IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HARLEY NATHAN KANE,

Respondent.

_____/

Supreme Court Case
No. SC13-389

The Florida Bar File
No. 2008-51,562(17B)

THE FLORIDA BAR'S ANSWER BRIEF

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

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

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

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

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PRELIMINARY STATEMENT

The Respondent, Harley Kane, is seeking review of a Report of Referee recommending disbarment.

Complainant will be referred to as The Florida Bar or as The Bar. Harley Kane, Petitioner/Respondent, will be referred to as Respondent.

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

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

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

STATEMENT OF THE CASE AND FACTS

In order to highlight and clarify the facts of these matters, the Bar submits this statement.

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

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

The Florida Bar filed its Complaint against Respondent, Harley Kane, on or about March 13, 2013, charging Respondent with violating a number of the Rules

Regulating The Florida Bar. The Florida Bar also filed Complaints against Charles Kane, Darin Lentner, Gary Marks and Amir Fleischer. Respondents Charles Kane and Darin Lentner's cases were consolidated for trial with Respondent.

Respondent's misconduct involved (1) his participation in a secret settlement with Progressive Insurance Company ("Progressive"), (2) his ethical misconduct related to the civil litigation against Progressive, and (3) his ethical misconduct during subsequent federal bankruptcy proceedings.

On or about June 17, 2013, County Judge Curtis L. Disque, was initially appointed as Referee. Due to scheduling conflicts, County Judge Disque requested that the Chief Judge reassign the case to a new Referee. On or about February 3, 2014, Senior Judge George Shahood was appointed as Referee.

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

On September 19, 2013, Respondent filed a Motion for Summary Judgment. The Florida Bar filed its Memorandum in Opposition to the Kane's Motion for Summary Judgment on October 7, 2013. Respondent filed his Reply on October 8, 2013. On October 22, 2013, Judge Disque entered an Order denying Respondent's Motion for Summary Judgment.

On April 11, 2014, Respondent filed a Motion to Dismiss for Failure to Timely Prosecute, and the Bar filed its Response on April 25, 2014. Judge Shahood entered an Order denying the Motion to Dismiss on July 31, 2014.

On July 1, 2014, The Florida Bar filed its Motion for Summary Judgment. The Respondent filed his Statement in Opposition on July 25, 2014. This Referee entered an Order denying The Florida Bar's Motion for Summary Judgment on August 8, 2014.

The guilt phase of the Final Hearing commenced on August 18, 2014 and continued on August 19-22, August 25-28 and October 14 and 16, 2014. The Referee heard the testimony of the Bar's witnesses: Todd Stewart, William Hearon, Harley Kane, Charles Kane and Darin Lentner. In addition, transcript excerpts of testimony of the following individuals were offered by the Bar and admitted into evidence: Joshua Smith, James Kirvin and Francis Anania.

The Referee also heard the testimony of Respondent's witnesses: Respondent, Charles Kane and the transcript excerpts of the testimony of the following individuals were also admitted into evidence: Irwin Gilbert, Alan Schaff, Michael Rosenberg and Sammy Cacciatore.

At the conclusion of the hearing, the Referee found that Respondent had violated Rules 3-4.3, 4-1.4(b), 4-1.5(f)(5), 4-1.7(b), 4-1.7(c), 4-1.8(g) and 4-8.4(c)

of The Rules Regulating The Florida Bar. The Referee found Respondent did not violate Rules 4-1.4(a), 4-1.7(a) and 5-1.1(f).

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

The Referee issued his Report of Referee on April 7, 2015. The trial transcript was filed with the Court on April 16, 2015.

In his report, the Referee recommended disbarment (RR 29). The Respondent has appealed this recommendation. However, the Referee's recommendation was entirely appropriate with factual findings of egregious ethical misconduct supported by clear and convincing evidence, discipline consistent with this Court's decisions, and the Florida Standards for Imposing Lawyer Sanctions.

The egregious ethical misconduct found by the Referee stems from Respondent's involvement in a secret settlement with Progressive. Beginning in approximately 2001, Respondent's firm (Kane & Kane) and two other personal injury protection (PIP) law firms began to pool their resources and jointly solicit healthcare providers as clients for the purpose of providing representation in PIP

claims against insurance companies (TFB Ex. 1) (RR 5) (TR 44). All three firms "assume[d] joint legal responsibility" to the clients (TFB Ex. 1(A)) (RR 6) (TR 37-38, 193-7).

