**IN THE SUPREME COURT OF FLORIDA**

THE FLORIDA BAR,

Petitioner/Complainant,

Supreme Court Case No. SC13-388

v.

TFB File No. 2008-51,559 (17B)

CHARLES JAY KANE,

Cross-Petitioner/Respondent.
_____/



# CROSS-PETITIONER/RESPONDENT'S ANSWER AND CROSS-INITIAL BRIEF

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

**CASES**

**STATUTES**



**RULES REGULATING THE FLORIDA BAR**

**STANDARDS FOR IMPOSING LAWYER SANCTIONS**

**CONSTITUTION OF THE STATE OF FLORIDA**



**UNITED STATES CODE**

## SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

| | | |
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| RE. | = | Record exhibit from final hearing. |
| K. Exh. | = | Respondent Charles J. Kane's exhibit at final hearing. |
| L. Exh. | = | Respondent Darin Lentner's exhibit at final hearing. |
| B.S. | = | Bates stamp, particularly regarding record exhibit Kane Exhibit 61. |
| R. M.D. | = | Respondent Charles J. Kane's Motion to Dismiss, dated August 4, 2014. |
| R. M.S.J. | = | Respondent Charles J. Kane's Motion for Summary Judgment, dated September 19, 2013. |
| RR. | = | Report of Referee, re: Charles J. Kane, Case No. SC13-388. |
| F. RR. | = | Report of Referee, re: Amir Fleischer, Case No. SC13-391. |
| T. | = | Transcript of final hearing before Referee on August 18, 19, 20, 21, 22, 25, 26, 27 and 28, 2014; and October 14 and 16, 2014. |
| MIT. | = | Transcript of hearing on Complainant Larry Stewart's Motion to Intervene before Referee on August 28, 2014. |
| MDT. | = | Transcript of hearing on Respondents' Motion to Dismiss before Referee on October 14, 2014. |
| ST. | = | Transcript of sanctions hearing before Referee on January 21-22, 2015. |
| I.B. | = | Initial Brief of The Florida Bar, dated July 17, 2015. |

## STATEMENT OF THE CASE AND FACTS

Charles Jay Kane, an attorney admitted in 1965 with no disciplinary history, made mistakes by settling bad faith litigation without informing co-counsel. While none of the 230 Kane & Kane PIP clients complained, an extremely contentious civil dispute arose with his former co-counsel, Larry Stewart, Esquire, culminating in the present disciplinary proceedings.

### I. Misconduct by The Florida Bar, the Complainant, and The Florida Bar's Expert.

Mr. Stewart leveraged his connections with The Florida Bar to pursue a private vendetta demanding disbarment and disgorgement of fees.[1] Mr. Stewart drafted pleadings adopted by Staff Counsel,[2] complained to supervisors about Staff Counsel's work product and zealousness,[3] denigrated the original referee,[4] and also lobbied Staff Counsel, the Bar President and President-elect to appoint Special Counsel to take over the prosecution.[5]

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1 RE. K. Exh. 61, B.S. 123.

2 For example, Mr. Stewart drafted argument and provided caselaw that the Bar adopted verbatim in its Motion to Consolidate, in which it argued that a respondent is "responsible for the acts of his or her co-partner, even if entirely innocent himself and even if he has no knowledge that the acts were occurring." RE. 19, p. 3; RE. K. Exh. 61, B.S., 62, 146. See also, RE. K. Exh. 61, B.S. 167, 177, 179, 229, 245. Mr. Stewart repeatedly reviewed, revised, and submitted draft work product to the Bar. RE. K. Exh. 61, B.S. 61, 63, 68, 98-100, 107-11, 129-30, 134-35, 199, 204, 210, 224, 230, 242, 261, 265.

3 RE. K. Exh. 61, B.S. 20-23, 187-90, 255, 300.

4 RE. K. Exh. 61, B.S. 228, 235, 262.

5 RE. K. Exh. 61, B.S. 187-90, 255, 300.

Prior to any finding of probable cause, the Bar failed to conduct a thorough and impartial investigation and disregarded rules requiring procedural due process in Bar disciplinary cases. Attorney Stephen Whalen, a former Assistant Staff Counsel with The Florida Bar for 14 years, previously represented the Kanes. MDT. 9; RE. 193. When Mr. Stewart initially filed his Inquiry/Complaint, the Grievance Committee's investigating member never responded to Mr. Whalen's request to discuss the inquiries against the Kanes. After the case was placed in deferment pending the appeal of Judge Crow's order, Bar Counsel assumed the role of investigating member. MDT. 11, 12. Although Mr. Whalen asked Bar Counsel to interview the Kanes to understand their limited role and perspective, the Bar never spoke with the Kanes. MDT. 15.

In July 2012, Mr. Whalen received a notice of summary proceeding that listed documents to determine whether there was probable cause. MDT. 12-13. Neither of the Kanes' responses to the inquiry was on the list of documents to be considered by the Grievance Committee, although Mr. Stewart's letter was listed. MDT. 17-18. Mr. Whalen objected and subsequently received an amended notice that contained reference to multiple additional documents, including emails between The Florida Bar and Mr. Stewart. MDT. 19. The emails revealed that the Bar had taken time to meet with and interview Mr. Stewart, but had not afforded the same opportunity to the Kanes. MDT. 19-20.

To address concerns about the handling of the investigation, Mr. Whalen filed on October 12, 2012, a motion to recuse Bar counsel and to reassign the case to another committee. MDT. 21-22, 37-38; RE. 193. The motion on behalf of the Kanes was denied. MDT. 22-23. On October 16, 2012, Mr. Whalen sent another letter to the Chair and each Committee member on behalf of the Kanes. No response was received other than notices of probable cause. MDT. 24.

In just the initial stages after the formal Complaint was filed, between September and October 2013, there were one hundred and sixteen emails exchanged between the Bar and Mr. Stewart. RE. K. Exh. 61. Respondent discovered serious misconduct after the Bar belatedly produced its email communications with Mr. Stewart. A September 22, 2013 email revealed Mr. Stewart's concern that the Referee might grant Respondent's Motion for Summary Judgment. Mr. Stewart wrote, "Given the nativity [*sic*] of the referee and his lack of any civil experience, this is ripe for disaster," and he expressed dismay that the Bar had not been "studying the file and learning the facts." RE. K. Exh. 61, B.S. 262. In the following two weeks, Mr. Stewart created and the Bar introduced an untruthful expert affidavit in order to refute Respondent's Motion for Summary Judgment. R. M.D., Exh. I. After Mr. Stewart and the Bar's expert gave false

deposition testimony regarding the preparation of the affidavit, Respondent filed a Motion to Dismiss.[6]

In response to the Motion to Dismiss, the Bar stated it "cannot, and will not try to, dispute the facts related to this motion." RE. 99, p. 3. The Bar attempted to correct the misconduct by voluntarily striking Mr. Stewart and the expert as witnesses. The Motion to Dismiss was heard contemporaneously with the Final Hearing. The Referee determined there was "some misconduct," but the expert's affidavit was "not that false." MDT. 218.

The Motion to Dismiss was based, in part, upon Mr. Stewart's improper direction of the Bar. Not only did Mr. Stewart draft legal argument for The Florida Bar, he also ghost-wrote an affidavit to be executed by the Bar's ethics expert, Attorney S. Sammy Cacciatore, Jr., which the Bar filed to contest Respondent's Motion for Summary Judgment. Mr. Stewart tried to conceal his participation by instructing Bar Counsel to send the affidavit drafted by Mr. Stewart to the expert for execution. On October 4, 2013, at 9:27AM, Mr. Stewart wrote:

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[6] This misconduct was discovered, in part, through incomplete and tardy document production. On February 6, 2014, Respondent requested the Bar's communications with the complainant. Staff Counsel initially responded with an index of emails on April 24, 2014, but Special Counsel did not respond or provide a privilege log. After prompting, Special Counsel provided hundreds of pages of emails on July 14, 2014 with no privilege log. The day after Respondent filed his Motion to Dismiss, the Bar provided five additional emails and a privilege log. A week before trial, the Bar provided approximately 200 additional emails exchanged with Mr. Stewart. This production was contemporaneous with the Bar's Response to Respondent's Motion to Dismiss. RE. K. Exh. 61.

> Alan: Sammy told me he talked to you yesterday about the draft aff't he and I have been working on. It is attached. He said that he wanted you all to send it to him. Since any communication to Sammy is discoverable, here is a suggested message for an e-mail to Sammy.
>
> Dear Sammy: Attached for your review is a draft aff't based on your opinions. Please make sure it accurately states your opinions and, if it does not, make any changes necessary so that it does. Note that your CV needs to be attached as Ex A and para 2 needs some more material.
>
> When you have it in final form, please execute it and send back. As you know, the M/SJ is set for next [T]hur[sday] and we need to incorporate your opinions into the Memo in Opposition so there is not a lot of time.

RE. K. Exh. 61, B.S. 335.

That same day, Staff Counsel sent Mr. Stewart's suggested email verbatim to its expert. RE. K. Exh. 61, B.S. 296. The expert executed the affidavit three hours after receipt, without substantive revision. The expert replied to Staff Counsel, "I have reviewed the affidavit and it covers my discussion with you and Alan. A job well done." RE. K. Exh. 61, B.S. 296.

At the time the Bar received and sent the expert's affidavit for execution on October 4, 2013, the Bar knew its investigator had just delivered the civil trial record, consisting of thousands of pages of transcripts and over a hundred exhibits, to the expert on October 2, 2013. RE. 192, Exh. 5. The expert's time records only reflected one preliminary meeting with Bar counsel where he did not review any documents. RE. 225, pp. 22-23, and attached Time Memo. The affidavit executed

by the expert extensively analyzed the civil trial record and claimed that the expert had reviewed the trial exhibits and all client communications regarding settlement. R. M.D., Exh. I.

The expert did not produce any draft affidavits or emails in response to a subpoena *duces tecum* asking for report drafts, and his communications with Larry Stewart and/or the Bar. At the expert's deposition, he could not recognize an exhibit attached to his own affidavit and he admitted he had not reviewed the trial exhibits and client communications, as claimed in his affidavit. RE. 225, p. 87, 89, 97, 124. He initially testified that, other than discussions with Bar Counsel, he drafted the affidavit on his own. RE. 225, p. 82. When pressed, the expert indicated he "may have had a question for Mr. Stewart on the day the affidavit was executed," but did not remember sending him any drafts as there were "no emails back and forth with Mr. Stewart." RE. 225, p. 84. The Bar, knowing Mr. Stewart drafted the affidavit, failed to correct the testimony. Instead, during the deposition, when the expert veered from the opinion expressed in the expert affidavit, Special Counsel interjected, "We intend on asking Sammy his opinion on everything we listed in the responses to you that we're going to ask and I'm going to rely upon, not your questioning and not even his response, but the affidavit that he prepared." K. Exh. 60, p. 77 (*emphasis added*). When subsequently confronted with email

paper trails, the expert retracted his testimony and admitted Mr. Stewart participated in drafting the affidavit. Id. at 165.

