibit number (e.g., TFB Ex. 1).

STATEMENT OF THE CASE AND OF THE FACTS

On April 24, 2008, Judge David F. Crow entered a final judgment in the case of Stewart, Tilghman, Fox, and Bianchi, P.A., et al. v. Kane & Kane et al., Case No. 502004 A006138MB AO (Fla. 15th Jud. Cir., Palm Beach County), specifically finding that the Respondent had acted unethically and violated a number of the Rules Regulating The Florida Bar. Judge Crow ordered that a copy of the final judgment be forwarded to The Florida Bar for action.

In his final judgment, Judge Crow specifically stated: "The facts and circumstances of the current litigation could be a case study for a course on professional conduct involving multi-party joint representation agreements and the ethical pitfalls surrounding such agreements when the interests of some of the attorneys and/or their clients come into conflict." (TFB Ex. 5, pg. 2). The Respondent decided to appeal the final judgment entered by Judge Crow, however, the Fourth District Court of Appeal agreed with Judge Crow and affirmed his findings (TFB Ex. 71).

In order to avoid paying the final judgment, in November 2008, Respondent and his son both filed for bankruptcy protection. First, a Chapter 11 bankruptcy was filed by them. This bankruptcy was ruled by the bankruptcy court to have been filed in bad faith. Thereafter, when that attempt did not succeed, Respondent, Harley

Kane, and Kane & Kane filed for Chapter 7 bankruptcy protection and attempted to discharge the debt from Judge Crow's final judgment. After a six day trial, the bankruptcy court found the testimony of Respondent to be untruthful, and the debt was deemed not dischargeable. Rather than accept the bankruptcy court's ruling, the Respondent once again appealed, but the bankruptcy court's decision was upheld by the United States District Court for the Southern District of Florida. The Respondent then appealed to the Eleventh Circuit Court of Appeals. The bankruptcy court's judgment was affirmed by the Eleventh Circuit. The Respondent then filed a Writ of Certiorari that was denied by the United States Supreme Court.

The Florida Bar filed its Complaint against Respondent, Charles Kane, on or about March 13, 2013, charging Respondent with violating numerous Rules Regulating The Florida Bar. The Florida Bar also filed Complaints against Harley Kane, Darin Lentner, Gary Marks and Amir Fleischer. Respondents Harley Kane and Darin Lentner's cases were consolidated for trial with Respondent. Respondent's misconduct involved (1) his participation in a secret settlement with Progressive Insurance Company ("Progressive"), (2) his ethical misconduct related to the civil litigation against Progressive, and (3) his ethical misconduct during subsequent federal bankruptcy proceedings.

On or about June 17, 2013, County Judge Curtis L. Disque, was initially appointed as Referee. Due to scheduling conflicts, County Judge Disque requested that the Chief Judge reassign the case to a new Referee. On or about February 2, 2014, Senior Judge George Shahood was appointed to preside over the proceedings.

Respondent was represented by Scott Tozian and Gwen Daniel. The Florida Bar was represented by David B. Rothman and Jeanne T. Melendez, Special Counsel, and by Ghenete Elaine Wright Muir and Alan A. Pascal, Bar Counsel.

On September 19, 2013, Respondent filed a Motion for Summary Judgment. The Florida Bar filed its Response in opposition to summary judgment on October 7, 2013. On October 22, 2013, Judge Disque entered an Order denying Respondent's Motion for Summary Judgment.

On July 1, 2014, The Florida Bar filed its Motion for Summary Judgment. The Respondent filed his Statement in Opposition and Memorandum of Law on July 25, 2014. A hearing on the Motion was held. This Referee entered an Order denying The Florida Bar's Motion for Summary Judgment on August 8, 2014.

The Final Hearing commenced on August 18, 2014 and continued on August 19-22, August 25-28 and October 14 and 16, 2014. The Referee heard the testimony of the Bar's witnesses: Todd Stewart, William Hearon, Charles Throckmorton, Harley Kane, Charles Kane and Darin Lentner. In addition,

transcript excerpts of testimony of the following individuals were offered by the Bar and admitted into evidence: Brian Korte, Michele Muir, Joshua Smith, James Kirvin and Francis Anania.

The Referee also heard the testimony of Respondent's witnesses: Charles Kane as well as his son and law partner, Harley Kane. In addition, transcript excerpts of testimony of the following individuals were offered by Respondent and admitted into evidence: Irwin Gilbert, Alan Schaff, Michael Rosenberg and Sammy Cacciatore.

