IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HARLEY NATHAN KANE,

Petitioner/Respondent.
_____/

Supreme Court Case No. SC13-389

TFB File No. 2008-51,562 (17B)

PETITIONER/RESPONDENT'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

RE.	=	Record exhibit from final hearing.
K. Exh.	=	Respondent Harley N. 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 Harley N. Kane's Motion to Dismiss, dated August 4, 2014.
R. M.S.J.	=	Respondent Harley N. Kane's Motion for Summary Judgment, dated September 19, 2013.
RR.	=	Report of Referee, re: Harley N Kane, Case No. SC13-389.
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.

STATEMENT OF THE CASE AND FACTS

Harley Nathan Kane, an attorney admitted in 1993 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 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.[5] In just the initial stages between September and October 2013, there

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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. 22, 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.

were 116 emails exchanged between the Bar and Mr. Stewart. RE. K. Exh. 61.

Respondent discovered serious misconduct only 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 the 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. 111, p. 3. The Bar attempted to correct the misconduct by voluntarily striking Mr. Stewart and the expert as

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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, contemporaneous with the Bar's Response to Respondent's Motion to Dismiss. RE. K. Exh. 61.

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 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:

> 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 substantial 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 one hundred exhibits, to the expert on October 2, 2013. RE. 204, Exh. 5. The expert's time records only reflected one preliminary meeting with Bar counsel where he did not review any documents. R. M.D., Cacciatore Depo., pp. 22-23; R. M.D., Exh. B. 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 Mr. Stewart and/or the Bar. At the expert's deposition, he could not recognize an exhibit attached to his own affidavit and admitted he had not reviewed the trial exhibits and client communications, as claimed in his affidavit. R. M.D., Cacciatore Depo., p. 87, 89, 97, 124. He initially testified that, other than

discussions with Bar Counsel, he drafted the affidavit on his own. Id. at 82-88. 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." Id. at 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.

When deposed, Mr. Stewart testified 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, but did not "remember whether [he] saw a draft in between." R. M.D., Stewart Depo., pp. 26-27. The Bar also failed to correct this testimony or Mr. Stewart's additional false testimony that he had not had "consistent communication" with the Bar. R. M.D., Stewart Depo., pp. 11-12.

The Bar submitted the untruthful affidavit to the Referee and the Referee relied on same in his Order denying the Motion for Summary Judgment. RE. 110.

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. 121. 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 sent from Mr. Stewart to the Bar's President and President-elect. RE. 227; MIT. 26, 43-45. Mr. Stewart's Exhibit 9 (RE. 227) 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 Bar failed to correct the testimony or offer the original exhibit.

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 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 Harley Kane even though he had limited participation 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.

Harley Kane and his father, Charles 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 PIP statute's 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. Harley Kane had a reputation with Broward County judges as being "among the best PIP lawyers [they] saw on a regular basis." ST. 105.

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 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. T. 976; RE. 128, 202.

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 Mr. Fleischer, Gary Marks, Ms. Watson and Darin Lentner 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. 187. Charles Kane did not communicate with anyone regarding Larry Stewart's involvement. T. 336.

While Larry Stewart entered his appearance, plaintiffs were added to the bad faith litigation, for a total of 37 plaintiffs. T. 85-86; RE. 128. 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. 138.

The Kanes signed the Goldcoast contracts intending to add some Kane & Kane clients to the litigation. While Kane & Kane filed some civil remedy notices on behalf of its clients, only 51 of Kane & Kane's approximately 1,000 PIP claims were "perfected" for purposes of potentially alleging bad faith. RE. 138.

However, Larry Stewart rejected the three to five Kane & Kane client contracts proposed for inclusion in Goldcoast. T. 683-84; RE. 142.

Harley Kane rarely communicated with the bad faith lawyers. William Hearon, Esquire, who handled the bad faith discovery, never received paperwork from Kane & Kane. 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. Todd Stewart testified that the majority of Mr. Stewart's communications were with Ms. Watson and Mr. Fleischer. T. 134.

During the pendency of the Goldcoast litigation, Kane & Kane represented 230 providers in PIP claims. T. 991; RE. 138. These clients did not hire Kane & Kane to pursue bad faith and did not have retention agreements with the bad faith attorneys. T. 697, 793, 991. 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 won a disqualification hearing, which they and Progressive had agreed 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. 191. The Kanes continued to settle PIP claims and set

hearings to determine attorneys' fees. T. 1138, 1139.