Mr. Stewart testified at his deposition that he "did not recall" drafting any affidavits other than his own in the Watson JQC proceedings. R. M.D., Stewart Depo., pp. 9-10. When asked whether he had seen a draft of the expert's affidavit, Mr. Stewart replied he had seen the final draft of it but did not "remember whether [he] saw a draft in between." R. M.D., Stewart Depo., pp. 26-27. Mr. Stewart further testified he had not had "consistent communication" with the Bar. R. M.D., Stewart Depo., pp. 11-12. The Bar failed to correct Mr. Stewart's testimony.

The Bar submitted the untruthful affidavit to the Referee. The Referee relied on it in his Order denying the Motion for Summary Judgment. RE. 98.

After the Bar struck Mr. Stewart from its witness list, Mr. Stewart submitted argument in letters to the Referee, which the Referee characterized as "robust and lengthy." T. 963. Mr. Stewart filed a Motion to Intervene, which the Bar neither adopted nor opposed. RE. 109. During the hearing on the Motion to Intervene, Mr. Stewart falsely testified that he had not requested the Bar to appoint Special Counsel and he introduced an altered September 10, 2013 email from Mr. Stewart to the Bar's President and President-elect. RE. 215; MIT. 26, 43-45. Mr. Stewart's Exhibit 9 (RE. 215) excised the portion of his original email in which he urged appointment of Special Counsel. MIT. 44-45. Neither Mr. Stewart's

testimony nor the exhibit indicated the exhibit had been altered. MIT. 45. The Florida Bar failed to correct Mr. Stewart's testimony or notify the Referee that the exhibit had been altered. MIT. 45.

Respondent's counsel thereupon introduced the unaltered version and confronted Mr. Stewart with his unaltered email, which the Bar had produced the week before trial. MIT. 44-45, RE. K. Exh. 61, B.S. 187-90. Mr. Stewart claimed he had forgotten about his request and denied knowing why his exhibit was altered. MIT. 45. The Referee denied Mr. Stewart's Motion to Intervene. When Respondent's counsel asked the Bar whether it intended to investigate Mr. Stewart's misconduct, he was told in open court to, "Stop bitching and do something about it." T. 2267.

The Bar pursued Mr. Stewart's agenda to disbar Charles Kane even though Mr. Kane had minimal involvement in the bad faith litigation, neither claimed nor received any portion of the bad faith settlement proceeds, and received no client complaints.

## II. Facts Underlying The Florida Bar's Complaint.

Charles Kane and his son, Harley Kane, were partners in Kane & Kane, P.A., representing medical providers in Personal Injury Protection ("PIP") claims. After Kane & Kane successfully argued the unconstitutionality of the arbitration clause, its practice grew to represent clients throughout the state. T. 828, 1064. In

these proceedings, four judges testified to the Kanes' outstanding skill in the PIP arena, describing the Kanes as "superior attorneys," "the attorneys others would go to for law," whom they could look to for "sophisticated arguments." ST. 9-11, 106-107. In addition, the judges testified that the Kanes were well respected amongst judges and attorneys, with a "high level of integrity," and that their professional ethical behavior was "excellent." ST. 52-53, 80, 82, 106-107. The judges testified that Charles Kane was "very professional," and provided the court "well-documented researched arguments." ST. 9-10. He was also described as "honorable and professional" and that he "takes extreme pride in his work." ST. 17, 82.

In 2001, Attorneys Amir Fleischer, Laura Watson and Todd Stewart approached Harley Kane to discuss a bad faith claim against Progressive for systematically refusing to pay perceived valid insurance claims. T. 48, 190, 850-51. On November 9, 2001, Todd Stewart, who worked for the Slawson Cunningham law firm, filed a lawsuit naming one plaintiff, Fishman & Stashak, M.D., P.A., d/b/a/ Goldcoast Orthopedics. T. 34, 67, 70, 853. Watson & Lentner, P.A., represented Goldcoast in their PIP claims. T. 83-84, 1523, 1584. Harley Kane signed the Goldcoast fee contract as co-counsel on behalf of Kane & Kane. T. 976, 1156, 1198, 1791-94; RE. 116, 190.

In 2002, Todd Stewart left the Slawson firm and asked his father, Larry Stewart, to take over the bad faith litigation. T. 34. Larry Stewart met with Gary Marks and Amir Fleischer, of Marks & Fleischer, P.A., and with Laura Watson and Darin Lentner, of Watson & Lentner, P.A., to discuss the representation. T. 336. Harley Kane did not participate and, at the time, was hospitalized for Hodgkin's lymphoma. T. 1109-12; RE. 175. Charles Kane was not present at and did not participate in the meeting. T. 336.

As Larry Stewart was substituting in as counsel of record, additional plaintiffs were added to the bad faith litigation, for a total of 37 plaintiffs. T. 85-86; RE. 116. Watson & Lentner represented 17 of the Goldcoast plaintiffs and Marks & Fleischer represented 19 of the plaintiffs. T. 250, 1417, 1583. Kane & Kane did not represent any of the Goldcoast plaintiffs in their underlying PIP claims. RE. 126.

The Kanes signed the Goldcoast contracts intending to add some Kane & Kane clients to the litigation. While Kane & Kane filed some civil remedy notices pertaining to some of its clients' claims, only 51 of Kane & Kane's approximately 1,000 PIP claims were "perfected" for purposes of potentially alleging bad faith. RE. 126. However, Larry Stewart rejected the three to five Kane & Kane client contracts proposed for inclusion in the Goldcoast litigation. T. 683-84; RE. 130.

Todd Stewart and William Hearon, Esquire, never met with or communicated with Charles Kane in person, by telephone, email or other correspondence. T. 62, 134, 202, 649, 1583. Charles Kane was excluded from Goldcoast emails. T. 666-67. Even Harley Kane rarely communicated with the bad faith lawyers. Mr. Hearon, who handled the bad faith discovery, never received paperwork from Kane & Kane, and while Harley Kane was copied on some group emails to the PIP lawyers, Mr. Hearon testified Harley Kane was not communicative. T. 206, 660, 662, 685, 1152-53.

During the pendency of the Goldcoast litigation, Kane & Kane represented 230 providers in PIP claims. T. 991; RE. 126. These clients did not hire Kane & Kane to pursue bad faith and did not have any retention agreement with the bad faith attorneys. RE. 126. In addition to litigating and settling their clients' PIP cases, Kane & Kane was defending against approximately 600 Motions for Disqualification filed by Progressive in almost every Florida county and prosecuted by Robert Josefsberg, Esquire. T. 1077.

In December 2003, the Kanes prevailed on an appeal affirming the trial court's denial of Progressive's motion for disqualification. The Kanes and Progressive had agreed the trial court's record would serve as the record for the hundreds of other disqualification motions. T. 1133, 1138. In rapid succession, the Kanes obtained nine judgments for attorneys' fees against Progressive totaling

$82,432.50, plus statutory interest. RE. 179. The Kanes continued to settle PIP claims and set hearings to determine attorneys' fees. T. 1138, 1139. The bad faith lawyers had no involvement in the Kanes' disqualification proceedings. T. 682.

Around this same time, Larry Stewart developed a theory for resolving Goldcoast, described in a December 31, 2003 email to Todd Stewart, which stated, in part:

> My concept – which I haven't yet discussed with Amir, Laura, etc. – is to approach settlement on the basis that there are not just the named plaintiffs and those certain claims but hundreds of others. We should reach a global deal on all the claims at once.

RE. 125. At Larry Stewart's request, Harley Kane supplied Mr. Stewart with a client list enabling him to reference Kane & Kane clients as potential future plaintiffs to use as leverage in the Goldcoast negotiations. RE. 118, 127; T. 249-53, 260-67, 295-98, 301. In return, Larry Stewart offered to attempt to globally settle Kane & Kane's PIP clients' claims at the Goldcoast mediation. T. 1001, 1080.

Charles Kane's brief meeting with Larry Stewart on April 13, 2004 to discuss Mr. Stewart's proposal – some two and a half years after Goldcoast was filed – was the first and only time Charles Kane communicated with any bad faith lawyer. T. 649, 1176. That same day, Charles Kane signed a letter drafted by Mr. Stewart permitting Mr. Stewart to attempt resolution of the Kane & Kane PIP claims at mediation. RE. 141; T. 386-90, 928-34, 1005, 1169-70. Charles Kane

gave Larry Stewart a $6.5 million dollar settlement figure for the PIP claims and attorneys' fees. T. 1001, 1005, 1080.

Two days later, Larry Stewart submitted a mediation statement stating he represented the 37 Goldcoast plaintiffs but referenced the universe of outstanding PIP claims, each with an average settlement value of $10,000. RE. 142, p. 4; T. 1080. According to Mr. Stewart's figures, Kane & Kane's settlement value for the 1,000 pending PIP claims was $10 million. Mr. Lentner, Mr. Hearon, and Larry Stewart attended the mediation held in April 2004, with clients Doctors Fishman and Stashak of Goldcoast Orthopedics, the original sole plaintiff. T. 395. No one communicated with Kane & Kane throughout the mediation. T. 395, 947, 1190, 1318. The bad faith attorneys did not resolve the claims. RE. 143; T. 411-13. After hearing Larry Stewart's reference to the hundreds of other potential bad faith plaintiffs, Doctors Fishman and Stashak complained that their claims were being diluted. T. 937, 1431-34, 1469; RE. 144; F. RR., p. 6.

On April 20, 2004, Larry Stewart emailed the PIP lawyers, excluding Charles Kane, reporting that Progressive offered $3.5 million at mediation and that "all bets were off," indicating that whatever proposal Progressive had made had been rejected by the bad faith lawyers. T. 936; RE. 143. This email did not reference any terms and conditions of Progressive's offer. RE. 143. He did not specify if the offer was for the Goldcoast bad faith claims, the universe of PIP

claims and unfiled bad faith claims, or some other combination. RE. 143. Charles Kane testified that the absence of any conditions or definitive terms to the reported settlement proposal by Progressive indicated to him that no actual offer had been made and that the preliminary settlement discussions had been cut off before an actual offer occurred. T. 1205-06.

After mediation, Mr. Fleischer independently negotiated settlement with Progressive without the Kanes' knowledge. T. 971-72; F. RR., p. 6. On May 14, 2004, Mr. Fleischer told Harley Kane that Progressive was offering $5.5 million to settle the Kane & Kane PIP cases. T. 948; F. RR., p. 7. Although Progressive had given separate settlement figures for each of the three PIP firms, Mr. Fleischer refused to disclose the other firms' settlement offers to Harley Kane. T. 977, 1004. Mr. Fleischer and Harley Kane did not discuss the Goldcoast settlement. T. 975, 989. Mr. Fleischer told Harley Kane that Progressive wanted to discuss the terms that weekend and that Progressive did not want Larry Stewart to be involved. T. 978. On Friday, May 14, 2004, Harley Kane accepted the offer pending client approval. T. 948-49, 973-75.