At the conclusion of the hearing, the Referee found that Respondent had violated Rules 3-4.3, 4-1.4(b), 4-1.5(f)(5), 4-1.7(b), 4-1.7(c), 4-1.8(g) and 4-8.4(c) of The Rules Regulating The Florida Bar. The Referee found Respondent did not violate Rules 4-1.4(a), 4-1.7(a) and 5-1.1(f).

The Florida Bar's Memorandum Regarding Sanctions was filed on December 29, 2014, requesting permanent disbarment, restitution and forfeiture of fees. The Respondent filed his Sanctions Memorandum and Reply, requesting a 30 day suspension and opposing restitution and forfeiture. The sanctions phase of the Final Hearing commenced on January 21, 2015 and continued on January 22, 2015.

The Referee issued his Report of Referee on April 7, 2015. The trial transcript was filed with the Court on April 10, 2015.

In his report, the Referee recommended that Respondent be suspended from the practice of law for three years (RR 30). He also recommended that Respondent's son, Harley Kane, be disbarred (TR Sanctions Hearing, Vol. II, 258). The Florida Bar appeals the recommended three year suspension against Respondent, Charles Kane, and argues that based on Respondent's conduct disbarment is the appropriate discipline.

The ethical misconduct found by the Referee stems from Respondent's involvement with a secret settlement with Progressive. In approximately 2001, Respondent's firm (Kane & Kane) and two other personal injury protection (PIP) law firms began to jointly solicit healthcare providers as clients for the purpose of providing representation in PIP claims against insurance companies (TFB Ex. 1) (RR 5) (TR 44). All three firms "assume[d] joint legal responsibility" to the clients. (TFB Ex. 1(A)) (RR 6) (TR 37-38, 193-7).

During their investigation of the PIP cases, the PIP law firms discovered that Progressive was systematically refusing to pay valid insurance claims to their clients (TR 48, 190). Respondent's law firm and the other two PIP law firms initiated bad faith claims for their clients by filing bad faith Civil Remedy Notices with the Florida Department of Insurance (RR 6) (TFB Ex.10) (TR 52-55, 58-59, 69, 203-204). The PIP law firms sought assistance in filing these bad faith claims

by initially hiring Todd Stewart and later Larry Stewart and William Hearon ("bad faith lawyers") to file and litigate these bad faith suits against Progressive (RR 6) (TR 44-52, 59-60, 74-75, 85, 189-190, 203, 214-15, 115-56). The PIP lawyers and the bad faith lawyers agreed on a contingency fee schedule as follows: the PIP lawyers would receive 100% of any fees collected from the underlying PIP benefit cases; from any bad faith recovery, the contingency fee would be 40%, with the bad faith lawyers receiving 60% and the PIP attorneys receiving 40% of the fees collected (TFB Ex. 1) (TR 207, 220-21).

A bad faith lawsuit against Progressive (the "Goldcoast" case) was filed naming 37 PIP clients as plaintiffs. Fishman & Stashak, M.D., P.A. d/b/a Goldcoast Orthopedics et al., v. Progressive Bayside Insurance Company, et al, Case No. CA-01-11649 (TFB Ex. 2) (TR 85-86) (RR 6-7). The Kane & Kane law firm and Respondent executed an additional attorney fee contract with the bad faith lawyers agreeing to jointly represent each of the 37 clients in that litigation (TFB Ex. 11, 14) (RR 7) (TR 976, 1156, 1198, 1791-94).

The bad faith lawyers litigated the cases against Progressive for over two years. In the course of said litigation, the PIP lawyers provided the bad faith lawyers with a list of 441 healthcare provider clients to be used in settlement negotiations with Progressive. Progressive vigorously defended and refused to

produce critical internal documents. However, through persistent litigation at the trial and appellate levels, the bad faith lawyers finally obtained key legal rulings compelling Progressive to produce internal records, that opened the door to settlement negotiations (TFB Ex. 16,17,18, 19, 26) (RR 7) (TR 309-317).