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

> 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. 137. 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. 130, 139; T. 249-53, 260-67, 295-98, 301. In return, Larry Stewart offered to attempt to settle Kane & Kane's PIP clients' claims at the Goldcoast mediation. T. 1001, 1080.

On April 13, 2004, Charles Kane signed a letter drafted by Mr. Stewart permitting Mr. Stewart to try to resolve the Kane & Kane PIP claims at mediation. RE. 153; T. 386-90, 928-34, 1005, 1169-70. He gave Larry Stewart a $6.5 million 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. 154, p. 4; T. 1080. According to Mr. Stewart's figures, Kane & Kane's settlement value for the 1,000 pending PIP claims was $10,000,000. Mr. Lentner, Mr. Hearon, and Larry Stewart attended the mediation held in April 2004, with representative 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. They did not resolve the claims. RE. 155; T. 411-13. After hearing Larry Stewart reference hundreds of other potential bad faith plaintiffs, Doctors Fishman and Stashak complained that their claims were being diluted. T. 937, 1431-34, 1469; RE. 156; F. RR., p. 6.

On April 20, 2004, Larry Stewart emailed the PIP lawyers, excluding Charles Kane, reporting a $3.5 million mediation offer and said "all bets were off." T. 936; RE. 155. He did not specify if the offer was for Goldcoast, all PIP claims and unfiled bad faith claims, or some other combination.

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' 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 Progressive wanted to discuss the terms that weekend and that Progressive did not want Larry Stewart to be involved. T. 978. 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 a discovery violation. T. 429-435; RE. 157-162. 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 for the successful defense of 173 of the 600 disqualification motions and the hearing to consider the Kanes' $1 million fee request 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 his partner 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 no money was being offered 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, 1210-1213, 1215-1218, 1350-51, 1355; RE. 163. Charles Kane left the settlement meeting before the MOU was completed. T. 1220-21.

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. 1029-30, 1228-30. 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 recovery 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 allocated $1.75 million to Goldcoast bad faith claims. T. 1763-64. Each law firm's settlement figure was revised and Kane & Kane's settlement was reduced by $250,000. T. 1028, 1054.

An Amended Memorandum of Understanding (AMOU) was executed, becoming effective when accepted by 100% of the Goldcoast plaintiffs and 90% of the PIP clients. RE. 169; T. 1227-28. Progressive released any right to pursue a clawback suit 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. 169. The Kanes conceded 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. Charles Kane advised the other two firms to send a "Notice of Disagreement" informing the Goldcoast plaintiffs of the conflict between counsel. T. 1502. Charles Kane drafted the Notice, but did not sign the letter or otherwise communicate with the Goldcoast plaintiffs. T. 1045, 1243-44, 1245; RE. 167. The Kanes 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. 171. The letter attached a list of the settled claims. T. 1340. The letter did not reference the Goldcoast litigation or attorney's fees. T. 993-94, 1344-45. No closing statements were provided, but the

clients were able to compare their recovery with their unreimbursed medical bills, plus statutory interest. T. 983, 995.

Even after being contacted during the 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. Doctors Alan Schaff and Michael Rosenberg testified they had only hired Kane & Kane to file PIP claims and were satisfied with their recovery. T. 1987-93, 1994-99.

Kane & Kane received $5.25 million. T. 988. After deducting $433,202 in costs and paying the PIP clients $672,742 for 100% of their PIP benefits plus interest, Kane & Kane received $4,144,055 in attorneys' fees. RE. 244.

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. 172. 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. 173, 175.

Shortly after they were discharged, the bad faith attorneys sued the Kanes and the other PIP attorneys. RE. 126. Mr. Marks and Mr. Fleischer settled prior to trial for $822,901.47. F. RR., p. 15. Despite their claim that clients were harmed by the nature of the settlement, the bad faith attorneys did not contribute any of this

money to the clients. 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 to reconstruct any time not kept contemporaneously. 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, 1682-84. Another Kane & Kane associate, Mischele Muir, confirmed they reconstructed time in files with no contemporaneous time records and that Harley Kane, as supervising attorney, would change some of the time. T. 1666. The Kanes produced the time records to plaintiffs but did not offer them at trial as Harley Kane conceded some entries were excessive. RE. 126, p. 12; T. 1059-61.

Judge Crow awarded $2 million of the Kanes' legal fees to the bad faith attorneys. RE. 126, 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. 126. However, for purposes of discipline, 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. 126, p. 2 (*emphasis added*).