Many factors contributed to the timing of the offer. Progressive was under a looming deadline to produce internal records due to its failure to provide a privilege log in response to a discovery request by the bad faith lawyers. T. 429-35; RE. 145-150. Further, the Kanes had settled an additional 273 claims out of

approximately 1,000 pending claims, with 100 pending fee hearings in addition to the outstanding $82,432.50 in judgments. T. 1124, 1127. Moreover, the Kanes had been awarded entitlement to fees incurred in the successful defense of 173 of the 600 disqualification motions and the hearing to consider the Kanes' request for over $1 million in fees to defend against disqualification was scheduled for the next month. T. 1124, 1137, 1138-39.

When Charles Kane returned from vacation, he learned of the firm's tentative acceptance. T. 1001. Concerned about Larry Stewart's exclusion, Charles Kane questioned Mr. Fleischer and Mr. Marks before meeting with Progressive. T. 1007, 1194-95. Mr. Fleischer confirmed Progressive's requirement to exclude Mr. Stewart and told the Kanes that Progressive was not offering any money for the Goldcoast bad faith claims. T. 1010.

At the settlement meeting, Progressive's representative, Francis Anania, Esquire, told Charles Kane that they could not get anything done if Larry Stewart was involved. T. 1212. Mr. Anania testified that Mr. Stewart had given Progressive permission to meet separately with the PIP attorneys. T. 1767. Nonetheless, the Kanes acknowledged that they should not have participated without notifying the bad faith attorneys. T. 1003, 1217-1218.

At the meeting, a Memorandum of Understanding ("MOU") was drafted in conjunction with a separate letter agreement with each firm to preserve the

confidentiality of each firm's individual settlement with Progressive. T. 1003, 1010-15, 1194-96, 1210-13, 1215-18, 1350-51, 1355; RE. 151. Charles Kane left the settlement meeting before the MOU was completed and he did not sign the agreement. T. 1216, 1222.

Mr. Fleischer initially argued that Mr. Stewart should be discharged for cause, but Harley Kane disagreed and offered to fund $250,000 of Mr. Stewart's legal fees from the PIP fees the Kanes stood to collect. T. 1025, 1028. The PIP attorneys initially offered $300,000 to compensate the bad faith attorneys. T. 440-43, 445, 1029-30, 1228-30, 1355. The PIP lawyers did not disclose the settlement figures but disclosed that no money was offered for bad faith claims. T. 443-44, 1230-31. Mr. Stewart rejected their offer and indicated it was improper to settle without compensation for the Goldcoast bad faith claims. T. 463-64, 1230.

Charles Kane recommended the PIP lawyers seek legal advice. T. 1040. Upon advice of counsel, Mr. Fleischer contacted Progressive to negotiate allocation for the Goldcoast bad faith claims. T. 1759-60. Progressive rejected Mr. Fleischer's initial offer of $3.5 million and subsequently agreed to allocate $1.75 million to Goldcoast bad faith claims. T. 1763-64. The settlement figures for each law firm were revised and Kane & Kane's settlement was reduced from $5.5 million to $5.25 million. T. 1028, 1054.

An Amended Memorandum of Understanding ("AMOU") was executed, becoming effective when accepted by one hundred percent of the Goldcoast plaintiffs and ninety percent of the PIP clients. RE. 157; T. 1227-28. Progressive released any right to pursue a clawback suit against any medical providers for billing practice or treatment issues. T. 1139-40. The AMOU also contained a clause in which the PIP attorneys agreed to indemnify and defend Progressive against claims by clients who did not provide releases. RE. 157; T. 519-20. The Kanes concede this clause created a potential conflict.

Kane & Kane had not previously communicated with any of the Goldcoast plaintiffs; rather, the Watson & Lentner and Marks & Fleischer firms communicated with their respective clients in Goldcoast. T. 1196, 1197, 1218. Of the PIP attorneys, Charles Kane was the most concerned about the dispute between the attorneys and advised the other two firms to send a "Notice of Disagreement" informing their clients of the conflict between counsel. T. 1502. Charles Kane assisted the firms by drafting the Notice, but did not sign the letter or otherwise communicate with the Goldcoast plaintiffs. T. 1045, 1243-45; RE. 155. Charles and Harley Kane disavowed any interest in the Goldcoast settlement funds. ST. 44.

Kane & Kane advised their PIP clients of the amount of their settlement for unreimbursed medical bills and informed them in bold, underscored type that they

were waiving any bad faith claims. RE. 159. The letter attached a list of the settled claims. T. 1340. The letter did not reference the Goldcoast litigation in which the PIP clients were not plaintiffs or otherwise involved, or the Kanes' attorney's fees. T. 993-94, 1344-45. No closing statements were provided, but the clients were able to compare their unreimbursed medical bills, plus statutory interest. T. 983, 995.

Even after being contacted during the subsequent contentious civil litigation and these Bar proceedings, none of the 230 Kane & Kane PIP clients complained about their settlement, the Kanes' conduct, or indicated that they had desired to pursue a bad faith action against Progressive. T. 994. Dr. Alan Schaff and Dr. Michael Rosenberg testified they had only hired Kane & Kane to file PIP claims and were satisfied with their recovery. T. 1987-93, 1994-99; RE. 220, 221.

Kane & Kane received $5.25 million from Progressive. T. 1028, 1054. After deducting $433,202 in costs and paying the PIP clients $672,742 for one hundred percent of their PIP benefits plus interest, Kane & Kane received $4,144,055 for attorneys' fees. RE. 242.

On June 22, 2004, Darin Lentner sent a letter to Larry Stewart on Watson & Lentner letterhead terminating the bad faith lawyers in the Goldcoast case. RE. 160. The Kanes were not copied on the letter. T. 535. That same day, the Marks

& Fleischer and Watson & Lentner firms entered their Notices of Appearance in Goldcoast and executed the Notice of Dismissal. RE. 161, 163.

Shortly after they were discharged, the bad faith attorneys sued the Kanes and the other PIP attorneys seeking payment of legal fees. RE. 114. Mr. Marks and Mr. Fleischer settled prior to trial for $822,901.47. F. RR., p. 15. The bad faith attorneys did not contribute any of their Goldcoast recovery to their clients in Goldcoast. T. 644-65.

During civil discovery, Judge Crow ordered Kane & Kane to reconstruct time records for production to opposing counsel. T. 1060. The Kanes required their associates, who had not contemporaneously kept their time, to reconstruct time records for their files. T. 1060. A former associate, Brian Korte, against whom the Kanes had filed a Bar inquiry for allegedly forging a settlement check, described the reconstruction as "manufacturing" evidence, and also "expressed concerns in some of the changing of time on the sheets." T. 1680. Another past Kane & Kane associate, Mischele Muir, confirmed they reconstructed time in files with no contemporaneous time records and that "there would be changes made to the time sheets that we submitted to Mr. Harley Kane." T. 1666. The Kanes produced the reconstructed time to plaintiffs but did not offer them at trial as Harley Kane acknowledged that some of the entries were excessive. RE. 114, p.

12; T. 1059-61. Charles Kane was not involved in modifying time records. RE. 170. There is no record evidence suggesting Charles Kane altered time records.

Judge Crow awarded $2 million of the Kanes' legal fees to the bad faith attorneys. RE. 114, pp. 20-22. Unlike Watson & Lentner, P.A., the Kanes were held personally liable because their partnership did not afford them protection from liability. Judge Crow did not differentiate between the PIP attorneys but rather treated them as one entity under joint venture liability for purposes of analyzing the civil claims. RE. 114.

Judge Crow did not find that Charles Kane violated the Rules Regulating The Florida Bar. Instead, Judge Crow held, "[w]hile there are serious and strong concerns as to the conduct by some of the Defendant attorneys involved in this litigation, those issues need to be resolved in a separate forum." RE. 114, p. 2 (*emphasis added*).

After the judgment, bankruptcy counsel advised the Kanes to file a Chapter 11 petition to avoid liquidation and enable payment of debts over time. T. 560-61, 585-86. The Chapter 11 was dismissed by Judge Kimball. The Kanes subsequently filed a Chapter 7 petition, which was also heard by Judge Kimball. Judge Kimball clarified in the Chapter 7 proceedings that the Chapter 11 dismissal was not due to any finding that the Kanes intended to "hinder, delay or defraud creditors." RE. 122, p. 45; T. 626.

Judge Kimball also found that the Kanes did not have a dishonest intent to defraud creditors by filing the Chapter 7 proceeding. Judge Kimball held: "The Plaintiffs must convince the Court, by the greater weight of the evidence, that the Defendants had a specific intent to hinder, delay or defraud creditors. The evidence here does not support such a conclusion." RE. 122, p. 46.

In evaluating whether Judge Crow's judgment against the Kanes was excepted from discharge in the Chapter 7 proceeding, the Bankruptcy Court gave preclusive effect to Judge Crow's factual findings pursuant to collateral estoppel. RE. 122, pp. 33-39. Judge Crow's findings referred generally to the actions of the "PIP attorneys" and did not differentiate between the actors. Id. The Bankruptcy Court found the PIP attorneys' conduct, as described in Judge Crow's Order, constituted a "malicious injury" pursuant to 11 U.S.C., § 523 (a)(6), and thus, the judgment was excepted from discharge. RE. 122, p. 61.

At the hearing on sanctions, Mr. Hearon testified that the bad faith attorneys "would be receiving $844,915" from Charles and Harley Kane within the next thirty days. ST. 34.

## STANDARD OF REVIEW

The Court is "precluded from reweighing the evidence and substituting its judgment for that of the referee" and should presume that the factual findings are correct and uphold the findings "unless clearly erroneous or lacking in evidentiary support." Florida Bar v. Wohl, 842 So. 2d 811, 814 (Fla. 2003) (*citations omitted*).

The Court's scope of review in considering discipline is broader and should only uphold the referee's recommended sanction if it has a "reasonable basis in existing case law." Id. at 815.

## SUMMARY OF THE ARGUMENT

The Referee and the Bar failed to assess each of the PIP lawyers' culpability in recommending sanctions. Charles Kane had the least involvement in the Goldcoast litigation and made the most effort to remediate the conflict between the "PIP lawyers" and the bad faith lawyers by drafting a Notice of Disagreement and recommending that Marks & Fleischer and Watson & Lentner seek advice of legal counsel regarding the Goldcoast settlement. Charles Kane and his son, Harley Kane, had no communication with Progressive regarding the Goldcoast litigation, did not speak with any of the Goldcoast clients regarding settlement, did not enter an appearance in Goldcoast or dismiss the proceedings, and disavowed any interest in the Goldcoast settlement funds. Charles Kane's conduct is in stark contrast to the architects of the Goldcoast litigation and settlement, and yet, the Kanes received the harshest recommended sanctions of any of the directly involved lawyers.