In early 2004, with the knowledge and consent of all of the PIP lawyers, including Charles Kane's son and partner, Harley Kane, the bad faith lawyers entered into settlement negotiations with Progressive. These negotiations included the universe of bad faith claims of all 441 clients, not just the 37 clients named in the Goldcoast case (TFB Ex. 12, 20) (RR 7) (TR 260-267, 320-323, 335-338). Harley Kane emailed a list to Larry Stewart detailing the Kane & Kane PIP clients for inclusion in the discussions and supplied client information to enable those negotiations to take place (TFB Ex. 6,12) (RR 7) (TR 249-253, 260-267, 295-298, 301). Progressive indicated that it wanted to expand negotiations to include the PIP benefits of all the clients. The PIP attorneys, including the Kanes, agreed and authorized the bad faith lawyers to negotiate both sets of claims at a mediation with Progressive in April 2004 (TFB Ex. 12, 20, 28, 29) (RR 7-8) (TR 324-329, 367-374, 377, 381, 386-390, 934). The Kanes met with Larry Stewart prior to the mediation and Respondent signed a new agreement on behalf of the Kane & Kane firm, agreeing to a modification of the fee division agreement to give the bad faith

attorneys 75% of attorney fees on any bad faith recovery in the event they were able to negotiate a settlement of the PIP benefit claims (TFB Ex. 29) (RR 7-8) (TR 386-390, 928-934, 1005, 1169-70).

At the mediation with Progressive on April 19, 2004, Progressive offered $3.5 million for the bad faith claims (RR 8) (TR 408-411). The offer was rejected. The parties failed to reach an agreement on that date and did not negotiate a settlement for the underlying PIP benefit claims (TFB Ex. 31) (RR 8) (TR 411-413).

After mediation failed, Progressive lost its effort to prevent the production of its internal records in the bad faith litigation (TFB Ex. 33, 34, 35, 36, 37, 38) (TR 429-435). One week prior to the court-ordered compliance date, unbeknownst to the bad faith lawyers, the PIP lawyers, including Respondent, went behind the backs of the bad faith lawyers and secretly negotiated with Progressive for a global settlement of their clients' claims (TFB Ex. 40) (RR 8) (TR 435-442, 450-452). Progressive offered aggregate, undifferentiated lump sums to each of the three PIP law firms, totaling $14.5 million, as settlement of all of their clients' claims, both PIP and bad faith claims as well as attorneys' fees (TFB Ex. 39). On Friday, May 14, 2004, Harley Kane accepted the offer on behalf of Kane & Kane (RR 9) (TR 948-49, 973-975). On Sunday, May 16, 2004, all of the PIP attorneys including

Respondent, excluded the bad faith lawyers and met with the Progressive attorneys to jointly draft a Memorandum of Understanding (hereinafter "MOU") (TFB Ex. 39) (RR 9) (TR 1003, 1010-1013, 1015, 1194-96, 1201, 1210-1213, 1215-1218, 1350-51, 1355). The MOU released all claims including the PIP and bad faith claims as well as all claims for attorneys' fees. The MOU, however, failed to specify how the undifferentiated proceeds of the settlement should be allocated (RR 9) (TR 452-53, 457-462, 1228, 1255) (RR 9) (TR 10310, 1211, 1219). The only requirement to trigger payment under the MOU was the delivery of the requisite number of client releases: 100% of the named Goldcoast case plaintiffs and 80% of the remaining PIP clients of all three PIP firms (TFB Ex. 39) (RR 9). As part of the MOU, the PIP law firms, including Respondent's firm, agreed to "defend, indemnify and hold THE PROGRESSIVE ENTITIES harmless from all claims" of their own clients (TFB Ex. 39, p. 11) (RR 9). Harley Kane signed the MOU on behalf of Kane & Kane (RR 10) (TR 1222).

Several days later, Charles Kane and the other five PIP lawyers met with Larry Stewart and offered only $300,000.00 to compensate all three bad faith law firms (RR 10) (TR 440-443, 445, 1029-1030, 1228-1230, 1355). The PIP lawyers refused to disclose the terms of the settlement, stating only that the cases had been settled with nothing specifically allocated to the bad faith claims (RR 10) (TR 443-

444, 1230-1231). Larry Stewart rejected their offer and informed the PIP lawyers that the settlement was improper because no specific amount was allocated to the bad faith claims (RR 10) (TR 462-64, 1230).

On May 28, 2004, the bad faith lawyers wrote to the named plaintiffs in the Goldcoast case, informing them that their legal rights may have been "compromised or even sacrificed," due to the actions of the PIP lawyers. The bad faith lawyers could not confirm their claims without seeing the actual settlement (TFB Ex. 43) (RR 10). The bad faith attorneys sent the PIP attorneys a copy of the May 28th letter requesting that the letter be forwarded to all of their PIP clients (TFB Ex. 45). The Kanes did not forward the bad faith lawyers' letter to their PIP clients (TR 1237-1238). Instead, on June 1, 2004, Charles Kane drafted a letter titled, "Notice of Disagreement Between Counsel," for the other two PIP law firms to send to their Goldcoast plaintiffs, in an attempt to obtain the releases required under the MOU (TFB Ex. 4) (RR 10-11) (TR 1243-1247). The letter contained misleading statements regarding his bad faith lawyers and the mediation with Progressive.