The PIP law firms investigated and discovered that Progressive was systematically refusing to pay valid insurance claims to their clients (RR 6) (TR 48, 190). Respondent's law firm and the other two PIP law firms initiated bad faith claims for their clients by filing bad faith Civil Remedy Notices with the Florida Department of Insurance (RR 6) (TFB Ex. 10) (TR 52-55, 58-59, 69, 203-204). The PIP law firms needed assistance in filing these bad faith claims and brought in specialized counsel, Todd Stewart, and later Larry Stewart and William Hearon ("bad faith lawyers") to file and litigate these bad faith suits against Progressive (RR 6) (TR 44-52, 59-60, 74-75, 85, 189-190, 203, 214-215, 115-156). The PIP lawyers and the bad faith lawyers agreed on a contingency fee schedule as follows: the PIP lawyers would receive 100% of any fees collected from the underlying PIP benefit cases; from any bad faith recovery, the contingency fee would be 40%, with the bad faith lawyers receiving 60% and the PIP attorneys receiving 40% of the fees collected (TFB Ex. 1) (TR 207, 220-21).

A bad faith lawsuit against Progressive (the "Goldcoast" case) was filed naming 37 PIP clients as plaintiffs. Fishman & Stashak, M.D., P.A. d/b/a Goldcoast

Orthopedics et al., v. Progressive Bayside Insurance Company, et al., Case No. CA-01-11649 (TFB Ex. 2) (TR 85-86) (RR 6-7). The Kane & Kane law firm and Respondent executed an additional attorney fee contract with the bad faith lawyers agreeing to jointly represent each of the 37 clients in that litigation (TFB Ex. 11, 14) (RR 7) (TR 976, 1156, 1198, 1791-94).

The bad faith lawyers litigated the bad faith cases against Progressive for over two years. In the course of said litigation, the PIP lawyers provided the bad faith lawyers with a list of 441 healthcare provider clients to be used in settlement negotiations with Progressive. Progressive vigorously defended and refused to produce critical internal documents. However, through persistent litigation at the trial and appellate levels, the bad faith lawyers finally obtained key legal rulings compelling Progressive to produce internal records, that opened the door to settlement negotiations (TFB Ex. 16,17,18, 19, 26) (RR 7) (TR 309-317).

In early 2004, with the knowledge and consent of all of the PIP lawyers, including Respondent, the bad faith lawyers entered into settlement negotiations with Progressive. These negotiations included the universe of bad faith claims of all 441 clients, not just the 37 clients named in the Goldcoast case (TFB Ex. 12, 20) (RR 7) (TR 260-267, 320-323, 335-338). The Respondent emailed a list to Larry Stewart detailing the Kane & Kane PIP clients for inclusion in the discussions and

provided client information to enable those negotiations to take place (RR 7) (TFB Ex. 6,12) (RR 7) (TR 249-253, 260-267, 295-298, 301). Progressive indicated that it wanted to expand negotiations to include the PIP benefits of all the clients. The PIP attorneys, including Respondent, agreed and authorized the bad faith lawyers to negotiate both sets of claims at a mediation with Progressive in April 2004 (TFB Ex. 12, 20, 28, 29) (RR 7-8) (TR 324-329, 367-374, 377, 381, 386-390, 934). The Kanes met with Larry Stewart prior to the mediation and Respondent's father and law partner, Charles Kane, signed a new agreement on behalf of the Kane & Kane firm, agreeing to a modification of the fee division agreement to give the bad faith attorneys 75% of attorney fees on any bad faith recovery in the event they were able to negotiate a settlement of the PIP benefit claims (TFB Ex. 29) (RR 8) (TR 386-390, 928-934, 1005, 1169-70).

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

After mediation was unsuccessful, Progressive lost its last effort to prevent the production of its internal records in the bad faith litigation (TFB Ex. 33, 34, 35, 36, 37, 38) (TR 429-435). One week prior to the court-ordered compliance date,

unbeknownst to the bad faith lawyers, the PIP lawyers, including Respondent, went behind the backs of the bad faith lawyers and secretly engaged in negotiations with Progressive for a global settlement of their clients' claims (TFB Ex. 40) (RR 8) (TR 435-442, 450-452). Progressive offered aggregate, undifferentiated lump sums to each of the three PIP law firms, totaling $14.5 million, as settlement of all of their clients' claims, both PIP and bad faith claims as well as attorneys' fees (TFB Ex. 39). On Friday, May 14, 2004, the Respondent accepted the offer on behalf of Kane & Kane (RR 9) (TR 948-49, 973-975). On Sunday, May 16, 2004, all of the PIP attorneys including Respondent, excluded the bad faith lawyers and met with the Progressive attorneys to jointly draft a Memorandum of Understanding (hereinafter "MOU") (TFB Ex. 39) (RR 9) (TR 1003, 1010-1013, 1015, 1194-96, 1201, 1210-1213, 1215-1218, 1350-51, 1355). The MOU released all claims including the PIP and bad faith claims as well as all claims for attorneys' fees. The MOU, however, failed to specify how the undifferentiated proceeds of the settlement should be allocated (RR 9) (TR 452-53, 457-462, 1228, 1255) (RR 9) (TR 1013, 1211, 1219). The only requirement to trigger payment under the MOU was the delivery of the requisite number of client releases: 100% of the named Goldcoast case plaintiffs and 80% of the remaining PIP clients of all three PIP firms (TFB Ex. 39) (RR 9). As part of the MOU, the PIP law firms, including Respondent's firm, agreed to