Although Charles Kane filed for bankruptcy following the entry of the judgment, the Bankruptcy Court found that he did not possess any intent to "hinder, defraud or delay" his judgment creditors. The Bankruptcy Court, pursuant to collateral estoppel, adopted Judge Crow's findings regarding the conduct of the "PIP lawyers." The Bankruptcy Court determined that these findings constituted a malicious injury which excepted the judgment from discharge. However, the

Bankruptcy judge's scathing disapproval of the conduct, as described by Judge Crow, does not aggravate Charles Kane's sanction any more than it would aggravate the disciplinary sanction of the other "PIP lawyers."

Moreover, the Referee's findings are without record support, including the finding that Charles Kane modified or altered time records, or made misrepresentations in the Notice of Disagreement. Similarly, the aggravating factors do not cite to any record evidence and they are not, in fact, supported by any evidence in the record. Other findings are clearly erroneous, including the determination that the Kanes were required to compensate their PIP clients for claims outside of the scope of their fee agreement. While the Referee reasoned that "nothing prevented" additional compensation to the PIP clients, the Referee did not cite to any authority or agreement that required additional compensation. All Kane & Kane PIP clients received one hundred percent of their unreimbursed medical bills, plus interest, and no Kane & Kane client testified, filed a grievance, or otherwise complained that the Kanes failed to properly advise them or compensate them, even after years of continued civil litigation and these disciplinary proceedings, which were driven by the bad faith lawyers.

Mr. Stewart actively participated in the disciplinary process and communicated via email and in person with Bar Counsel prior to any finding of probable cause. Thereafter, Mr. Stewart doggedly directed the ethics prosecution

by drafting argument, which the Bar adopted, controlling discovery, demanding disbarment and disgorgement, and urging the appointment of Special Counsel. When Mr. Stewart became concerned that the prior referee might grant Respondent's Motion for Summary Judgment, he surreptitiously drafted a detailed expert affidavit, which the legal ethics expert executed despite only having the extensive civil records for about 24 hours. Mr. Stewart also persuaded the Bar to conceal his participation. The Referee relied on this untruthful affidavit in his order denying Respondent's Motion for Summary Judgment. The Bar subsequently failed to correct false deposition testimony by Mr. Stewart and the expert.

The Bar conceded it cannot and will not try to dispute the allegations of misconduct; Larry Stewart and the Bar's expert were struck as witnesses. This self-imposed remedy fails to address the Bar's misconduct. Had any attorney unaffiliated with the Bar committed similar misconduct, the Bar's inquiry would have been swift and the Court's punishment severe. The Bar's failure to heed this Court's demand for responsible prosecution erodes the faith and confidence in our disciplinary system. Given Mr. Kane's lesser culpability, the misconduct by the Bar and its witnesses, and existing caselaw and standards, the recommended sanctions are not warranted.

## ARGUMENT

### I. The Bar's Self-Imposed Sanction for the Misconduct of the Complainant and the Bar's Ethics Expert of Striking Them as Witnesses Does Not Remedy the Bar's Participation in and Commission of Repeated and Substantial Misconduct Which Warrants Dismissal.

Mr. Whalen described the Bar's mishandling of the initial investigation and its deference in communicating with Mr. Stewart while refusing to speak with the accused attorneys. The Bar conceded that Larry Stewart and the Bar's expert committed misconduct. In its response to the Motion to Dismiss, the Bar stated, "it cannot, and will not try to, dispute the facts related to this motion." RE. 99, p. 3. The Referee found there was "some misconduct" but reasoned that the affidavit drafted by Larry Stewart and executed by the expert without his review of the underlying documents was "not that false." MDT. 218. The Bar argued and the Referee agreed that striking Larry Stewart and the expert from its witness list remedied the misconduct.

The remedy of striking the witnesses, which the Bar self-imposed after Respondent filed his Motion to Dismiss, does not address the Bar's misconduct in this prosecution. Prior to any probable cause finding, the Bar's misconduct included a disregard of rules requiring procedural due process; insufficient notice to respond to allegations; a failure to conduct a thorough and impartial investigation; and a refusal to interview the respondent attorneys, in contrast with

repeated contact with Mr. Stewart, the complainant. Subsequently, the Bar's misconduct continued and included the following: (1) adopting pleadings and argument drafted by Mr. Stewart; (2) permitting Mr. Stewart to draft the ethics expert's affidavit; (3) allowing the expert to execute Mr. Stewart's affidavit knowing the expert had only received the voluminous file materials approximately 24 hours earlier; (4) agreeing to hide Mr. Stewart's participation by sending a misleading email message submitting Mr. Stewart's draft affidavit to the expert; (5) using the untruthful and misleading affidavit to refute the Respondent's Motion for Summary Judgment; (6) failing to correct the expert's testimony that no one assisted him in drafting the affidavit other than the Bar; (7) informing Respondent's counsel that it would rely on the expert's position in the expert's affidavit, even if the expert's deposition testimony veered from the affidavit; (8) failing to correct Mr. Stewart's deposition testimony that he did not recall seeing a draft of the expert's affidavit even though he had actually drafted the expert affidavit; (9) failing to correct Mr. Stewart's testimony that he did not have consistent communication with the Bar; (10) failing to correct Mr. Stewart's testimony before the Referee that he did not request the Bar President, President-elect or the Bar to appoint Special Counsel; and (11) failing to advise the Referee that Mr. Stewart's email exhibit offered during his Motion to Intervene had been redacted to delete Mr. Stewart's request for appointment of Special Counsel.

When the Bar permits an influential member with a private agenda to direct its actions, misconduct is assured. An accused attorney is entitled to a fair prosecution. In Florida Bar v. Rubin, 362 So. 2d 12, 16 (Fla. 1978), the Court held:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.

See also Florida Bar v. McCain, 361 So. 2d 700, 705 (Fla. 1978) ("After all, The Florida Bar acts for and is an agency of this Court. When the child falters, the parent shall correct.").

The determination of "whether misconduct by The Florida Bar during disciplinary proceedings warrants dismissal of charges depends on the severity of the breach and gravity of the consequences." Florida Bar v. Greenspan, 708 So. 2d 926, 928 (Fla. 1998) (citing Rubin). The misconduct here strikes at the heart of our disciplinary system that demands candor and fair play.

As reflected in his emails, Mr. Stewart feared the Referee would grant the Kanes' Motion for Summary Judgment. RE. K. Exh. 61, B.S. 262. He drafted work product and persuaded the Bar to present false evidence purporting to be the independent opinion of a well-respected expert. RE. K. Exh. 61.

In reality, the expert had twenty-four hours to review the record of an eight-week trial, research authority, and form an opinion. Mr. Stewart directed the Bar to send his draft affidavit to the expert using an email message concealing Mr. Stewart's involvement and hindering Respondent's discovery efforts. Mr. Stewart cautioned the Bar, "Since any communication to Sammy is discoverable, here is a suggested message for an email to Sammy." RE. K. Exh. 61, B.S. 335. The Bar adopted Mr. Stewart's "suggested message" and forwarded Mr. Stewart's draft of the affidavit to its ethics expert. RE. K. Exh. 61, B.S. 296.

Had Respondents simply asked for the expert's communications, they would not have discovered Mr. Stewart's involvement. When deposed about Mr. Stewart's preparation of the affidavit, the expert vaguely replied, "I have no emails back and forth with Mr. Stewart." RE. 225, p. 84.

Less than three hours after receiving the draft, the expert executed the affidavit without discussion, only adding his professional background. RE. K. Exh. 61, B.S. 296. When deposed, the expert and Mr. Stewart gave untruthful testimony regarding the creation of the affidavit. The Bar did not correct their misrepresentations.

Bar counsel may act as the scrivener to draft the expert's opinion.[7] Unfortunately, the Bar created the false impression that it was assisting the expert and, instead, passed off Larry Stewart's opinion as that of the expert.

The Bar contended that because the expert was told to "make sure it accurately states your opinions," the affidavit was "true and correct." RE. 192, p. 8. This hollow instruction tucked into an intentionally misleading email does not correct the misconduct. First, if Bar Counsel believed Mr. Stewart's ghost-writing was appropriate, Bar Counsel would not have concealed Mr. Stewart's involvement with the email ruse. Second, the expert had woefully insufficient time to reasonably adopt Mr. Stewart's opinion, a fact known to the Bar since it had delivered the voluminous record of the civil trial within a day of the execution of the affidavit. It is a charade to pretend that the affidavit is "not that false" simply because the expert was perfunctorily told he could revise it. Third, if the expert and Mr. Stewart felt their conduct was appropriate, they would not have given untruthful testimony about the affidavit's creation. Fourth, the Bar struck Mr. Stewart and the expert to avoid submitting further false testimony and evidence.

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[7] See Linq Indus. Fabrics, Inc. v. Intertape Polymer Corp., 8:03-CV-528-T-30-MAP, 2004 WL 5575053 (M.D. Fla. 2004) ("counsel is permitted to 'actually put pen to paper (or fingers to keyboard)' so long as the expert expresses his opinions to counsel before the report is generated and remains involved in the editing of the report.").

Moreover, the affidavit stated that the expert had reviewed trial exhibits and client communications when he had not. The Court found similar misconduct to violate Rules 4-8.4(c) and 4-8.4(d). See Florida Bar v. Richard G. Toledo, SC14-233 (Fla. March 10, 2014); Florida Bar v. Suarez, SC14-235 (Fla. March 10, 1014); Florida Bar v. Anthony G. Woodward, SC03-1351 (Fla. April 15, 2004) (affidavits were false when affiants averred they had reviewed materials when they had not). The Bar submitted the untruthful affidavit to the Referee, who referenced same when denying the Motion for Summary Judgment.

In Florida Bar v. Head, 84 So. 3d 292, 302 (Fla. 2012) (*internal citations omitted*), this Court held, "Dishonesty cannot be permitted 'by a profession that relies on the truthfulness of its members.'" The Head Court further explained that "dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole." Id. at 302 (citing Florida Bar v. Head, 27 So. 3d 1, 8-9 (Fla. 2010)). Recently, this Court emphasized, "any attempt to withhold the truth or present false information in a court proceeding would normally merit disbarment." Florida Bar v. Dupee, 160 So. 3d 838 (Fla. 2015) (*internal citations omitted*). Civil cases have been dismissed for subterfuge in discovery proceedings, including hiding evidence or giving untruthful deposition testimony. Jesse v. Comm. Driving Academy of Jacksonville, Inc., 963 So. 2d 308 (Fla. 1st DCA 2007).

This misconduct was unlikely to have occurred without Mr. Stewart's direction of the prosecution. The Court has repeatedly defined the limited role of the complaining witness as follows:

> As we explained over forty years ago in In re Harper, 84 So. 2d 700, 702 (Fla. 1956), the purpose of an attorney disciplinary proceeding is the protection of the public, not the vindication of private rights: "Disciplinary proceedings against attorneys are instituted in the public interest and to preserve the purity of the courts. No private rights except those of the accused are involved."