Following the meeting with Larry Stewart, the Respondent became concerned about the MOU's lack of specificity (RR 11) (TR 1227-1228). On June 16, 2004, the MOU was amended to specifically allocate $1.75 million of the settlement money to the bad faith claims of the now 36 remaining named plaintiffs

in the Goldcoast case. This document, the Amendment to Memorandum of Understanding (AMOU) was signed by Harley Kane on behalf of Kane & Kane (TFB Ex. 48) (RR 11) (TR 1227-1228). As in the original MOU, no monies were specifically allocated in the AMOU to the bad faith claims of the nearly 400 remaining clients who were not named in the Goldcoast case. It was once again left to the PIP law firms to decide how much would be paid to the non-Goldcoast case PIP clients and how much would be taken as attorneys' fees. The Respondent's firm and the other two PIP law firms determined that these clients would only be paid the amount of the PIP benefits owed to them by Progressive plus interest (RR 11-12) (TR 985-986, 988, 990-992, 1358). The remaining proceeds, after paying costs, would be taken as attorneys' fees. The non-Goldcoast case PIP clients did not receive any compensation for their bad faith claims, although they were required to release those claims (RR 12).

The Kane & Kane firm sent letters to their clients to obtain releases in order to trigger payment under the AMOU (RR 12) (TR 1225). The clients were not informed of the conflicts of interests created by the MOU/AMOU, the total amount of the settlement, the amount of attorneys' fees the firm planned to take from the undifferentiated settlement sum, and the value of the clients' bad faith claims (RR

12) (TR 993-994, 1344-1345). Further, the clients were not provided with closing statements (RR 12) (TR 995).

Once the releases were obtained, Respondent's firm received $5.25 million from Progressive. The firm deducted $433,202.00 for costs and paid the PIP clients $672,742.00 for their PIP benefits plus interest. The Respondent and Harley Kane then took a total of $4,144,055.00 as attorneys' fees (TFB Ex. 77) (TR 13).

Once the PIP firms received the settlement funds, the bad faith lawyers were discharged, a sanctions hearing against Progressive was cancelled, and a Notice of Voluntary Dismissal with Prejudice was filed, ending the Goldcoast litigation (TFB Ex. 54, 55, 56 and 57) (RR 13) (TR 533-535).

After being discharged, the bad faith lawyers filed suit against the Respondent, Harley Kane, Kane & Kane and the other PIP lawyers/firms for quantum meruit and/or unjust enrichment and fraud in the inducement (TFB Ex. 5) (RR 15).

In June 2004, soon after filing their case, the bad faith lawyers sought a temporary restraining order to freeze the attorneys' fees received by the Kanes and the other PIP lawyers in the secret settlement. The court denied the injunction finding that there was an adequate remedy at law. The counsel for the bad faith attorneys then sent a letter notifying counsel for the Kanes that the proceeds should

be treated as disputed funds under Florida Bar Rule 5-1.1(f) of the Rules Regulating The Florida Bar (TFB Ex. 59) (RR 13) (TR 544-545). The Kanes were advised by their counsel that they were not required to treat the funds as disputed funds (RR 13-14) (TR 1961-65). Rather than hold the settlement monies in trust until the fee dispute was resolved, the funds were transferred from the Kane & Kane trust account to the firm's operating account and disbursed (RR 14) (TR 1269).

In 2005, the Kanes tried to force their associates to fabricate time records for the purpose of the civil litigation following the secret settlement. The time records were also altered and inflated by the Kanes after they were turned in by the associates (TFB Ex. 63 (emails)) (RR 14); deposition testimony of Associate Brian Korte (TFB Ex. 85B) and trial testimony of Associate Michele Muir (TFB Ex. 85A). The inflated time sheets were produced to the plaintiffs in discovery. Harley Kane admitted during the civil trial that the time records produced in discovery were "excessive" (TFB Ex. 5, p. 12) (RR 14) (TR 1059-1061).