"defend, indemnify and hold THE PROGRESSIVE ENTITIES harmless from all claims" of their own clients (TFB Ex. 39, p. 11) (RR 9). Respondent signed the MOU on behalf of Kane & Kane (RR 9) (TR 1222).

Several days later, Respondent and the other five PIP lawyers met with Larry Stewart and offered only $300,000.00 to compensate all three bad faith law firms (RR 10) (TR 440-443, 445, 1029-1030, 1228-1230, 1355). The PIP lawyers refused to disclose the terms of the settlement, stating only that the cases had been settled with nothing specifically allocated to the bad faith claims (RR 10) (TR 443-444, 1230-1231). Larry Stewart rejected their offer and informed the PIP lawyers that the settlement was improper because no specific amount was allocated to the bad faith claims (RR 10) (TR 462-64, 1230).

On June 16, 2004, the MOU was amended to specifically allocate $1.75 million of the settlement money to the bad faith claims of the now 36 remaining named plaintiffs in the Goldcoast case. This document, the Amendment to Memorandum of Understanding (AMOU) was signed by Respondent on behalf of Kane & Kane (TFB Ex. 48) (RR 10) (TR 1227-1228). As in the original MOU, no monies were specifically allocated in the AMOU to the bad faith claims of the nearly 400 remaining clients who were not named in the Goldcoast case. It was once again left to the PIP law firms to decide how much would be paid to the non-

Goldcoast case PIP clients and how much would be taken as attorneys' fees. The Respondent's firm and the other two PIP law firms determined that these clients would only be paid the amount of the PIP benefits owed to them by Progressive plus interest (RR 10) (TR 985-986, 988, 990-992, 1358). The remaining proceeds, after paying costs, would be taken as attorneys' fees. The non-Goldcoast case PIP clients did not receive any compensation for their bad faith claims, although they were required to release those claims (RR 10-11).

The Respondent directed lawyers employed by Kane & Kane to contact their clients to obtain releases in order to trigger payment under the AMOU (RR 11) (TR 1225). The clients were not informed of the conflicts of interests created by the MOU/AMOU, the total amount of the settlement, the amount of attorneys' fees the firm planned to take from the undifferentiated settlement sum, and the value of the clients' bad faith claims (RR 11) (TR 993-994, 1344-1345). Further, the clients were not provided with closing statements (RR 11) (TR 995).

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

Once the PIP firms received the settlement funds, the bad faith lawyers were discharged, a sanctions hearing against Progressive was cancelled, and a Notice of Voluntary Dismissal with Prejudice was filed, ending the Goldcoast litigation (TFB Ex. 54, 55, 56 and 57) (RR 12) (TR 533-535).

Shortly after being discharged, the bad faith lawyers filed suit against the Respondent, Charles Kane, Kane & Kane and the other PIP lawyers/firms for quantum meruit and/or unjust enrichment and fraud in the inducement (TFB Ex. 5) (RR 12).

In June 2004, soon after filing their case, the bad faith lawyers sought a temporary restraining order to freeze the attorneys' fees received by the Kanes and the other PIP lawyers in the secret settlement. The court denied the injunction finding that there was an adequate remedy at law. The counsel for the bad faith attorneys then sent a letter notifying counsel for the Kanes that the proceeds should be treated as disputed funds under Florida Bar Rule 5-1.1(f) of the Rules Regulating The Florida Bar (TFB Ex. 59) (RR 12) (TR 544-545). The Kanes were advised by their counsel that they were not required to treat the funds as disputed funds (RR 13-14) (TR 1961-65). Rather than hold the settlement monies in trust until the fee dispute was resolved, the funds were transferred from the Kane & Kane trust account to the firm's operating account and disbursed (RR 14) (TR 1269).