Tyson v. Florida Bar, 826 So. 2d 265, 268 (Fla. 2002). The Bar improperly permitted a complainant to assume a prominent role. See State v. Murrell, 74 So. 2d 221, 226-27 (Fla. 1954). In Murrell, the complainant was "out to make a case against the respondent." Id. at 226-27. The Court admonished the Bar for permitting a complainant to investigate and assist in an ethics prosecution. While the Court did not dismiss the charges in Murrell, the Court directed the Bar to refrain from similar misconduct in the future. See Florida Bar v. Swickle, 589 So. 2d 901, 904 (Fla. 1991) ("this Court has condemned the practice of allowing those with interest adverse to an attorney a prominent part in directing disciplinary proceedings against the attorney.").

In 2004, a referee admonished the Bar for permitting the complainant, Anheuser-Busch, to "control and dictate" the disciplinary prosecution by drafting and reviewing documents, and outlining issues for discovery. See Florida Bar v. Gary, SC03-632 (Fla. April 15 2004), Report of Referee, p. 12. In Gary, the

complainant's influence also led to serious misconduct in which the Bar sent a Board of Governors member to request the former referee, whom complainant believed was not favorable, to recuse himself, resulting in "forum shopping" through *ex parte* communications. Id. at 9-12. The referee recommended dismissal based on the misconduct "over and above" the fact that the Bar did not meet its burden. Id. at 12. The Court approved the Report of Referee. Gary Order, April 15, 2004.

In contravention of Murrell, Swickle and Gary, the Bar succumbed to Mr. Stewart's pressure. Although Bar supervisory staff instructed Mr. Stewart to trust the Bar to do its job, the assigned Bar Counsel allowed Mr. Stewart to draft pleadings and argument that were adopted verbatim. RE. K. Exh. 61, B.S. 62, 146; RE. 19. See also, supra at 3, fn. 2. After Florida Bar v. Fleischer, Case No. SC13-391 (Fla.), and Florida Bar v. Marks, Case No. SC13-392 (Fla. July 2, 2015), were initially dismissed, Mr. Stewart adamantly demanded Chief Disciplinary Counsel and the President of the Bar to appoint Special Counsel. MIT. 44-45; RE. K. Exh. 61, B.S. 187-90. After the Bar acquiesced, Mr. Stewart made disparaging comments about the supervisor who had stood up to him. R. M.D., Exhs. J, W.

Even after the Bar struck Mr. Stewart and Mr. Cacciatore as witnesses, Mr. Stewart filed a Motion to Intervene. RE. 109. The Bar failed to object or inform the Referee that intervention was improper. When Mr. Stewart falsely testified

during the hearing on his Motion to Intervene that he had not requested the Bar to appoint Special Counsel, the Bar failed to correct his testimony. When Mr. Stewart introduced an altered email removing his request for appointment of Special Counsel, the Bar failed to correct the record. When Respondent's counsel asked whether Mr. Stewart's conduct would be investigated, the Bar responded, "Stop bitching and do something about it," in open court. T. 2267.

While a prosecutor should "prosecute with earnestness and vigor," and "strike hard blows, he is not at liberty to strike foul ones." Florida Bar v. Cox, 794 So. 2d 1278, 1285 (Fla. 2001). The Bar relinquished control of this disciplinary proceeding to Mr. Stewart, who was pursuing a private vendetta. The Bar failed to correct multiple misrepresentations, which hindered discovery, facilitated the creation of a false affidavit, which it then submitted to the Referee, and subsequently stood silent while Mr. Stewart gave false testimony and introduced an altered exhibit to the Referee. This egregious misconduct, in defiance of this Court's previous admonitions to the Bar, warrants dismissal.

## II. Rule Violations.

A. There was not an aggregate settlement, pursuant to Rules 4-1.7(c) or 4-1.8(g), even though the PIP cases were settled simultaneously, because each PIP client recovered 100% of their unreimbursed medical bills, which did not impact any other PIP client's recovery.

*1. Goldcoast bad faith litigation.*

While the Kanes had signed contingency fee contracts as co-counsel in the Goldcoast litigation, they were minimally involved. RE. 126; T. 134, 662, 685. Charles Kane's only involvement was one meeting with Larry Stewart in which he permitted Mr. Stewart to attempt to resolve the Kane & Kane PIP files at the Goldcoast mediation. The Kane & Kane PIP clients were not plaintiffs in the Goldcoast litigation. Charles and Harley Kane never communicated with the Goldcoast plaintiffs. T. 1196-97, 1218. Charles and Harley Kane did not receive or otherwise handle Goldcoast settlement funds. T. 544-45, 793; RE. 164; ST. 44. In fact, they disavowed any interest in the Goldcoast settlement funds. ST. 44. Accordingly, there is no evidence that they violated Rules 4-1.7(c) or 4-1.8(g) as to the Goldcoast settlement.

*2. Kane & Kane PIP settlement.*

While Kane & Kane settled its clients' PIP claims against Progressive at one time and all clients were paid out of the settlement recovery, this was not a joint representation or an aggregate settlement within the meaning of Rules 4-1.7(c) or 4-1.8(g). First, Kane & Kane had been individually litigating and resolving PIP

claims. In the five months before the global settlement in May 2004, Kane & Kane resolved 273 individual claims against Progressive and had pending attorney fee claims, with approximately 700 additional medical provider claims pending. T. 1124, 1127.

Second, the Kane & Kane PIP clients' recovery was not compromised by resolving all claims at one time. All the clients received one hundred percent of their unreimbursed medical bills underlying their PIP claim against Progressive, plus statutory interest. Fla. Stat. § 627.736. T. 983, 1052, 1070. As such, one client's recovery did not impact another client's recovery. T. 983.

Third, although the Kanes did not disclose their attorneys' fees to the client, in PIP litigation, the attorney's fees are not deducted from a client's recovery. Fla. Stat. § 627.428. Rather, the medical provider's claim is settled first and the client is paid. Subsequently, the attorney litigates or settles the attorneys' fees directly with the insurance company. Id. See also United Auto Ins. Co. v. Rodriguez, 808 So. 2d 82, 85 (Fla. 2001) (PIP statute's legislative intent is to encourage "prompt resolution of PIP claims by imposing reasonable penalties on insurers who pay late.").

B. The Kanes appropriately distributed recovery to PIP clients in accordance with PIP clients' fee agreements.

In contrast to the other two firms, the Kanes did not participate in the Goldcoast recovery. The Rules 4-1.4(b), 4-8.4(c) and 3-4.3 violations are based on

the Referee's finding that the Kanes did not compensate their PIP clients for claims they waived, even though the PIP clients only contracted with the Kanes to obtain their unreimbursed medical bills, plus interest. Each of the Kanes' PIP clients received their full PIP recovery and none of the clients complained or expressed dissatisfaction with the representation. Indeed, Progressive had previously disputed these PIP claims. The settlement with Progressive ensured that each provider recovered all of the disputed medical bills without proving that each claim was valid.

The Referee found Charles Kane should have allocated "additional money from the settlement to the non-Goldcoast case clients of each of the three law firms," even though the Kane & Kane clients did not hire Kane & Kane to pursue bad faith. RR., p. 19. In contrast to the other two firms, the Kanes' PIP clients only contracted with the firm to pursue unreimbursed medical bills, plus statutory interest. In effect, the Referee recommends that Charles Kane should be disciplined for distributing recovery and fees consistently with his fee agreement with his clients.

The Referee also found that "there was nothing . . . that prevented the PIP law firms from allocating additional money from the settlement to the non-Goldcoast clients." RR., p. 19. However, there is no obligation or duty under the Rules Regulating The Florida Bar or under any attorney-client retention contract

requiring the Kanes to compensate their PIP clients more than the amount of the PIP clients' unreimbursed medical bills plus interest. Rule Regulating The Florida Bar 3-7.6(l) states that "evidence other than that contained in a written attorney-client contract may not be used in proceedings conducted under the Rules Regulating the Florida Bar to vary the terms of that contract."[8]

An attorney does not have a duty to investigate, pursue or advise a client regarding matters outside of the contracted legal representation. See Kates v. Robinson, 786 So. 2d 61, 64-65 (Fla. 4th DCA 2001); McCarty v. Browning, 797 So. 2d 30, 31 (Fla. 3d DCA 2001). No Kane & Kane client complained that they were entitled to additional compensation, even after that idea was suggested to them in the civil litigation or by the Bar. Rather, Kane & Kane clients testified they had only hired the firm to pursue unpaid bills and they did not want to be involved in a bad faith dispute with an insurance company. T. 1987-93, 1994-99; RE. 220, 221.

The Bar did not charge and the Referee did not find that Charles Kane received an excessive fee. According to Mr. Stewart's own PIP fee analysis at the time of mediation, Kane & Kane's fee award could have totaled close to $10 million, if litigated separately. RE. 142, p. 4; T. 1080. Nonetheless, they assert that Charles Kane should have increased the clients' recovery by reducing the

[8] The only exception is for consideration of whether the attorney's fee was excessive under Rule 4-1.5, which is not charged or found in this prosecution.

firm's $4.14 million fee because the Kanes' fees are disproportionate to the clients' recoveries. This type of analysis has been previously rejected.

In Altamonte Springs Imaging, L.C., v. State Farm Mut. Auto. Ins. Co., 12 So. 3d 850, 857 (Fla. 3d DCA 2009), the court rejected the contention that a PIP attorneys' fees were "disproportionate to the benefits they obtained" explaining that multiple separate county court actions, all for "small sum in controversy" could generate significant reasonable fees. See also State Farm Fire & Cas. Co. v. Palma, 555 So. 2d 836, 837 (Fla. 1990) (attorneys' fees of $253,500 for $600 bill was reasonable; insurance company made a decision to "stand and fight."). There is no legal basis justifying redistribution of attorney's fees to increase the recovery the client had agreed to receive in the fee agreement.

C. PIP cases do not require a closing statement, pursuant to Rule 4-1.5(f)(5).

Kane & Kane did not participate in the Goldcoast settlement, communicate with Goldcoast plaintiffs, or receive any bad faith settlement funds. Accordingly, it did not prepare any closing statements in the bad faith litigation. Instead, the Referee found that Charles Kane had "technically" violated Rule 4-1.5(f)(5) for only providing his PIP clients with a closing letter documenting the amount of the recovery for the unreimbursed medical bills and the calculation of statutory interest. RR., p. 23.

The Preamble to Chapter 4 emphasizes that the Rules of Professional Conduct are "rules of reason." A common sense application of Rule 4-1.5 to the unique circumstances of PIP litigation shows that a closing statement is not necessary. Unlike a typical contingency fee case, where the client's ultimate recovery is directly impacted by the attorneys' fee, PIP litigation concludes with the court assessing the fee based upon the insurer's failure to pay. Fla. Stat. § 627.736(4)(b); United Auto. Ins. Co. v. Rodriguez, 808 So. 2d 82, 86 (Fla. 2001). In a traditional contingent fee arrangement, a closing statement provides the requisite information, such as the settlement amount, the attorneys' fee percentage, and any itemized cost reduction, so that the recovery can be independently confirmed. In PIP cases, however, the client seeks reimbursement for a discrete amount of unreimbursed medical bill. The attorneys' fee is statutory and set by the court or through a settlement agreement with the insurance company. The client's recovery is not affected by the attorney's fee or costs. Since a PIP claimant can verify the recovery by comparing it with the unreimbursed medical bill and calculating interest, the closing statement is not required.