Following a two month bench trial in 2008, the court ruled in favor of the bad faith lawyers as to their quantum meruit/unjust enrichment claim (TFB Ex. 5, pp. 21-22) (RR 14) (TR 545). The trial court awarded $2 million of the Kane & Kane fees plus interest to the bad faith lawyers (TFB Ex. 5, pp. 20-22). The Kanes appealed the trial court's decision, on February 29, 2012, the Fourth District Court

of Appeal affirmed the lower court's decision. Stewart, Tilghman, Fox, and Bianchi, P.A., et al. v. Kane & Kane et al., Case No. 502004 A006138MB AO (Fla. 15th Jud. Cir., Palm Beach County) *aff'd,* 85 So. 3d 1112 (4th DCA 2012), *review den.* 118 So. 3d 221 (Fla. 2013) (TFB Ex. 71) (RR 15).

The trial court found that the PIP firms "unfairly deprived the [bad faith attorneys] of a fee by ignoring multiple conflicts of interest, misrepresenting the terms of the settlement to the [bad faith attorneys], misrepresenting the terms of the settlement to the clients to obtain the releases to trigger payment, manipulating the allocation of the settlement to obtain most of it as attorneys' fees, and by discharging the [bad faith attorneys] for no reason." (TFB Ex. 5, p. 19).

In November 2008, after the Kanes lost their Motion for Rehearing and the Final Judgment was entered, awarding $2 million of the Kane & Kane fees plus interest to the bad faith lawyers, the Kanes filed for bankruptcy. The Respondent continued with his dishonest and deceitful conduct by filing for Chapter 11 protection (RR 15) (TR 560-561, 585-586). The bankruptcy court ruled that the bankruptcy had been filed in bad faith and dismissed the case (TFB Ex. 73, 75) (TR 589-590, 594-95) (RR 16).

The Kanes later filed voluntary Chapter 7 bankruptcy petitions seeking to discharge the debt owed to the bad faith lawyers (RR 16) (TR 604, 1056). After a

six day trial, the bankruptcy court described the testimony of both Kanes as follows: "Given the choice between finding that the Defendants are naive or that their statements are false, in light of the Defendants' significant experience in complex litigation, the court concludes that their testimony was not truthful" (TFB Ex. 72, p. 11) (RR 16). The debt to the bad faith lawyers under the civil judgment was held not dischargeable because the Kanes acted, not merely to pad their own pockets but, with ill-will and specific intent to injure the bad faith attorneys (TFB Ex. 72, at p. 60) (RR 16). Respondent once again engaged in dishonest and deceitful conduct.

Rather than accept the bankruptcy court's ruling, the Kanes appealed the decision to the United States District Court, which adopted the bankruptcy court's judgment. The Kanes then appealed to the Eleventh Circuit Court of Appeal. The bankruptcy court's judgment was affirmed by the Eleventh Circuit on June 16, 2014. Kane v. Stewart Tilghman Fox & Bianchi, P.A., Case No. 13-10560 (11th Cir, June 26, 2014) (TFB Ex. 72(A)) (RR 16). The Kanes filed a Petition for Writ of Certiorari which was denied by the United States Supreme Court on December 1, 2014, Harley N. Kane, et al. v. Stewart Tilghman Fox & Bianchi, P.A., et al., Case No. 14-352 (U.S. S.Ct.).

Based on the factual findings by the Referee and the severity of the misconduct by Respondent, The Florida Bar petitions for review of the recommended sanction of a three year suspension and seeks disbarment.

SUMMARY OF ARGUMENT

The Referee erred in his report when he recommended suspension rather than disbarment. The Respondent engaged in multiple acts of deceit and dishonesty in the PIP cases, in his dealings with the bad faith lawyers, in the subsequent civil litigation, and his filings in the bankruptcy court. The Respondent was clearly motivated by greed and completely ignored his ethical obligations.

The Referee specifically found that Respondent directly participated in misleading his clients in the PIP benefit cases so that his clients would agree to the settlement and Progressive would release the settlement proceeds to Respondent. Additionally, Respondent withheld critical information from his clients regarding the settlement solely to further his own interests.

The Referee further found that Respondent committed acts "contrary to honesty and justice" in connection with the secret settlement with Progressive. Additionally, by entering into the MOU and the AMOU, Respondent created multiple conflicts of interest.

Furthermore, the Referee found that the Respondent knowingly and intentionally manufactured "excessive" time records for use in the civil litigation and that the Respondent provided false testimony during the bankruptcy

proceedings in an attempt to have the bankruptcy court discharge his financial obligations to the bad faith attorneys.