In 2005, under threat of withheld compensation, the Respondent and Charles Kane attempted to force their associates to fabricate time records for the purpose of the civil litigation following the secret settlement. The time records were also altered and inflated by the Kanes after they were turned in by the associates (TFB Ex. 63 (emails)) (RR 13); deposition testimony of Associate Brian Korte (TFB Ex. 85B) and trial testimony of Associate Michele Muir (TFB Ex. 85A). The inflated time sheets were produced to the plaintiffs in discovery. Harley Kane admitted during the civil trial that the time records produced in discovery were "excessive" (TFB Ex. 5, p. 12) (RR 13) (TR 1059-1061).

Following a two month bench trial in 2008, the court ruled in favor of the bad faith lawyers as to their quantum meruit/unjust enrichment claim (TFB Ex. 5, pp. 21-22) (RR 13) (TR 545). The trial court awarded $2 million of the Kane & Kane fees plus interest to the bad faith lawyers (TFB Ex. 5, pp. 20-22). The Kanes appealed the trial court's decision. On February 29, 2012, the Fourth District Court of Appeal affirmed the lower court's decision. Stewart, Tilghman, Fox, and Bianchi, P.A., et al. v. Kane & Kane et al., Case No. 502004 A006138MB AO (Fla. 15th Jud. Cir., Palm Beach County) aff'd, 85 So. 3d 1112 (4th DCA 2012), review den. 118 So. 3d 221 (Fla. 2013) (TFB Ex. 71) (RR 14).

The trial court found that the PIP firms "unfairly deprived the [bad faith attorneys] of a fee by ignoring multiple conflicts of interest, misrepresenting the terms of the settlement to the [bad faith attorneys], misrepresenting the terms of the settlement to the clients to obtain the releases to trigger payment, manipulating the allocation of the settlement to obtain most of it as attorneys' fees, and by discharging the [bad faith attorneys] for no reason." (RR 13-14) (TFB Ex. 5, p. 19).

In November 2008, after the Kanes lost their Motion for Rehearing and the Final Judgment was entered, awarding $2 million of the Kane & Kane fees plus interest to the bad faith lawyers, the Kanes filed for bankruptcy. The Respondent initially filed for Chapter 11 protection (RR 14) (TR 560-561, 585-586). The bankruptcy court ruled that the bankruptcy had been filed in bad faith and dismissed the case (TFB Ex. 73, 75) (TR 589-590, 594-95) (RR 14). Upon the dismissal of the Chapter 11 claims the Kanes sought a stay to allow them to file Chapter 7 bankruptcy petitions. The bankruptcy court granted the stay but in order to preserve the monies in the Kane & Kane firm's possession, the bankruptcy court ordered that there could not be any distributions made from the Kane & Kane law firm that were not for the ordinary expenses of the law firm (RR 15) (TFB Ex. 75) (TR 596-597). The Respondent disregarded and violated the bankruptcy court's order and paid his property taxes as well as the property taxes of a family member from the firm's

operating account (RR 15) (TR p. 597, 599-560). When questioned by the court, the Respondent stated that he did not understand the distinction between himself and the firm. The bankruptcy court described Harley Kane's testimony as "plainly fabricated." (RR 15) (TFB Ex. 72, p. 20). The bankruptcy court found Respondent's violation of the court's Order to be intentional and an attempt to hinder and delay the bad faith lawyers from collecting their judgment (RR 15) (TFB Ex. 72, p. 20) (TR p. 599-603).

The Kanes later filed voluntary Chapter 7 bankruptcy petitions seeking to discharge the debt owed to the bad faith lawyers (RR 15) (TR 604, 1056). After a six day trial, the bankruptcy court described Respondent's testimony as "unbelievable" and "untruthful." (RR 15) (TFB Ex. 72). The bankruptcy court described the testimony of both Respondent and Charles Kane as follows: "Given the choice between finding that the Defendants are naive or that their statements are false, in light of the Defendants' significant experience in complex litigation, the court concludes that their testimony was not truthful" (TFB Ex. 72, p. 11) (RR 15-16). The debt to the bad faith lawyers under the civil judgment was held not dischargeable because the Kanes acted, not merely to pad their own pockets but, with ill-will and specific intent to injure the bad faith attorneys (TFB Ex. 72, at p. 60) (RR 16). Respondent once again engaged in dishonest and deceitful conduct.

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

Based on the factual findings by the Referee and the severity of the misconduct by Respondent, the Referee's recommendation for disbarment is appropriate.

SUMMARY OF ARGUMENT

The Referee's recommendation was appropriate given Respondent's multiple acts of deceit and dishonesty in the PIP cases, his conduct in his dealings with the bad faith lawyers, his conduct in the subsequent civil litigation, and his filings in the bankruptcy court. The Respondent was driven by greed and completely disregarded his ethical obligations.