After the judgment, Kanes were advised to file a Chapter 11 petition to avoid liquidation and to pay debts over time. T. 560-61, 585-86. The Chapter 11 was dismissed by Judge Kimball. The Kanes subsequently filed a Chapter 7 petition, also heard by Judge Kimball. Judge Kimball clarified in the Chapter 7 proceedings that the Chapter 11 dismissal was not based on any intent by the Kanes to "hinder, delay or defraud creditors." RE. 134, p. 45; T. 626.

When the Chapter 11 claims were dismissed, the Kanes sought a stay to allow them to file Chapter 7 petitions. The Court entered an oral order prohibiting distributions to the defendants and only authorized payments for "goods and services delivered or rendered to it in the ordinary course of business." RE. 134, p. 19. Harley Kane was not present during the court's oral pronouncement. RE. 181, p. 3. A few days after the pronouncement, Harley Kane caused his firm to pay his real estate taxes. T. 597, 599-600. After receiving the written order, he attempted to reverse the transaction. T. 873. Harley Kane explained to Judge Kimball that "at the time he did not understand that difference between the firm and himself personally," because the firm consistently paid his personal taxes as a part of its ordinary course of business. RE. 134, p. 20. Judge Kimball found Harley Kane's explanation was "plainly fabricated." RE. 134, p. 20. However, in subsequent

proceedings, Judge Kimball found that the firm had historically paid the partners' personal taxes in the firm's ordinary course of business. T. 2009-11.

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. 134, p. 46.

In evaluating whether Judge Crow's judgment was excepted from discharge, the Bankruptcy Court gave preclusive effect to Judge Crow's factual findings pursuant to collateral estoppel. RE. 134, 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. 134, p. 61. Harley Kane's violation of the order during the stay formed an additional exception to his discharge. RE. 134, p. 51.

At the sanctions hearing, Mr. Hearon testified that the bad faith attorneys "would be receiving $844,915" from the Kanes 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

Judge Crow made substantial findings, relying on the credibility of Larry Stewart, regarding the conduct of the "PIP lawyers." Judge Crow did not differentiate between each attorney's varying degree of participation. Mr. Kane minimally participated in Goldcoast, rarely communicated with the bad faith attorneys, never communicated with the plaintiffs and disavowed any interest in the settlement funds. His conduct is in sharp contrast to the other PIP firms, who actively pursued the bad faith litigation, orchestrated the settlement, communicated with plaintiffs, handled the recovery and took over Goldcoast from Mr. Stewart. Yet, Harley Kane received the harshest recommended sanction.

The Kanes were precluded by collateral estoppel from contesting Judge Crow's finding in their bankruptcy proceedings. Judge Kimball's scathing

criticism of the "PIP lawyers'" conduct, as described by Judge Crow, should not aggravate Harley Kane's sanction, particularly when the Bankruptcy Court found the Kanes did not intend to hinder or defraud a creditor by filing bankruptcy. Mr. Kane's violation of the Bankruptcy Court's oral pronouncement was negligent and mitigated by the same court's subsequent findings.

Mr. Stewart doggedly directed the ethics prosecution by drafting argument, which the Bar adopted, controlling discovery, demanding disbarment and disgorgement, and urging 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. 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. Motion to Dismiss.

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 a seven-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." R. M.D., Cacciatore Depo., 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. 204, 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 which were adopted verbatim. RE. K. Exh. 61, B.S. 62, 146; RE. 22. 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. 187-190. 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. 121. 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" 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 Rule 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 in the Goldcoast

litigation, they were minimally involved. T. 134, 662, 685. The Kane & Kane PIP clients were not plaintiffs in the Goldcoast litigation. RE. 138. 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. 176; 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 May 2004 global settlement, Kane & Kane resolved 273 individual PIP claims against Progressive and had pending attorney fee claims, with approximately 700 additional PIP claims pending. T. 1124, 1127.

Second, the Kane & Kane PIP clients' recovery was not compromised by resolving all claims at one time. All clients received 100% 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 affect 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 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.

The Referee found Harley 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 Harley Kane should be disciplined for distributing recovery and fees consistent with his fee agreement with his clients. Rule 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]

[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.

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 contended 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 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. 1987-99.