Despite these very specific and serious findings of misconduct, the Referee imposed only a three year suspension rather than disbarment. The findings, the case law, and the Standards for Imposing Lawyer Sanctions support greater discipline. The only appropriate discipline based on Respondent's egregious conduct is disbarment.

ARGUMENT

DISBARMENT IS THE APPROPRIATE SANCTION GIVEN THE REFEREE'S FINDINGS OF MULTIPLE ACTS OF DISHONESTY AND DECEIT BY RESPONDENT IN THE PROGRESSIVE SETTLEMENT, THE SUBSEQUENT CIVIL LITIGATION AND IN THE BANKRUPTCY COURT.

While a Referee's findings of fact should be upheld unless clearly erroneous, this Court is not bound by the Referee's recommendations in determining the appropriate level of discipline. The Florida Bar v. Wohl, 842 So. 2d 811 (Fla. 2003); The Florida Bar v. Rue, 643 So. 2d 1080 (Fla. 1994); and The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986). Furthermore, this Court has ruled that the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. The Florida Bar v. Grief, 701 So. 2d 555 (Fla. 1997); and The Florida Bar v. Wilson, 643 So. 2d 1063 (Fla. 1994). In The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), this Court found that three purposes must be kept in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter other attorneys from similar conduct. This Court has further stated that a Referee's recommended discipline must have a reasonable basis in existing case law or the Standards for Imposing

Lawyer Sanctions. The Florida Bar v. Sweeney, 730 So. 2d 1269 (Fla. 1998); and The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997). The Court will not second guess a Referee's recommended discipline "as long as that discipline has a reasonable basis in existing case law." This standard also applies when reviewing a Referee's finding of mitigation and aggravation. The Florida Bar v. Arcia, 848 So. 2d 296 (Fla. 2003).

In the instant case, the recommended discipline is too lenient given Respondent's multiple acts of deceit and dishonesty, his total disregard of his ethical duties, and given the aggravating factors found by the Referee. Disbarment rather than suspension is the appropriate sanction.

Respondent's misconduct during the Progressive Settlement in and of itself warrants disbarment. The Referee found that the Respondent engaged in a plethora of misconduct during the Progressive Settlement when he found that:

(i) In an effort to protect his own financial interest, Respondent created a series of conflicts of interest between the various groups of clients, between the clients and the PIP lawyers and between the PIP lawyers and the bad faith lawyers.

(ii) Respondent participated in an aggregate settlement pitting his interests against the interest of his own clients. The less the clients received, the more Respondent received.

(iii) Respondent agreed to defend Progressive against his own clients.

(iv) Respondent abandoned the non-Goldcoast case clients who did not receive anything for the bad faith claims, in order to obtain more substantial attorneys' fees.

(v) Respondent retained most of the settlement funds for himself, his son and his practice rather than pay the clients the value of their bad faith claims.

(vi) Respondent failed to explain the settlement to his clients and to the contrary withheld information regarding the settlement from his clients.

(vii) Respondent failed to inform his clients that his firm had received over $5 million while only approximately $672,742.00 was paid to the clients.

(viii) Respondent deliberately misled the clients so that the clients would agree to the settlement. In obtaining the releases needed to finalize the settlement, the Respondent did not inform the clients of material facts such as the total amount of the settlement, the amount of the attorneys' fees, the value of the clients' bad faith claims or that Progressive had previously made a settlement offer.

(ix) Respondent knew and participated in the exclusion of the bad faith lawyers from the settlement.

(x) Respondent participated in the meeting where Larry Stewart was offered $300,000.00 to compensate all three bad faith claims and claimed there was zero dollars allocated in the settlement for the bad faith claims.

(xi) Respondent drafted the "Notice of Disagreement of Counsel" letter sent to the Goldcoast clients which included misleading statements and false accusation against the bad faith lawyers.

(xii) Respondent failed to provide his clients with closing statements further keeping his clients in the dark (RR 18-26).

These enumerated acts each detailing the lengths Respondent went to in order to further his personal gain support disbarment. The Standards for Imposing Lawyer Sanctions also mandate disbarment for Respondent's misconduct. In the instant case, the following standards were all found applicable by the Referee:

A. Violations of Duties Owed to Clients

(i) Standard 4.31 (Conflicts of Interest)
"Disbarment is appropriate when a lawyer, without the informed consent of the client(s): (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client…"

(ii) Standard 4.61 (Lack of Candor)
"Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client."