The Referee specifically found that Respondent directly participated in misleading his very own clients in the PIP benefit cases so that his clients would agree to the settlement and Progressive would release the settlement proceeds to the Respondent. The Referee further found that Respondent also withheld vital information from his clients regarding the settlement in order to further his own selfish interests.

The Referee additionally found that Respondent committed multiple deceptive and dishonest acts "contrary to honesty and justice" in connection with the secret settlement with Progressive. Additionally, by negotiating and signing the MOU and the AMOU, Respondent created multiple conflicts of interest.

The Referee also found that Respondent knowingly and intentionally directed his employees to manufacture "excessive" time records to be used in the civil litigation.

Furthermore, the Referee found that the Respondent provided "clearly fabricated" testimony during the bankruptcy proceedings in an attempt to have the bankruptcy court discharge his debt to the bad faith lawyers.

These findings of egregious misconduct, the case law, and the Standards for Imposing Lawyer Sanctions support disbarment. As such, the Referee's report should be approved.

ISSUES ON APPEAL

I

THE FLORIDA BAR APPROPRIATELY PROSECUTED THE CASE AGAINST RESPONDENT.

II

THE REFEREE'S FINDINGS THAT THE RULES REGULATING THE FLORIDA BAR WERE VIOLATED ARE CLEARLY SUPPORTED BY THE RECORD, ARE NOT CLEARLY ERRONEOUS, AND SHOULD THEREFORE BE UPDHELD.

III

DISBARMENT IS THE APPROPRIATE SANCTION GIVEN RESPONDENT'S MULTIPLE ACTS OF DISHONESTY AND DECEIT, HIS CONDUCT DURING THE SUBSEQUENT CIVIL LITIGATION AND HIS ACTIONS DURING THE BANKRUPTCY PROCEEDINGS.

ISSUE I

THE FLORIDA BAR APPROPRIATELY PROSECUTED THE CASE AGAINST RESPONDENT.

The Respondent has raised these same arguments now that he previously made during the Bar's case and his Motion to Dismiss. These arguments were rejected by the Referee. These arguments are unsubstantiated and do not address the egregious misconduct of Respondent. The Respondent has attempted to defuse his dishonest and deceitful conduct by attacking The Florida Bar. However, the Referee properly denied Respondent's Motion to Dismiss and found Respondent guilty of ethical misconduct (RR 3, 29).

Specifically, the Referee found that Respondent played an integral role in the secret settlement which included both negotiating and signing both the MOU and the AMOU. The Referee found:

> [I]n obtaining the releases necessary to effectuate the settlement, he did not inform the clients of the material facts as required by Rule 4-1.4(b), Rules of Discipline, i.e., the total amount of the settlement, the amount of attorneys' fees they intended to take, the value of the clients' bad faith claims or that Progressive had already offered money to settle those cases (RR 21).
>
> Harley Kane never told his clients that his firm ultimately received more than $5 million from Progressive, of which only approximately $672, 742 was paid to the clients, $433, 202 was paid in cost reimbursement, but more than $4 million was kept as attorneys' fees. As for the clients who were not part of the Goldcoast litigation, Harley Kane did not inform them that, while they would not receive anything for their bad

> faith claims, the Goldcoast case clients would be receiving some bad faith compensation as part of the settlement (RR 21).
>
> Harley Kane knowingly and intentionally deceived his clients to obtain the necessary releases, and that he did so with the specific intent to benefit himself and his father (RR 22).
>
> In addition to misleading his clients, there is clear and convincing evidence Harley Kane engaged in additional, multiple acts of dishonesty involving the bad faith lawyers, the civil litigation and the Bankruptcy court, in violation of Rules 4-8.4 and 3-4.3 (RR 24).

The Respondent knew about the secret settlement and went along with the exclusion of the bad faith lawyers from the settlement and "also refused to disclose any of the terms of the settlement to Larry Stewart and the other bad faith attorneys until ordered by the court to disclose the MOU. In the civil proceedings, Harley Kane vigorously fought having to pay to the bad faith attorneys any money he received from the settlement." (RR 24).

The Referee further found that the Respondent "knowingly and intentionally manufactured "excessive" time records for use in the civil case. It was only after former associates of his firm disclosed the circumstances under which they were generated and that they were altered and inflated by the Kanes after they were turned in, that the Kanes decided not to use them at the civil trial." (RR 25). And finally in the bankruptcy proceedings the Referee found:

> Harley Kane knowingly and intentionally had his firm pay his personal real estate taxes in violation of the Bankruptcy Court's Order.