The Bar did not charge and the Referee did not find that the Kanes received an excessive fee. According to Mr. Stewart's PIP fee analysis at the mediation, Kane & Kane's fee awards could have totaled close to $10 million, if litigated separately. RE. 154, p. 4; T. 1080. Nonetheless, they assert the Kanes should have increased the clients' recovery by reducing the firm's $4.25 million fee because the Kanes' fees were disproportionate to the client's recovery. 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 denied 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) ($253,500 fee for $600

bill reasonable; insurance company decided to "stand and fight."). Attorney's fees should not be redistributed to increase the recovery the client had agreed to receive in the fee agreement.

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

Kane & Kane did not participate in the Goldcoast settlement 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 Harley 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 attorney's 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 attorney's 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 attorney's fee is statutory and set by the court or through a settlement agreement with the insurance company. The client 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. Harley Kane did not violate Rule 4-1.4(b) because he did not participate in Goldcoast settlement communications with clients and had no obligation to advise Kane & Kane PIP clients of the status of bad faith litigation in which they were not plaintiffs and had not otherwise hired the firm to pursue a bad faith claim.

1. Goldcoast clients.

Harley Kane did not communicate with the Goldcoast plaintiffs. Rather, attorneys at Watson & Lentner and Marks & Fleischer communicated with the plaintiffs. In contrast to the other two PIP firms, Kane & Kane did not enter an appearance in Goldcoast or otherwise take over the Goldcoast litigation from the bad faith attorneys. Harley Kane did not receive any Goldcoast settlement funds and did not have any discussions with the plaintiffs regarding settlement.

2. Kane & Kane PIP clients.

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. The Referee 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. However, as found by Judge Crow, assessment of the bad faith value was "speculative." RE. 126, p. 20. Further, 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. The email did not clarify whether the offer was for Goldcoast, the universe of PIP claims, or another combination. RE. 155. This email did not state there was "more in the offing." RR., p. 21. Instead, the email stated, "all bets were off." RE. 155; T. 936.

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' nearly 1,000 PIP claims were arguably perfected and Larry Stewart had rejected those claims for inclusion in the bad faith litigation. RE. 138, 142; T. 683-84. There is no evidence of any value attributed to unfiled and perfected or unfiled and unperfected bad faith claims. Harley 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.

E. Rules 4-8.4(c) and 3-4.3(a).

1. Reconstruction of time records and review and revision of an associate's reconstructed time entries does not violate Rules 4-8.4(c) or 3-4.3.

Reconstructing time records is 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."). While it is not disputed that that Harley Kane "modified" reconstructed time estimates, there is no evidence what time was modified or, indeed, whether it was reduced or increased. Although Harley Kane acknowledged some of the entries were "excessive," there is no evidence that his modifications were the excessive entries. Moreover, the Kanes did not introduce these records in the civil trial because they were concerned that the time was excessive. 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.

2. *The bankruptcy judge's assessment of Judge Crow's findings regarding the "PIP attorneys'" conduct should not aggravate the sanction and Harley Kane's violation of Judge Kimball's order was negligent and mitigated by Judge Kimball's subsequent findings.*

The Referee found Harley 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 Harley Kane filed for bankruptcy with the intent to defraud his judgment creditors.[9] 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 an intent to defraud their creditors. RE. 134, p. 45.

When the Kanes filed the Chapter 7 petition, Judge Kimball directly

[9] 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.").

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. 134, p. 46.

Judge Kimball gave Judge Crow's findings preclusive effect required by collateral estoppel. RE. 134, 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. 134, pp. 61-62. The adopted factual findings did not differentiate between the actors but used the general term "PIP lawyers." RE. 134, pp. 33-39. While Judge Kimball scathingly disapproved of the PIP lawyers' conduct, his reaction to Judge Crow's findings is not an additional finding of misconduct against Mr. Kane.

While Judge Kimball found that Harley Kane violated his order prohibiting distribution during a stay unless the payments were made in the "ordinary course of business," there are several mitigating circumstances. First, Harley Kane made the transfer following the judge's oral pronouncement when he was not present and attempted to reverse the transaction when he received the written order. Second, Harley Kane explained he did not appreciate the distinction between debts paid by

the firm and himself when considering the "ordinary course of business." Third, while Judge Kimball initially found Harley Kane's explanation "plainly fabricated," in the subsequent partnership bankruptcy, Judge Kimball found that Kane & Kane made the partners' tax payments in the ordinary course of the firm's business. In pertinent part, the court founds as follows:

> The evidence as a whole does not give the Court the impression that Charles or Harley Kane caused the Debtor to make the Transfers with the intent to harm Stewart or any other existing or future creditor of the Debtor. While there was some animus toward Stewart, the greater weight of the evidence does not convince the Court that the Transfers, or indeed any payments made by the Debtor on behalf of the Kanes, were aimed at Stewart or any other creditor. The conclusion is consistent with the credible testimony of Charles and Harley Kane that they did not cause the Transfers with the intent to favor themselves over any creditor. **It is clear to the Court that the Kanes often caused the debtor to make payments to the IRS and to pay various other parties on their behalves. While the Kanes did not always cause the debtor to pay their personal income taxes, they often did so. Each of these payments was duly recorded in their individual capital accounts with the Debtor and reflected in the Debtor's tax returns. This practice was the Debtor's ordinary course of business for years prior to commencement of the Stewart Litigation, and continued during that litigation and through to the filing of the initial bankruptcy petition by the Debtor.**

K. Exh. 77, pp. 28-29 (*emphasis added*).

The Referee also cites to 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., pp. 15-16. Judge Kimball

did not specify which Defendant made any specific statement that he found to be false or untruthful. RE. 134, 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. Disbarment is not supported by existing caselaw.

By signing the Goldcoast contingency fee contracts, the Kanes acknowledged owing duties to those plaintiffs. 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, Harley Kane concedes he violated Rules 3-4.3(a) and 4-1.7(b).

Harley Kane's minimal involvement in Goldcoast and his remedial efforts should be considered. Kane & Kane was focused on its PIP clients who were not plaintiffs in Goldcoast. The Kanes did not interact with Goldcoast clients, enter an appearance in Goldcoast, or dismiss the action. They disavowed any interest in

Goldcoast settlement funds.

Harley Kane told Mr. Fleischer that Larry Stewart should not be discharged for cause and offered to fund $250,000 of Mr. Stewart's legal fees from the PIP fees the Kanes stood to collect. T. 1025, 1028. 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. Moreover, given Mr. Stewart's significant and consistent misconduct herein, coupled with Judge Crow's reliance on Mr. Stewart in reaching his decision, grave doubt is cast upon the validity of Judge Crow's order.

The facts do not support the "extreme sanction" of disbarment that is "designed to be imposed in cases where rehabilitation is highly improbable and the conduct is egregious." Florida Bar v. Mason, 826 So. 2d 985, 989 (Fla. 2002). The Referee does not cite to any disbarment case. He instead analogizes 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. While the Referee accepted the Bar's argument that the Kanes' PIP clients had become a part of the Goldcoast litigation, 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. 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.

The present matter did not involve a class action, and class actions cannot be brought in bad faith cases. Fla. Stat., § 624.155(6) (Insurance code, "shall not be construed to authorize a class action against an issuer."). Even Mr. Stewart acknowledged a class action was not permitted. RE. 196, 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 signed only fee agreements authorizing the pursuit of PIP claims.

The two types of actions could not be blended. The Goldcoast plaintiffs objected to adding plaintiffs and diluting their bad faith claims. T. 1469; RE. 156. The Kanes' PIP clients had no retention agreement with the bad faith lawyers. T. 697, 793. Mr. Stewart had rejected the few bad faith contracts submitted by Kane

& Kane PIP clients for potential inclusion in Goldcoast. T. 683-84; RE. 142. The Kanes' PIP clients recovered their full unpaid medical bills, with interest, and were informed they were waiving potential bad faith claims. RE. 171. No Kane & Kane client contended that they were not adequately informed or that they subsequently wished they had pursued bad faith claims. Consequently, reliance upon Adorno is misplaced.

Despite varying degrees of participation, the individual respondents have 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 Harley Kane similarly referred to "PIP lawyers" without differentiation for his actions. 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. 22, p. 3; RE. K. Exh. 61, B.S. 62, 146. 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 were intimately involved in Goldcoast, ultimately taking it over, had PIP clients who were plaintiffs in Goldcoast, and who had received Goldcoast settlement funds. The Kanes have 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. 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, Harley Kane's ability to testify is limited by his minimal interaction in Goldcoast.

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, Harley Kane's participation is more analogous to the conduct of the attorneys in Florida Bar v. Ferraro, SC02-1549 (Fla. February 20, 2003), and Florida Bar v. Friedman, SC02-2430 (Fla. September 20, 2006), 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.[10] 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.