D. Charles Kane did not violate Rule 4-1.4(b) because he did not communicate with the Goldcoast plaintiffs and the Notice of Disagreement he drafted and recommended to be used by Watson & Lentner and Marks & Fleischer appropriately advised the Goldcoast plaintiffs of the dispute between counsel.

1. *The Referee's finding that the Notice of Disagreement sent to the Goldcoast plaintiffs contained misrepresentations is not supported by competent evidence.*

Charles Kane did not communicate with the Goldcoast plaintiffs. Rather, attorneys at Watson & Lentner and Marks & Fleischer communicated with the plaintiffs. Nonetheless, Mr. Lentner testified that Charles Kane was most concerned about the dispute with the bad faith attorneys and advised the other two firms to inform the plaintiffs of the conflict. T. 1502. Charles Kane drafted the Notice of Disagreement but did not sign or approve the final letter. T. 1045, 1243-45.

The Referee faults Charles Kane for drafting the Notice of Disagreement, finding it made "misleading statements and false accusations against the Stewart bad faith team." RR., p. 23. This finding is not supported by competent and substantial evidence. The Referee does not reference any specific statement it finds to be false. The Referee found that the letter "made it seem like" the bad faith attorneys had "committed some illegal action" by seeking a global bad faith settlement. RR., p. 23. However, the Notice did not make this suggestion. Rather, the Notice accurately stated that after the mediation, "one or more of the original

plaintiffs has expressed concerned that continuing to add plaintiffs will aggrandize the legal fees but may dilute the recovery available for each participant in the group as the group grows in size." RE. 155, p. 2. This statement is supported by Mr. Lentner's contemporaneous email to Mr. Stewart after the mediation that Doctors Fishman and Stashak were "concerned that their interest in any Bad Faith settlement is getting diluted by the number of potential claims." RE. 144.

The Notice was also found to be false because it characterized the records required to be produced by Progressive as "embarrassing." RR., p. 23. However, the Notice actually stated as follows:

> To be fair, you should also know that a recent development in the Bad Faith Case arising out of failure by Progressive's counsel to timely abide by certain court rules did give Progressive some incentive to seek resolution by way of the PIP settlement. Specifically, Progressive is now under court order to disclose certain records it could have timely listed and asserted were undiscoverable. The Stewart Firm undoubtedly believes those records will be embarrassing for Progressive and helpful in the Bad Faith Case. That may be true.

RE. 155, p. 2.

Importantly, the Notice also told plaintiffs that they could speak directly to the bad faith attorneys or anyone else as their advisor. RE. 155, p. 3. A fair reading of the Notice indicates a good faith attempt to accurately describe the PIP attorneys' disagreement with the bad faith attorneys and does not support a finding that Charles Kane made any misrepresentations to the Goldcoast plaintiffs.

E. Charles Kane did not violate Rule 4-1.4(b) because he had no obligation to advise Kane & Kane PIP clients of the status of bad faith litigation in which they were not plaintiffs and when they had not otherwise hired the firm to pursue a bad faith claim.

The Referee found "as the non-Goldcoast case clients were not privy to what had been happening in the Goldcoast litigation, they were completely in the dark about the discovery compliance issues." RR., pp. 21-22. The Referee takes the unprecedented position that the Kanes were required to advise their PIP clients of the status of the bad faith litigation in which the clients were not parties. In Brennan v. Ruffner, 640 So. 2d 143 (Fla. 4th DCA 1994), the Fourth District reasoned that no separate duty arose to advise a shareholder when the attorney only represented the corporation. While the Kanes represented their PIP clients in pursuing payment of medical bills, the Kanes did not have an obligation to advise their PIP clients with regard to the Goldcoast litigation when none of their clients were parties in Goldcoast or had contracted to pursue bad faith claims. In promulgating the commentary to Rule 4-2.1, the Court noted, that a "lawyer ordinarily has no duty . . . to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest." R. Regulating Fla. Bar 4-2.1, Commentary (*emphasis added*). The term "may" is merely permissive and "the lawyer has discretion to exercise professional judgment" for which "[n]o disciplinary action should be taken when

the lawyer chooses not to act or acts within bounds of such discretion." Preamble, R. Regulating Fla. Bar (scope).

The Referee also determined that the Kanes should have informed their PIP clients that "their bad faith claims had value, that Progressive had already offered $3.5 million for those claims with an indication there was much more in the offing." RR., p. 21. There is no evidence the Kanes were told there was "more in the offing." The Kanes' sole source of information following the mediation was an email from Larry Stewart, which was sent to Harley Kane and not Charles Kane, referencing a $3.5 million offer. This email did not state there was "more in the offing." RR., p. 21. Rather, the email stated, "all bets were off." RE. 143; T. 936. The email did not clarify whether the offer was for Goldcoast, the universe of PIP claims, or a combination of the two. RE. 143. As found by Judge Crow, assessment of the bad faith value was "speculative." RE. 126, p. 20. Further, Larry Stewart's rejection of the 3 to 5 bad faith claims initially proposed by the Kanes for inclusion in the bad faith suit indicated the unfiled claims did not have value.

The Kanes informed their PIP clients that they had to waive their bad faith claims when receiving funds for their unreimbursed medical bills. While the Bar in hindsight assesses value for those unfiled and uncontracted bad faith claims,

only 51 of the Kanes' 1,000 PIP claims were arguably perfected[9] and Larry Stewart had rejected those claims for inclusion in the bad faith litigation. RE. 126, 130; T. 683-84. There is no record evidence of the specific value attributed to unfiled and perfected or unfiled and unperfected bad faith claims. There is no evidence that any of these potentially perfected bad faith claims were valid. To the contrary, Larry Stewart's rejection of the Kanes' proposed bad faith claims in Goldcoast suggests these potential claims had some type of defect for inclusion and had no value. Charles Kane did not violate Rule 4-1.4(b) for failing to assess a speculative value to a claim that his clients did not hire him to pursue.

F. The Referee's finding that Charles Kane violated Rules 4-8.4(c) and 3-4.3(a) based on improper modification of time records and filing a bankruptcy petition is not supported by any evidence and is contradicted by Judge Crow's order (time records) and Judge Kimball's orders (bankruptcy).

*1. The Referee's finding that Charles Kane altered or inflated time records is not supported by any evidence.*

There is no "competent substantial evidence in the record, such as testimony or documents"[10] to support the factual finding that the "time records were altered and inflated by Charles Kane." RR., p. 26. Judge Crow only cited Harley Kane and not Charles Kane in the trial court's findings regarding the time entries. RE.

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[9] A Civil Remedy Notice ("CRN") demands payment of a PIP contract claim. It is not a separate claim until it is pursued in bad faith litigation after the validity of the contract claim is "perfected" by settlement or judgment.

[10] Florida Bar v. Head, 84 So. 3d 292, 300 (Fla. 2012) (referee's factual findings must be based on competent and substantial evidence).

114, p. 12. The Referee's citations to the testimony of Mr. Korte and Ms. Muir, as well as the composite of emails, do not implicate Charles Kane. RR., p. 14. Rather, Mr. Korte and Ms. Muir testified that it was Harley Kane and not Charles Kane who reviewed and modified their time. T. 1666-69, 1680-81. The composite emails indicate that Charles Kane instructed his associates to reconstruct time if not contemporaneously kept. However, the emails do not indicate that Charles Kane was modifying time records or that he instructed anyone to falsify any record. RE. 170.

The trial court had ordered the parties to reconstruct time records and Charles Kane's instructions to associates to create these records was not improper. See Cohen & Cohen v. Angrand, 710 So. 2d 166, 168 (Fla. 3d DCA 1998) (citing City of Miami v. Harris, 490 So. 2d 69, 73 (Fla. 3d DCA 1985)); Fla. Stat. § 90.956 ("Where attorneys have not kept contemporaneous time records, it is permissible for a reconstruction of time to be prepared."). The absence of any factual support for the Referee's finding requires reversal of the Rules 4-8.4(c) and 3-4.3 violations against Charles Kane.

*2. Bankruptcy proceedings.*

The Referee found Charles Kane violated Rule 4-8.4(c) by filing Chapter 11 and Chapter 7 proceedings. Intent is a necessary element of a Rule 4-8.4(c) violation. Head 27 So. 3d at 9. While there is no question the Kanes deliberately

and knowingly filed the petitions on advice of counsel, filing for bankruptcy is not inherently dishonest. Florida Bd. of Bar Examiners re: Groot, 365 So. 2d 164, 167 (Fla. 1978). The issue is whether Charles Kane filed for bankruptcy with the intent to defraud his judgment creditors.[11] The Bankruptcy Court answered this question in the negative.

Judge Kimball presided over both bankruptcy proceedings. At the advice of counsel, Charles Kane filed the Chapter 11 proceeding to reorganize debt to pay the judgment rather than attempting to discharge the debt. Judge Kimball determined the Chapter 11 was being used as a substitute for a bond and dismissed it. However, Judge Kimball explained that his dismissal did not imply bad intent. RE. 122, p. 45.

When the Kanes filed the Chapter 7 petition, Judge Kimball directly addressed whether they had pursued bankruptcy as a means to defraud their judgment creditor. Judge Kimball held:

> This Court is asked to find that this cloud of evidence is black at its core. The standard is preponderance of the evidence. The Plaintiffs must convince this Court, by a greater weight of the evidence, that the Defendants had a specific intent to hinder, delay or defraud creditors. The evidence here does not support such a conclusion.

RE. 122, p. 46.

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[11] See Florida Bar v. Tipler, 8 So. 3d 1109, 1115 (Fla. 2009) (misconduct in pursuing bankruptcy to discharge a judgment when "[t]he bankruptcy court specifically found that Tipler's actions indicated he intended to hinder, delay or defraud his creditors.").

Judge Kimball gave Judge Crow's findings preclusive effect required by collateral estoppel. RE. 122, pp. 33-39. Judge Kimball adopted almost nine pages of factual findings and determined that the conduct described therein constituted a "malicious injury" under 11 U.S.C. § 523(a)(6), an exception to discharge. RE. 122, pp. 61-62. The adopted factual findings did not differentiate between the actors but used the general term "PIP lawyers." RE. 122, pp. 33-39. While Judge Kimball scathingly disapproved of the PIP lawyers' conduct, his reaction to Judge Crow's findings is not the basis for an additional finding of misconduct against Charles Kane.