Moreover, he did so to specifically hinder and delay the bad faith attorneys from receiving payment of their judgment. Harley Kane then provided false testimony to the Bankruptcy Court when he was questioned about it. Harley Kane also provided additional false testimony during the proceedings in an attempt to have the Bankruptcy Court discharge his financial obligations to the bad faith attorneys under the civil judgment. Such conduct by a member of The Florida Bar is particularly egregious and should not be tolerated (RR 25).

ISSUE II

THE REFEREE'S FINDINGS THAT THE RULES REGULATING THE FLORIDA BAR WERE VIOLATED ARE CLEARLY SUPPORTED BY THE RECORD, ARE NOT CLEARLY ERRONEOUS, AND SHOULD THEREFORE BE UPDHELD.

In considering Respondent's argument and evaluating the Referee's findings of fact, the Court will recall the principles articulated in The Florida Bar v. Dubbeld, 748 So. 2d 936, 940 (Fla. 1999):

> A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. Florida Bar v. Beach, 699 So. 2d 657, 660 (Fla. 1997). If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. Florida Bar v. Bustamante, 662 So. 2d 687, 689 (Fla. 1995). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. Florida Bar v. Miele, 605 So. 2d 866, 868 (Fla. 1992).

Accordingly, it is Respondent's burden to prove that there is no record evidence to support the referee's findings, or that such evidence contradicts his conclusions. He has met neither burden in his Initial Brief. To the contrary, the record is replete with evidence to support both the Referee's findings that Respondent is guilty and that disbarment is the appropriate sanction. Respondent's

Initial Brief essentially raises factual arguments that were previously made at the final hearing and rejected by the Referee.

First, Respondent claims that the Referee erred in finding there was an aggregate settlement pursuant to Rule 4-1.7(c) or 4-1.8(g) because each PIP client recovered 100% of their unreimbursed medical bills. In order for there to be error, there must be no evidence in the record to support that finding. However, the evidence clearly establishes that there was an aggregate settlement and that Respondent violated both Rules 4-1.7(c) and 4-1.8(g). There was clear and convincing evidence that the settlement was a release of both PIP and bad faith claims and Respondent failed to compensate his clients for their bad faith claims. As the Referee noted: "It was an aggregate settlement on multiple levels. That lump sum was payment for release of both PIP and bad faith claims, as well as attorneys' fees for the three PIP law firms and the bad faith lawyers. The allocation of the settlement funds between the clients' recoveries and the attorneys' fees was left up to the PIP lawyers, including Harley Kane. The PIP lawyers, including Harley Kane, not Progressive were the ones who decided how much each client would be offered under the settlement. The PIP lawyers, including Harley Kane, were the ones who decided not to compensate the non-Goldcoast case PIP clients even one penny for the release of their bad faith claims. Except for greed, there was nothing,

including the MOU and AMOU, that prevented the PIP law firms from allocating additional money from the settlement to the non-Goldcoast case clients of each of the three law firms." (RR 18-19).

Next, Respondent claims that he appropriately distributed recovery to PIP clients in accordance with PIP clients' fee agreements. Respondent would like to hang his hat on the fact that he paid his clients the unpaid medical bills plus interest. However, Respondent acted in greed and complete disregard for the ethical obligations he had as a lawyer representing his clients. Respondent received $5.25 million from Progressive, deducted $433,202.00 in costs and paid his PIP clients $672,742.00 and kept the balance of over $4 million for himself and his father. The Referee found this to be the most egregious of the Respondent's numerous violations. The Referee found: "The most egregious violation occurred when Harley Kane abandoned the bad faith claims of his non-Goldcoast clients, who received absolutely nothing for those claims, in order to obtain substantial attorneys' fees for himself and his partner and father, Charles Kane. He sacrificed the rights of all of his PIP clients for a settlement on behalf of the Goldcoast claimants. And he sacrificed the rights of all of the clients, both PIP and Goldcoast plaintiffs, when the majority of the settlement money went into his and his father's

pockets as PIP fees rather than to pay the client the value of their bad faith claims." (RR 19).

Next, Respondent claims that PIP cases do not require a closing statement pursuant to Rule 4-1.5(f)(5). While the Referee found that it is not common practice for lawyers in Florida to provide closing statements in PIP benefit cases the Referee found that there is no exception to the rule requiring closing statements.

Respondent also claims that he did not participate in the Goldcoast settlement or receive any bad faith settlement funds. However, the Respondent errs in this claim. There is overwhelming evidence that settlement monies received from Progressive were to release both the PIP claims and the bad faith claims of all of the clients regardless of whether they were in the Goldcoast suit (RR 10-11, 18).