B. Violations of Duties Owed to the Public

(i) Standard 5.11(f) (Failure to Maintain Personal Integrity)
"Disbarment is appropriate when…a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

C. Violations of Other Duties Owed as a Professional

(i) Standard 7.1
"Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for a lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." (RR 27).

Although each Standard considered by the Referee on its own would support disbarment, the Referee only recommended a three year suspension. Such a recommendation is inconsistent with the Standards.

Not only do the specific findings by the Referee and the applicable Standards for Imposing Lawyer Sanctions support disbarment but so does the existence of aggravating or mitigating circumstances. *See* The Florida Bar v. Marrero, 157 So. 3d 1020, 1026 (Fla. 2015) ("The referee shall . . . make findings of fact regarding possible aggravating and mitigating factors. . . ."); The Florida Bar v. Greene, 926 So. 2d 1195, 1201 (Fla. 2006) ("[A] presumptive sanction under the Standards are subject to aggravating and mitigating circumstances."); *see also* The Florida Bar v. Abrams, 919 So. 2d 425, 430-31 (Fla. 2006); and The Florida Bar v. Kavanaugh, 915 So. 2d 89, 94 (Fla. 2005).

In the instant case, the Referee found a number of aggravating factors including:

9.22 (b) Dishonest or selfish motive;

9.22 (c) Pattern of misconduct;

9.22 (d) Multiple offenses;

9.22 (f) False statements during the disciplinary process;

9.22 (g) Refusal to acknowledge wrongful nature of conduct;

9.22 (i) Substantial experience in the practice of law; and

9.22 (j) Indifference to making restitution (RR 28-29).

While the Referee found two mitigating factors, 9.32(a) Absence of a prior disciplinary record and 9.32(g) Good character and reputation (RR 29-30), these mitigating factors do not overcome the numerous aggravators nor mitigate Respondent's egregious unethical misconduct.

The case law further supports harsher discipline for the type of misconduct engaged in by the Respondent. In The Florida Bar v. St. Louis, Jr., 967 So. 2d 108 (Fla. 2007), the Court increased Respondent's discipline from a 60 day suspension to disbarment. While representing a number of clients against DuPont Corporation, Respondent entered into a secret "engagement agreement" with DuPont as a part of the settlement. This agreement provided that Respondent and his firm would no longer bring any suits against DuPont. Respondent entered the agreement solely for his own financial benefit. His firm was paid over 6 million dollars for entering into this engagement agreement. Respondent deliberately failed to disclose the existence of an engagement agreement to his clients and thus failed keep his clients reasonably informed. Additionally, the agreement required Respondent to form an attorney-client relationship with DuPont, while Respondent was still representing his clients. Further, Respondent was dishonest with a judge and The Florida Bar. In

increasing the sanction from a 60 day suspension to disbarment the Court noted that St. Louis "engaged in several acts of dishonesty." Id. at 122.

Like in St. Louis, the Respondent in the instant case engaged in numerous acts of dishonesty, was motivated by greed, and his conduct therefore warrants a more severe sanction than a three year suspension.

Similarly, in The Florida Bar v. Kaufman, 684 So. 2d 806 (Fla. 1996), the Court found that Respondent's dishonest conduct in a civil suit warranted disbarment. In Kaufman, Respondent was a landlord who filed suit against his tenants. The tenants filed a counterclaim and prevailed. The Court entered a judgment for more than $300,000.00 in addition to attorneys' fees against the Respondent. To avoid paying the judgment, Respondent testified falsely about his assets. He also transferred and dissipated his assets. Similarly to the instant case, the Court applied Standard 5.11 of the Standards for Imposing Lawyer Sanctions: "Disbarment is appropriate when…a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Id. at 810. It is clear that this Court frowns heavily upon a Respondent who engages in deceit and dishonesty. Respondent's dishonest misconduct warrants disbarment.

As further support for this Court imposing harsh sanctions on a Respondent who engages in deceit and dishonesty, in The Florida Bar v. Hall, 49 So. 3d 1254 (Fla. 2010), the Court found that Respondent's dishonest conduct in her efforts to purchase real estate warranted disbarment rather than a 90 day suspension. Respondent had signed a contract to lease property and later forged documents to change the lease to include an agreement for sale. Respondent eventually admitted that she deliberately changed the title and language of the document for her own benefit. Over a number of years, Respondent aggressively pursued the purchase of the property, harassing the owners in attempts to persuade them to sell her the property. The Court found there that Respondent "engaged in ongoing, continuous misrepresentations for several years." Similarly, Respondent engaged in an ongoing and continuous course of dishonest conduct over a number of years solely for his own benefit.