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

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[10] 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.

attorney of record for an opposing party at the same time her partners represented several firm clients against that same opposing party. In order for her firm to receive a fee of $6.445 million, 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, pp. 4-6). In addition, he did not inform the clients about the side agreement with the opposing party. (Id. at 8). The firm received the $6.445 million secret side agreement from the opposing party and Mr. Friedman received his approximate 24% share. (Id. at 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 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. 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. Just as Ferraro and Friedman received less severe sanctions than the attorneys with more culpability and involvement, so too should Mr. Kane's sanction be less severe than the four-month suspension the Bar considered appropriate for Mr. Fleischer.

B. The following aggravating factors should be rejected.

1. 9.22(c) – Pattern of misconduct.

Harley Kane's misconduct was aberrational in his otherwise pristine 22-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 evidence that Harley Kane inappropriately modified time records.[11] The Bankruptcy judge found that Harley Kane did not possess the intent

[11] See supra at 34, E., 1.

to "hinder, delay or defraud" his judgment creditor.[12] The Bankruptcy judge's conclusory findings regarding the Defendants' credibility does not support a pattern of misconduct.[13] Harley Kane violated Judge Kimball's oral pronouncement because he believed the payment of his taxes was permitted as being within the firm's "ordinary course of business." This violation is mitigated by Judge Kimball's subsequent finding that the firm has, for years, paid the partners' tax obligations within the "ordinary course of business." 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 Harley Kane was "not truthful" but does not cite any statement or even the subject matter of the statement which he found to be untruthful. Contra Florida Bar v. Arango, 720 So. 2d 248 (Fla. 1998) (9.22(f) supported by 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 finding that the respondent had given "verifiably false, confusing and deliberately misleading testimony" regarding her failure to respond to a court order). The conclusory finding does not have any record support and should be rejected.

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12 See supra at 35-36.

13 See supra at 37-38.

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

Harley Kane acknowledged 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 differentiating between each respondent's culpability. Mr. Kane appropriately disputed the factual contentions that he: (1) was actively involved in Goldcoast; (2) communicated with Goldcoast plaintiffs; (3) took over Goldcoast; (4) received any Goldcoast settlement funds; (5) created excessive time records when modifying his associate's reconstruction; or (6) that he attempted to hinder or defraud his creditors by filing bankruptcy.

Disputing factual findings 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 883, 889 (Fla. 2002) (quoting Florida Bar v. Lipman, 497 So. 2d 1165, 1168 (Fla. 1986)).

The Referee admonished Respondents for filing appeals, remarking that they would have appealed to the "World Court" if one existed. ST. 263. 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.

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

The Referee found that the Harley Kane "actively sought to prevent the bad faith attorneys from being able to collect on the civil judgment." RR., p. 28. 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. 134, p. 46. Through the bankruptcy proceedings, the Kanes have liquidated their assets and $844,915 was approved for distribution to the bad faith attorneys. ST. 34.

C. The Standards for Imposing Lawyer Sanctions and caselaw support a non-rehabilitative suspension.

Standard for Imposing Lawyer Sanctions 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."

Harley 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. Nonetheless, 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. A non-rehabilitative suspension is appropriate for conduct that falls between a public reprimand and suspension.

Mr. Kane's violation of Judge Kimball's order during the stay does not aggravate the presumptive sanction to rehabilitative suspension or disbarment. Standard for Imposing Lawyer Sanctions 6.2 pertains to cases involving the "failure to obey any obligation under the rules of a tribunal." Standard 6.24 is the most applicable and explains, "admonishment is appropriate when a lawyer negligently fails to comply with a court order or rule and causes little or no injury to a party, or causes little or no actual or potential interference with a legal proceeding." Harley Kane's attempt to reverse the tax payment after receiving the written order, combined with Judge Kimball's subsequent finding that even before the Stewart litigation, Harley Kane paid his tax obligations through the firm as an "ordinary course of the business," supports the finding that it was a negligent, versus willful, violation of the court's pronouncement. A non-rehabilitative suspension is supported by caselaw, the mitigating factors (which the Bar does not contest) and the Standards for Imposing Lawyer Sanctions.

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

CONCLUSION

Petitioner/Respondent Harley Nathan Kane respectfully requests this Honorable Court to reject the Referee's recommended sanction of 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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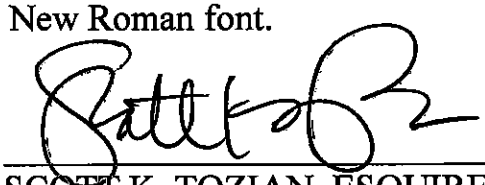
CERTIFICATION OF FONT SIZE AND STYLE

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 Petitioner/Respondent's 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,

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