Respondent also claims that he did not violate Rule 4-1.4(b) because he did not participate in the Goldcoast settlement communications with clients and did not have an obligation to advise Kane & Kane PIP clients of the status of bad faith litigation in which they were not plaintiffs. However, the Kane & Kane law firm agreed to jointly represent each of the 37 clients in the Goldcoast litigation and executed such agreement in writing (TFB Ex. 11, 14) (TR 976, 1156, 1198, 1791-94) (RR 7). Further, the Kane & Kane clients did have a right to bad faith proceeds.

The Kanes kept their clients in the dark and had their clients waive these rights so that the Kanes could keep more money for themselves.

Next, Respondent claims that reconstructing time records and review and revision of an associate's reconstructed time entries does not violate Rules 3-4.3 or 4-8.4(c). Respondent himself admits in his Initial Brief that some of the entries were "excessive." In addition to manufacturing these excessive time records for use in the civil litigation Respondent was requiring his employees to be dishonest and deceitful to assist him in the production of the excessive time records. The Referee correctly found that "[t]here was no justification for Harley Kane's actions which were deceitful and contrary to honesty and justice." (RR 25).

Finally, the Respondent argues in his Initial Brief that the Respondent's misconduct during the bankruptcy proceedings should not aggravate Respondent's sanction and that Respondent's conduct was mitigated by the bankruptcy judge's subsequent findings. Respondent's misconduct in the bankruptcy proceeding was additional misconduct and should indeed be considered an aggravating factor. Judge Kimball's later findings related to bankruptcy law that were not included in the Referee's findings and do not discount Judge Kimball's findings that Respondent's testimony was "unbelievable" and "untruthful." (TFB Ex. 72) (RR 15).

ISSUE III

DISBARMENT IS THE APPROPRIATE SANCTION GIVEN RESPONDENT'S MULTIPLE ACTS OF DISHONESTY AND DECEIT, HIS CONDUCT DURING THE SUBSEQUENT CIVIL LITIGATION AND HIS ACTIONS DURING THE BANKRUPTCY PROCEEDINGS.

Respondent asserts in his Initial Brief that disbarment is not supported by existing case law. The Referee cited in his Report of Referee that he considered The Florida Bar v. St. Louis, 967 So. 2d 108 (Fla. 2007). In St. Louis, this Court increased St. Louis's discipline from a 60 day suspension to disbarment. During the representation of several clients against DuPont Corporation, St. Louis entered a secret "engagement agreement" with DuPont as part of the settlement. This agreement required St. Louis and his firm to refrain from bringing any additional suits against DuPont. St. Louis entered into the secret agreement solely for his own financial gain. His firm was paid over $6 million for entering into the agreement. St. Louis failed to disclose the existence of an engagement agreement to his clients and thus failed to keep his clients informed. Further, the agreement required St. Louis to form an attorney-client relationship with DuPont, while St. Louis was still representing his clients. St. Louis was also dishonest with a judge and The Florida Bar. As the Court increased the sanction from a 60 day suspension to a disbarment the Court noted that St. Louis "engaged in several acts of dishonesty." Id. at 122.

As in St. Louis, the Respondent in the instant case engaged in several acts of dishonesty, was motivated by greed, and his conduct therefore warrants the disbarment recommended by the Referee.

Respondent also claims that he had minimal involvement with the secret settlement. However, the Referee found the following specific misconduct regarding the Respondent:

- Harley Kane negotiated and signed the MOU and AMOU which created a series of inherent conflicts of interest.

- Harley Kane abandoned the bad faith claims of his non-Goldcoast clients, who received absolutely nothing for those claims, in order to obtain substantial attorneys' fees for himself and his partner and father, Charles Kane.

- Harley Kane knowingly and intentionally participated in and accepted the benefit of the aggregate settlement, and that he knowingly and intentionally failed to inform the clients of the conflicts and obtain waiver those conflicts.

- Harley Kane's duty to his clients was to explain the settlement "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" Rule 4-1.4(b). He did the opposite. He withheld from his clients nearly all the information about the settlement with Progressive, entirely to further his own interests.

- Harley Kane committed acts "contrary to honesty and justice" in his dealings with the bad faith lawyers in connection with the secret settlement with Progressive. He knew about and went along with the exclusion of the bad faith lawyers from the settlement (RR 18-24).

Respondent further claims that the Referee erred in finding that there was a pattern of misconduct, false statements during the disciplinary process, refusal to acknowledge wrongful nature of misconduct and an indifference to making restitution.