As further support of why a more severe sanction is warranted, Respondent's misconduct in the subsequent civil litigation and in the bankruptcy proceedings further justifies the recommendation of disbarment. Specifically, during the civil litigation, the Referee found that Respondent required his employees to fabricate time records which were then produced in discovery (RR 14, 26). Further, during the bankruptcy proceedings, Respondent was found to have filed a bankruptcy case

in bad faith and was further found to be dishonest with the bankruptcy court (RR 14, 16). Respondent continued to refuse to acknowledge the serious nature of his misconduct by attempting to obtain bankruptcy relief from the final judgment. In a scathing opinion entered by the bankruptcy court, the judge found that Respondent, in taking part in the secret settlement with Progressive, intentionally and maliciously intended to harm the bad faith lawyers.

Bankruptcy Judge Kimball specifically found:

> …the evidence is overwhelming that the Defendants [Respondent] acted intentionally in negotiating, structuring and documenting the Secret Settlement, forcing the Plaintiffs out of the Bad Faith Litigation, and implementing the settlement with the clients and that they knew, at the time of each such act, that the Plaintiffs would certainly be harmed by reduction or elimination of legal fees rightfully payable to the Plaintiffs. The Defendants' actions were wrongful. There was no just cause for their actions. Their actions were malicious… …The Defendants argument that they did not have control over allocation of the settlement amount is contrary to the greater weight of evidence in this case. The PIP Lawyers, including the Defendants, negotiated and papered the Secret Settlement. They were not compelled to sign the MOU or the AMOU. Not only were the Defendants architects of the Secret Settlement, but they forcefully recommended it to their clients while systematically eliminating the Plaintiffs from the process by, *inter alia*, not including the Plaintiffs in any of the negotiations and removing the Plaintiffs from the Bad Faith Litigation. There is no question that the Defendants' actions were both willful and malicious. (TFB Ex. 72, p. 61)

Based on the egregious nature of the misconduct engaged in by the Respondent, the Standards for Imposing Lawyer Sanctions, the applicable case law, and the findings by this Referee, disbarment is the only appropriate sanction. From

the secret settlement that occurred over a decade ago through subsequent civil litigation regarding the settlement, the Respondent has engaged in an ongoing, deliberate, and continuous course of serious misconduct that is and always been dishonest and deceitful. Such misconduct has been motivated by greed. Further, Respondent during these many years of legal proceedings has never demonstrated remorse.

Specifically, as to Respondent's remorse or the lack thereof, the Referee stated the following at the sanction hearing:

> In this case we heard the testimony, by my calculation, of 27 witnesses. What the court's concern is the violations of 4-8.4(c) and 3-4.3…What concerns the Court as well is the Kanes in this case received an adverse ruling from Judge Crow, number one; number two, an adverse ruling from the 4th District; number three, adverse ruling from Judge Kimball in the Chapter 11; number four, adverse ruling in the Chapter 7; number 5, the District Court's ruling affirming Judge Kimball; six, the District Court of Appeal affirming the ruling from Judge Kimball and the District Court; and finally, which I was truly shocked to hear that they had filed a Petition for Certiorari with the U.S. Supreme Court that was denied. That is a minimum one, two, three, four, five, six, seven adverse rulings and to date I've heard no remorse whatsoever by anyone in this particular case. (TR Sanctions Hearing, Vol. II, 257)

This Court cannot tolerate such serious misconduct. Disbarment is the only sanction that is supported from the inception of this case when Judge Crow made his findings to when this Referee made his.

CONCLUSION

The Florida Bar respectfully submits that the Referee's recommendation of discipline is too lenient. The Respondent should be disbarred.

Ghenete Elaine Wright Muir, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal; with copies to Respondent's Counsel, Scott K. Tozian, via E-mail at stozian@smithtozian.com, email@smithtozian.com; and David B. Rothman, Special Bar Counsel, via E-mail at DBR@Rothmanlawyers.com; Jeanne T. Melendez, Special Bar Counsel, via E-mail at JTM@Rothmanlawyers.com; and to Staff Counsel, The Florida Bar via E-mail at aquintel@flabar.org, on this 17th day of July, 2015.

Ghenete Elaine Wright Muir, Bar Counsel
The Florida Bar
Ft. Lauderdale Branch Office
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 550728
gwrightmuir@flabar.org

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Ghenete Elaine Wright Muir, Bar Counsel