IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.:
SC13-390

THE FLORIDA BAR

The Florida Bar File
No. 2008-51,561 (17B)

Petitioner / Complainant,

v.

DARIN JAMES LENTNER,

Cross-Petitioner / Respondent.

AMENDED CROSS-PETITIONER/RESPONDENT'S ANSWER BRIEF AND CROSS-INITIAL BRIEF OF THE REFEREE'S RECOMMENDATIONS TO GUILT AND DISCIPLINE

Filed on Behalf of the Cross-Petitioner / Respondent by:

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STATEMENT OF THE CASE AND THE FACTS

The Respondent, Darin James Lentner ("Lentner"), accepts The Florida Bar's ("TFB") rendition of the statement of the case and the facts with the following disputed and additional facts outlined below. Further, this cross-initial brief requests this Honorable Court to reject some of the Referee's recommendations as to Lentner's guilt and discipline, and reject TFB's plea for disbarment.

Disputed facts:

TFB claims that "[t]he PIP lawyers decided to hire Todd Stewart and later Larry Stewart and William Hearon ("bad faith lawyers") to file and litigate these bad faith suits against Progressive." [TFB br. at p. 5]. In fact, the PIP lawyers *did not hire* the bad faith lawyers; the Gold Coast clients hired both the bad faith lawyers and the PIP lawyers, who were co-counsel on the bad faith case. [TFB Ex. 11].[1]

TFB claims that in early 2004, "[t]he Watson and Lentner law firm emailed a list of its PIP clients to Larry Stewart to ensure that its clients were included in the settlement negotiations." [TFB br. at p. 7]. This is not accurate. The list of clients was requested by Larry Stewart ("L. Stewart") to support punitive damages sought in the Gold Coast bad faith case. Pursuant to statute, "[n]o punitive

[1] References to Bar exhibits shall be by the symbol TFB Ex followed by the appropriate exhibit number.

damages shall be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are: (a) willful, wanton, and malicious; (b) in reckless disregard for the rights of any insured; or (c) in reckless disregard for the rights of a beneficiary under a life insurance contract." Fla. Stat. § 624.155(5). The list of pending PIP claims was one of the best methods to show Progressive's general business practices.

Additional facts:

To be clear, the Referee Report: (1) *did not find* Lentner charged his clients an illegal, prohibited, or clearly excessive fee, (2) *did not find* Lentner misappropriated clients funds, (3) *did not find* Lentner guilty of trust account violations, and (4) *did not find* Lentner misused his clients funds or acquired a pecuniary interest adverse to his clients.[2] Rather, TFB Complaint arises out of events occurring in 2004 and allegations contained in a civil action related to an attorney's fees dispute that occurred nearly a decade ago, from 2002-2004 ("*Attorney's Fees Dispute*"). At issue were the division of attorney's fees and at

[2]Importantly, the Referee also ruled in favor of Lentner on significant allegations of violations of the Rules of Professional Conduct. Though TFB initially charged Lentner with failure to inform the clients of status of representation (**4-1.4(a)**); conflicts of interest by representing adverse interests (**4-1.7(a)**); and disputed ownership of trust property (**5-1.1 (f)**), the Referee found that "the Bar failed to present clear and convincing evidence that Respondent Darin Lentner violated" those rules. (RR 19).

no time were amounts due clients in dispute, nor is there any allegation of misappropriation of client monies part of the inquiry. [RR[3] 1-31].

The Referee erroneously found that the bad faith attorneys only sued Lentner "and the other PIP attorneys/firms for quantum meruit and/or unjust enrichment and fraud in the inducement". [RR 15]. In actuality, Stewart and the other bad faith attorneys brought an extensive and expensive litigation with allegations of:

(1) fraud in the inducement,

(2) constructive fraud,

(3) constructive trust,

(4) breach of fiduciary duty, and

(5) quantum meruit /unjust enrichment.

The case went to trial in 2008, four years after the filing of the law suit. After a ten (10) week trial, the trial court found no civil torts whatsoever. Judge Crow *flatly rejected* all claims against Lentner, personally, but simply found an "unjust enrichment" theory against Watson, PA, as an equitable device to compensate Stewart for recovering PIP fees that he had expressly disclaimed, in writing. The trial court held that Watson, PA benefitted from the work performed by the bad faith lawyers and "that they were 50% responsible for the result

[3] References to the Report of Referee shall be by symbol RR followed by the appropriate page number.

achieved." [**Tab[4]I** *Complaint* Exhibit A, p. 19]. Based upon that finding, a judgment was entered against Watson, PA for quantum meruit / unjust enrichment. [**Tab I** *Complaint* Exhibit A, pp. 19-23]. Importantly, *Judge Crow did not find that the Watson and Lentner clients were short changed in any manner.* If Judge Crow had, he would have been obligated to ensure the clients were compensated in some manner such as disgorging the fees from Watson PA. It is inconsistent to think that Judge Crow would take monies owed the Watson PA clients, and give those funds to Stewart and the other bad faith lawyers. Further, as recognized by the Referee: "The trial court, however, declined to hold Darin Lentner personally liable to the bad faith lawyers, finding there was no evidence presented as to the value, if any, individually conferred upon him, or otherwise justifying piercing the corporate veil to hold the officers of the firm individually liable." [RR 17].