Respondent states that his misconduct was a "single continuing series of closely related events in a short period of time." However, Respondent's misconduct has clearly spanned a number of years from the secret settlement to civil litigation to the bankruptcy proceedings. The Referee specifically found that "Harley Kane's conduct continued for years. He committed violations by participating in the MOU and the later AMOU, both of which violated the aggregate settlement and conflict of interest rules. After the AMOU, Kane & Kane sent out deceitful letters to the clients. He later committed dishonest acts during the course of both the civil and bankruptcy proceedings. Thus, he engaged in a long-term pattern of misconduct." (RR 27).

The Referee also properly found that Respondent was not truthful during his trial testimony. Much of Respondent's position is contrary to the Referee's findings. For instance in his Initial Brief, Respondent has stated that there was not an aggregate settlement which is contrary to the Referee's findings and he also states that the Kanes appropriately distributed settlement monies to the PIP clients

when it is clear that the PIP clients did not receive any monies for their bad faith claims (RR 18-19).

Further, the Referee appropriately found that Respondent has refused to acknowledge the wrongful nature of his misconduct. The Referee specifically found that "[o]ver the past decade, Harley Kane continually refused to acknowledge the wrongful nature of his conduct." (RR 28). Respondent's failure to acknowledge the wrongful nature of his conduct is clearly evident by his constant attempts to evade the Judge Crow final judgment.

Respondent also claims that the Referee erred in finding that he has shown an indifference to making restitution. The Respondent was first asked to restitute the bad faith lawyers in 2004 and 10 years later still has not restituted the bad faith lawyers. That is clear evidence of an indifference to make restitution. The Referee specifically found: "Harley Kane has not made any efforts to pay restitution. In fact, he has actively sought to prevent the bad faith attorneys from being able to collect on the civil judgment (RR 28).

The Respondent further claims that the applicable Standards for Imposing Lawyer Sanctions provide for a public reprimand or suspension. However, the Referee properly applied Standards that were appropriate for the multiple acts of deceitful and dishonest conduct of the Respondent. The Standards for Imposing

Lawyer Sanctions considered by the Referee all mandate disbarment for Respondent's misconduct. In the instant case, the following standards were all found applicable by the Referee:

A. Violations of Duties Owed to Clients

(i) Standard 4.31 (Conflicts of Interest)

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

(ii) Standard 4.61 (Lack of Candor)

"Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client."

B. Violations of Duties Owed to the Public

(i) Standard 5.11(f) (Failure to Maintain Personal Integrity)

"Disbarment is appropriate when…a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

C. Violations of Other Duties Owed as a Professional

(i) Standard 7.1

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

Finally, the Respondent argues that satisfaction of the trial court judgment is not an appropriate condition of his reinstatement. However, the Standards for Imposing Lawyer Sanctions 2.8(a) and 2.8(g) clearly empower a Referee to impose this condition when justified in a disciplinary case. The Standards for Imposing Lawyer Sanctions 2.8 reads: "Other sanctions and remedies which may be imposed include: (a) restitution and (g) other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions." The Florida Bar is not utilizing the disciplinary system as a substitute for civil proceedings. Respondent's egregious misconduct found by the Referee and his continued misconduct to avoid paying the final judgment supports the imposition of this condition of his reinstatement.

CONCLUSION

A Referee's findings should not be disturbed unless they are clearly erroneous. This Referee's findings of egregious misconduct and recommendations of disbarment and restitution are supported by the record, the case law and the Standards for Imposing Lawyer Sanctions. The Florida Bar respectfully submits that the Court should approve the Report of Referee in its entirety and disbar Respondent as well as require Respondent to satisfy the civil judgment entered against him in Stewart, Tilghman, Fox, and Bianchi, P.A., et al. v. Kane & Kane et al., Case No. 502004 A006138MB AO (Fla. 15th Jud. Cir., Palm Beach County) as a condition of reinstatement to the Bar as well as pay costs incurred by The Florida Bar.

Ghenete Elaine Wright Muir, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal; with copies to Respondent's Counsel, Scott K. Tozian, via E-mail at stozian@smithtozian.com, email@smithtozian.com; and David B. Rothman, Special Bar Counsel, via E-mail at DBR@Rothmanlawyers.com; Jeanne T. Melendez, Special Bar Counsel, via E-mail at JTM@Rothmanlawyers.com; and to Staff Counsel, The Florida Bar at aquintel@flabar.org on this 3 day of September, 2015.

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

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

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

Ghenete Elaine Wright Muir, Bar Counsel