The Referee also cites to broad language in Judge Kimball's Order that "'[g]iven the choice between finding that the Defendants are naïve 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.'" RR., p. 16. Judge Kimball did not specify which Defendant made any specific statement that he found to be false or untruthful. RE. 122, p. 11. This conclusory finding, unsubstantiated by any facts in evidence, is insufficient to meet the clear and convincing standard. See Florida Bd. of Bar Examiners re M.B.S., 955 So. 2d 504, 507 (Fla. 2007) (the Board's "conclusory" findings regarding the applicant's rehabilitation were insufficient to meet clear and convincing burden of proof).

## III. Sanctions.

### A. A three-year suspension is not supported by existing caselaw and the Bar's argument for disbarment has no basis in existing caselaw.

By signing the Goldcoast contingency fee contracts, Charles Kane acknowledged owing duties to the Goldcoast plaintiffs, even though he had minimal participation in the litigation and disavowed any interest in the Goldcoast settlement funds. Given the contentious break with the bad faith attorneys, Mr. Fleischer's refusal to disclose the full settlement figures to the Kanes, and Mr. Fleischer's initial agreement with Progressive to allocate nothing to the Goldcoast bad faith claims, the Kanes should have insisted on the attendance of bad faith counsel, withdrawn from the representation, or pursued separate PIP settlement negotiations. As a consequence, Charles Kane concedes he violated Rules 3-4.3(a) and 4-1.7(b).

Charles Kane had the least involvement in Goldcoast and he made the most effort to address the dispute with the bad faith lawyers. Kane & Kane was focused on representing its PIP clients who were not plaintiffs in Goldcoast. Other than one meeting with Larry Stewart, permitting a one-time attempt to resolve the Kane & Kane PIP claims at the Goldcoast mediation, Charles Kane had no contact with the bad faith lawyers by phone, email or in person. Charles Kane was not even copied on any emails regarding the Goldcoast litigation. The Kanes did not interact with Goldcoast clients, did not enter an appearance in Goldcoast, or

dismiss the action. They disavowed any interest in Goldcoast settlement funds. ST. 44. In the ten years of aggressive civil litigation and these Bar proceedings, no Kane & Kane PIP client has ever stated they were either unhappy with the Kanes or wanted to allege bad faith against Progressive, even after hearing the allegations made by the bad faith attorneys or the Bar.

Charles Kane was the most concerned about the bad faith attorneys' exclusion. T. 1007, 1194-95. Charles Kane advised the other two firms who were communicating with the Goldcoast plaintiffs to: (1) seek legal counsel regarding the initial failure to allocate any money to the Goldcoast bad faith claims; and (2) send a Notice of Disagreement, informing the Goldcoast plaintiffs of the dispute so they could seek advice from an attorney of their choice. T. 1040, 1502.

The Referee analogized the present matter to the class action suit in Florida Bar v. Adorno, 60 So. 3d 1016 (Fla. 2011), where the attorney violated his duty to the entire class of clients. Adorno is distinguishable. Adorno involved one type of claim related to an improper assessment of property taxes resulting in an easily identifiable class. Mr. Adorno was hired as class action counsel. His fee contract indicated it was a class action. Mr. Adorno repeatedly told the judge it was a class action. The Court treated it as a class action. The representative clients and opposing party knew it was a class action. There was a pamphlet explaining that the named plaintiffs were only representative clients. Mr. Adorno settled the case

on behalf of the named representatives only and ignored obligations to a putative class who received nothing. While there was only one type of claim, some recovered, but many did not.

Not only did the present matter not involve a class action, class actions cannot be brought in bad faith cases. Florida Statutes, § 624.155(6), states it "shall not be construed to authorize a class action against an issuer." Even Mr. Stewart acknowledged a class action was not permitted. RE. 184, p. 3.

In contrast to the single cause of action for the entire putative class in Adorno, here there were two separate identifiable types of actions: (1) the Goldcoast litigation in which the clients signed fee contracts to pursue bad faith and PIP claims against Progressive; and (2) the claims of other Kane & Kane medical provider clients who only signed fee agreements authorizing the pursuit of PIP claims and who did not sign any type of representation agreement with the bad faith lawyers.

The two types of actions could not be blended. The Goldcoast plaintiffs objected to increasing the number of plaintiffs and diluting their bad faith claims. T. 1469; RE. 144. The Kanes' PIP cases were separate from Goldcoast. Mr. Stewart had rejected the few bad faith contracts submitted by Kane & Kane PIP clients for potential inclusion in the suit. The Kanes' PIP clients recovered all their unreimbursed medical expenses, plus interest, and were informed they were

waiving any other claim, including specific reference to potential bad faith claims. RE. 159. No Kane & Kane client contended that they were not adequately informed or that they subsequently wished they had pursued bad faith claims. Consequently, the Referee's reliance upon Adorno is misplaced.

Despite varying degrees of participation, the individual attorneys have, for the most part, been referred to as "PIP lawyers." Judge Crow referred to "PIP lawyers" in evaluating the civil claims under a "joint venture theory." The Bar's complaint against Charles Kane similarly referred to "PIP lawyers" without differentiation for each attorney's action. The Bar adopted Larry Stewart's argument that any of the PIP lawyers could be sanctioned "even if entirely innocent himself and even if he has no knowledge that the acts were occurring." RE. 19, p. 3. No disciplinary case supports this assertion.

Instead, in assessing discipline, the actor's culpability is considered. Florida Bar v. Tauler, 775 So. 2d 944, 949 (Fla. 2000) (while it did not "countenance" the responding attorney's actions, "proportionality require[d] that Tauler be held less culpable" than his counterparts); see also Florida Bar v. St. Louis, 967 So. 2d 108, 111 (Fla. 2007) (varying levels of participation by the law partners required different sanctions).

The Kanes are less culpable than the attorneys who: (1) were intimately involved in Goldcoast; and (2) had PIP clients who were plaintiffs in Goldcoast.

The Kanes had minimal involvement as compared to Mr. Fleischer and Mr. Marks, whose firm was the architect of the bad faith litigation, as well as the independent settlement negotiations with Progressive and the exclusion of the bad faith attorneys. Similarly, Watson & Lentner was actively involved in the bad faith litigation and attended the Goldcoast mediation. Marks & Fleischer and Watson & Lentner interacted with the Goldcoast clients, ultimately took over the bad faith litigation after discharging the bad faith attorneys, and persuaded the Goldcoast clients to accept the settlement.

Although the Kanes had the least involvement, they received the most severe recommended sanctions. Darin Lentner received a recommended two-year suspension; the Bar agreed to a four-month suspension for Amir Fleischer; and Gary Marks' negotiated ninety-one day suspension was approved by this Court.

The Bar mitigated Mr. Marks and Mr. Fleischer's sanctions because they were the "only attorneys who set aside" attorneys' fees for settlement with the bad faith lawyers. F. RR., p. 14-15. This mitigation is undermined by Mr. Fleischer and Mr. Marks' acceptance of the Goldcoast funds in the first place. In contrast, as Mr. Hearon explained, the Kanes "disavowed any interest" in the funds. ST. 44. Although Mr. Fleisher and Mr. Marks' sanctions were also mitigated by their agreement to testify in the future, Charles Kane, in particular, could not offer

testimony against co-respondents since he was not privy to the communications with Progressive or bad faith counsel.

The Referee also relies on Florida Bar v. St. Louis, 967 So. 2d 108 (Fla. 2007), and Florida Bar v. Rodriguez, 959 So. 2d 150 (Fla. 2007). However, Charles Kane's participation is more analogous to the conduct of the attorneys in Florida Bar v. Ferraro, SC02-1549, and Florida Bar v. Friedman, SC02-2430, who were two of the attorneys who had more limited involvement in the Benlate litigation addressed in St. Louis and Rodriguez. Although Attorneys Ferraro and Friedman resolved their cases through plea deals and, therefore, do not have published opinions discussing the facts, their conduct is described in St. Louis and the consent agreement in Friedman.[12] In imposing sanctions on attorneys in St. Louis, Rodriguez, Ferraro, and Friedman, the Court noted that "[b]ased on the partners' separate acts of misconduct, they received different sanctions." St. Louis at 111.

Ms. Ferraro was publicly reprimanded because she accepted the firm's fee in the Benlate litigation, which resulted, in part, from her partners' agreements to become attorney of record for an opposing party at the same time her partners'

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[12] The Standards for Imposing Lawyer Sanctions were created, in part, to meet the goal of imposing consistent sanctions for similar misconduct. The standards are utilized in determining "acceptable pleas" between the Bar and respondents. Stds. Imposing Law. Sancs. (Preface). As such, the consent judgments may assist in imposing consistent discipline.

represented several firm clients against that same opposing party. In order for her firm to receive a fee of $6,445,000, her partners had to convince the firm's clients to accept the settlement agreement offered by the opposing party, who was also the firm's new client. Her partners met with the firm's clients to persuade them to accept the settlement. See St. Louis at 111 (discussing Ferraro).

In Friedman, the Court similarly evaluated the attorney's more limited role when imposing a ninety-day suspension. Mr. Friedman knew about the engagement agreement with opposing counsel, although he did not execute it. Mr. Friedman participated in a partnership meeting discussing the proposed engagement agreement and did not object or take any remedial measure to prevent its acceptance by the firm. See Amended Report of Referee Accepting Consent Judgment, hereinafter "Amended ROR," pp. 4-6. In addition, he did not inform the clients about the side agreement with the opposing party. Amended ROR, p. 8. The firm received the $6.445 million dollar secret side agreement from the opposing party and Mr. Friedman received his approximate 24 percent share. See Amended ROR, p. 9. The Court found he "partook in the financial benefits of the unethical agreement" by receiving $910,000 in fees as his portion and "acquiesced in the firm lying to the clients." St. Louis at 111 (discussing Florida Bar v. Friedman). Mr. Friedman violated Rules 4-1.4(b), 4-1.5(a), 4-1.7(b), 4-1.8(a), former 4-1.15, 4-5.1(c)(2), and 4-5.6.

Unlike Ferraro and Friedman, who received fees from their firm as a result of the payment from DuPont, the Kanes did not receive any of the Goldcoast settlement. Like Ferraro and Friedman, the Kanes did not discuss settlement of the Goldcoast matter with Progressive, nor did they engage in any settlement discussions with Goldcoast clients. While Charles Kane was present at the settlement meeting with Progressive, he left before the agreement was finalized and did not sign the MOU. T. 1220-21.

Moreover, Charles Kane took remedial steps to protect the Goldcoast plaintiffs' interests. He drafted a letter advising them of the conflict and their right to speak directly with the bad faith attorneys. He also advised the other PIP attorneys to seek counsel about allocating settlement funds for the Goldcoast bad faith claims which resulted in the Amended Memorandum of Understanding. The Kanes reduced the amount of their PIP settlement for the sake of the AMOU, even though the Kanes received none of the Goldcoast funds. In effect, Charles Kane was responsible for the recovery by the Goldcoast plaintiffs and the contingency fees paid to the bad faith lawyers and the other two PIP firms.

The Bar cites Florida Bar v. Kaufman, 684 So. 2d 806 (Fla. 1996), to support its argument that the Referee's recommended sanction should be increased to disbarment. I.B., p. 26. The Bar argued that Kaufman is analogous to findings against Mr. Kane because Mr. Kaufman "testified falsely about his assets" and

"also transferred and dissipated his assets" in order to "avoid paying [a] judgment." I.B., p. 26. However, the Bar provides a sanitized recitation of the findings against Mr. Kaufman.

In addition to the findings that Mr. Kaufman "hid his assets, lied about his assets and obstructed efforts to collect the judgment against him," he engaged in "blatant and bizarre behavior" in the disciplinary case. Kaufman at 809. Mr. Kaufman failed to respond to the Bar's complaint, requests for admissions or discovery, and "subjected [the Referee] to numerous confusing and almost unintelligible pleadings," including claiming that he did not "have 'omnipotent control' over witnesses" or that a final hearing could not be held because he "would be 'another helpless Flu victim for a couple of months.'" Id. at 808-09. Mr. Kaufman's behavior prompted the Referee to require a psychiatric evaluation to determine Mr. Kaufman's competency to proceed. Id. at 809. Mr. Kaufman also had a disciplinary history including a private reprimand in 1967, a two-year probation in 1977, and a public reprimand in 1992. Id. at 808.

While the Bar appears to analogize Charles Kane's conduct to Mr. Kaufman's because Mr. Kane filed a bankruptcy petition following the entry of Judge Crow's judgment, the Bankruptcy Court specifically rejected the contention that Mr. Kane had any intent to "hinder, delay or defraud his creditors." RE. 122, p. 46. The Bankruptcy Court's criticism of the PIP lawyers' conduct, as described

in Judge Crow's findings, is not additional misconduct and should not aggravate Charles Kane's sanction. Moreover, Mr. Kane has not been previously disciplined in his nearly fifty years of practice.

After considering caselaw, especially Ferraro and Friedman, which address the culpability of partners with more minimal participation than the misconduct described in St. Louis and Rodriguez, the Referee's recommended sanction should not be accepted.

B. The following aggravating factors should be rejected.

The imposition of an aggravating factor is a finding of a fact requiring record support. Florida Bar v. Arcia, 848 So. 2d 296 (Fla. 2003). The following aggravating factors should be rejected.

*1. 9.22(c) – Pattern of misconduct.*

Charles Kane's misconduct was aberrational in his otherwise pristine 49-year membership in The Florida Bar. The misconduct, which occurred from May to June 2004, pertained to a "single continuing series of closely related events in a short period of time" and therefore, does not constitute a "pattern of misconduct." Florida Bar v. Ticktin, 14 So. 3d 928, 937 (Fla. 2009).

There is no record support for the Referee's finding that he sent "deceitful letters" to the clients.[13] There is no evidence that Charles Kane modified time

[13] See supra at 41-42.

records.[14] The Bankruptcy judge found that Charles Kane did not possess the intent to "hinder, delay or defraud" his judgment creditor.[15] The Bankruptcy judge's conclusory findings regarding the defendants' credibility does not support a pattern of misconduct.[16] Consequently, there is no pattern of misconduct and this aggravator should be rejected.

*2. 9.22(f) – False statements during disciplinary process.*

The Referee states that Charles Kane was "not truthful" but does not cite any statement or even the subject matter of the statement which he found to be untruthful. RR., pp. 28-29. Contra Florida Bar v. Arango, 720 So. 2d 248 (Fla. 1998) (9.22(f) supported by Referee's citation to the submission of false evidence and giving differing explanations for conduct); Florida Bar v. Fortunato, 788 So. 2d 201, 203 (Fla. 2001) (9.22(f) supported by Referee's finding that the respondent had given "verifiably false, confusing and deliberately misleading testimony" regarding her failure to respond to a court order). The Referee's conclusory finding does not have any record support and should be rejected.

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14 See supra at 45-46.
15 See supra at 46-48.
16 See supra at 48.

### 3. *9.22(g) – Refusal to acknowledge wrongful nature of misconduct.*

Charles Kane has acknowledged throughout these proceedings that the bad faith attorneys should not have been excluded from settlement with Progressive. However, he has refuted the Bar's attempt to prosecute the "PIP lawyers" without differentiation between each respondent's culpability. Mr. Kane has disputed the Bar's argument that any of the PIP lawyers is responsible for the acts of the other PIP lawyers even if he was "entirely innocent himself and even if he has no knowledge that the acts were occurring." RE. 19, p. 3. Mr. Kane appropriately disputed the factual contentions that he: (1) was actively involved in the Goldcoast litigation; (2) communicated with the bad faith attorneys; (3) communicated with the Goldcoast plaintiffs; (4) took over the Goldcoast litigation; (5) received any Goldcoast settlement funds; (6) modified time records; (7) made misrepresentations in his draft of the Notice of Disagreement; or (8) attempted to "hinder or defraud" his creditors by filing bankruptcy.

Disputing factual allegations does not support a Rule 9.22(g) aggravating factor. Florida Bar v. Germain, 957 So. 2d 613, 621 (Fla. 2007). It is "improper for a referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct or 'lack of remorse' presumed from such refusal." Florida Bar v. Karten, 829 So. 2d 838, 889 (Fla. 2002) (quoting Florida Bar v. Lipman, 497 So. 2d 1165, 1168 (Fla. 1986)).

The Referee admonished Respondents for appealing Judge Crow and Judge Kimball's Orders, remarking that they would have appealed to the "World Court" if one existed. ST. 263. I.B., p. 29. The Referee's admonition is premised on the Kanes' decision to pursue their appellate remedies. However, sanctions should not be aggravated for pursuing appellate remedies and exercising a constitutional right to access the courts. Fla. Stat. Const. Art. I § 21. Moreover, the appellate issue before the United States Supreme Court was distinct from the argument presented below. The Eleventh Circuit recognized a conflict between circuits on a point of bankruptcy law and certiorari was based on a conflict between circuits.

*4. 9.22(j) – Indifference to making restitution.*

The Referee found that the Charles Kane "actively sought to prevent the bad faith attorneys from being able to collect on the civil judgment." RR., p. 29. However, the Bankruptcy Court found that the evidence did not support the contention that the Kanes "had a specific intent to hinder, delay or defraud creditors" by filing for bankruptcy. RE. 122, p. 46. Through the bankruptcy proceedings, the Kanes have liquidated their assets and $844,915.00 was approved for distribution to the bad faith attorneys. ST. 34.

C. The Bar incorrectly relies on Standard for Imposing Lawyer Sanctions 5.11, which is inapplicable to the proceedings. Standards 4.32 and 4.33 support a non-rehabilitative suspension.

In its Initial Brief, the Bar relies primarily on Standard for Imposing Lawyer Sanctions 5.11 to support disbarment. I.B., p. 26. However, Standard 5.1 applies to cases "involving the commission of a criminal act," which is not at issue here. Instead, Standard 4.3, "Failure to Avoid Conflicts of Interest," is most applicable to these circumstances. Standards 4.32 and 4.33 provide helpful guidance. Standard 4.33 states, "Public Reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interest, or whether the representation will adversely affect another client, and causes injury or potential injury to a client." Standard 4.32 indicates, "Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client."

Charles Kane has conceded that resolving the Kane & Kane PIP clients' claims at the same time as Goldcoast created a conflict even though he did not participate in the Goldcoast settlement. In addition, Charles Kane testified that the indemnification clause in the MOU created a potential conflict of interest. Charles Kane left the settlement meeting before the MOU was drafted and did not sign the MOU.

There is no evidence of client injury or even a potential injury. No Goldcoast client testified against the Kanes. The Kane & Kane PIP clients refuted any claim of injury. To the contrary, they testified that they were fully satisfied with their recovery and had never hired the Kanes to pursue bad faith. While the Referee found that "nothing prevented" the Kanes from providing additional compensation to their PIP clients that was not required by their fee agreements, the Kanes were under no duty to do so. Moreover, Charles Kane was instrumental in ensuring the Goldcoast clients were advised of the conflict with the bad faith attorneys. A non-rehabilitative suspension is appropriate for conduct that falls between a public reprimand and suspension.

D. If reinstatement is required, satisfaction of the trial court judgment is not an appropriate condition.

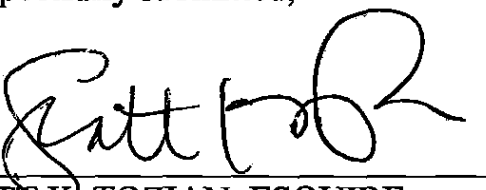
This Court has stressed that the disciplinary system should not be a substitute for civil proceedings. Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989). Moreover, the Court has explained that the "Bar should not be used as a collection agency." Florida Bar v. Nesmith, 642 So. 2d 1357, 1358 (Fla. 1994). This is especially true given Mr. Stewart's persistent and improper participation and direction of the Bar's prosecution to pursue his own interests. Not only did Mr. Stewart repeatedly intervene in these proceedings, his influence resulted in significant misconduct by the Bar. Mr. Stewart has adequate remedies to pursue collection of the judgment. Assisting Mr. Stewart to collect his private judgment

not only condones, but rewards his intervention and manipulation of these proceedings.

## CONCLUSION

Cross-Petitioner/Respondent Charles Jay Kane respectfully requests this Honorable Court to dismiss the complaint against Charles Kane due to the substantial misconduct of the Bar, the complainant, and the Bar's expert. In the alternative, Cross-Petitioner/Respondent requests this Court to reject the Referee's recommended sanction of a three-year suspension and the Bar's request for disbarment and satisfaction of the civil judgment as a condition of reinstatement, and enter an order imposing a non-rehabilitative suspension.

Respectfully submitted,



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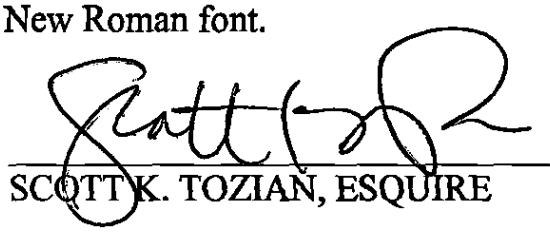
## CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.



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## CERTIFICATE OF MAILING

I HEREBY CERTIFY that the original of the foregoing Cross-Petitioner/Respondent's Answer and Cross-Initial Brief has been filed via eportal; and furnished by email to Bar Counsel, Ghenete Elaine Wright Muir, Esquire, (gwrightmuir@flabar.org) and Alan Anthony Pascal, Esquire, (apascal@flabar.org), The Florida Bar; Special Counsel, David B. Rothman, Esquire, (dbr@rothmanlawyers.com) and Jeanne T. Melendez, Esquire, (jtm@rothmanlawyers.com); and Adria Quintela, Esquire, Staff Counsel (aquintel@flabar.org), this 10th day of September, 2015.

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