The *Attorney's Fees Dispute* comes from a settlement propounded by Progressive Insurance to clients in the Gold Coast bad faith action which was accepted by the Gold Coast clients, opposed by the bad faith lawyers, and supported by Watson PA and the other PIP lawyers (Marks & Fleisher, and Kane and Kane). Lentner was an associate with Watson PA. While *Watson PA was co-counsel with the bad faith lawyers* in the Gold Coast Bad Faith suit, the *bad faith lawyers were not co-counsel to Watson PA's* eighty –five (85) PIP clients for the

[4] References to the Index on Record of Appeal shall be by the symbol Tab followed by the Pleading and page number when appropriate.

cases filed by the firm to recover PIP benefits for these health care providers. [**Tab154**, *PIP Contingency Fee Contract*]. One of the architects of the settlement, attorney Gary Marks ("Marks"), entered into a Consent Judgment with TFB for a ninety-one day suspension. In that Consent Judgment, TFB and Marks explained the relationship between the bad faith lawyers and the PIP lawyers in this manner:

> All three PIP law firms,[] filed bad faith Civil Remedy Notices with the Florida Department of Insurance as a first step towards asserting potential bad faith claims against Progressive....The contingency fee schedule agreed to between the two groups of attorneys [the bad faith lawyers and the PIP lawyers] was 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 40% of the fees collected....The three PIP law firms (Marks & Fleischer, Kane & Kane and Watson &Lentner) and the bad faith lawyers executed attorney fee contracts agreeing to jointly represent each of the 37 clients in that litigation. *The Florida Bar v. Gary Howard Marks*, SC 13-392,Consent Judgment of May 14, 2015, at 3-4.

In the ordinary course of Watson PA's business, the firm filed individual actions on behalf of health care providers to recover specific amounts of PIP benefits from a recalcitrant insurer.[5] The PIP contracts with these providers limited client recovery to the amount of unpaid benefits, plus interest. Watson, PA undertook representation for statutory attorney's fees recoverable from the insurer

[5] Pursuant to the attorney-client contract, Watson, PA paid all costs of the litigation. The firm only recovered costs from the insurer directly if they prevailed.

directly, with recovery contingent on the success in obtaining PIP benefits. Every single PIP client of Watson, PA was made 100% whole.

There is no dispute that once Progressive made the offer, all lawyers were obligated to communicate the offer the clients. There is no dispute that the bad faith lawyers opposed the settlement and communicated this with the Gold Coast bad faith clients. [RR 12].There is no dispute that the clients accepted the 1.75 million dollar settlement and that the settlement proceeds were distributed in strict accordance to written client agreements. From the point of view of the Gold Coast bad faith clients, the settlement made perfect sense. The clients did well with a $1.75 million settlement in the Gold Coast bad faith action, especially given the limitations of *Campbell*[6] and the Florida Tort Reform Act limiting recovery to $2 million under the best trial outcome. The Gold Coast plaintiffs also received 100% of their PIP benefits and interest under the written PIP contracts.

Further, there is no dispute that all of the Gold Coast bad faith settlement attorney's fees, *seven hundred thousand dollars ($700,000.00) went to the bad faith lawyers* and *none of the fees* went to Lentner or the other PIP lawyers. TFB did not call a single client of Lentner's to testify to any alleged wrongdoing. Importantly, according to the Referee's Report, the Referee failed to consider

[6] See **Tab 140**, e-mail from L. Stewart Re: *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003).

testimony from Dr. Gerald Stashak, Lentner's client who testified favorably for Lentner. [Volume XIV pp. 1950 C, D, and E].

Lentner owed no fiduciary duties to the bad faith lawyers:

In hindsight, Lentner would have handled the settlement differently, but the fact remains that as co-counsel from two different law firms, Lentner *did not* have a fiduciary relationship with the bad faith attorneys. Nor did Lentner represent the bad faith attorneys. The bad faith attorneys and the PIP attorneys were co-counsel on the Gold Coast bad faith case. Thus, as Judge Crow found, "a fiduciary relationship cannot be found in the instant case for reasons set forth in *Beck v. Wecht*, 28 Cal. 4th 289 (Cal. 2002)" and he likewise held that "the Plaintiffs/ [bad faith attorneys] have failed to establish the requirements of a constructive trust under the facts of this case." [**Tab I** *Complaint* Exhibit A, p. 20]. Indeed the Referee ruled in favor of Lentner on the sole trust account allegation 5-1.1 (f) [disputed ownership of trust property]. Importantly, Lentner was not charged with violating a fiduciary relationship and the Referee—like Judge Crow—did not find that Lentner had a fiduciary duty with the bad faith lawyers. [RR 19].

The Gold Coast bad faith case *was not* a class action:

The Gold Coast bad faith lawyers had experience with class actions but had never handled a multi-plaintiff "group action" as distinguished from a class action. Yet there are crucial differences between a class action and a "group action" that

the bad faith lawyers did not fully appreciate. The law of class actions has developed a number of procedural safeguards. The class representative owes fiduciary duties to the class members. Potential class members have to be notified and given the right to opt out. There is court supervision of the settlement process, requiring a fairness hearing and court approval of the allocation of the recovery and attorney's fees. These safeguards would have avoided what turned out to be the pitfalls of the Gold Coast case.[7]

The group action envisioned by L. Stewart gave rise to all of the conflicts and inequities for which the law of class actions provides safeguards, and then some. But it lacked any of the safeguards. The concept was fatally flawed from its inception. To begin with, the Gold Coast plaintiffs owed no fiduciary duties to providers who had not joined the Gold Coast case. As a result, the Gold Coast plaintiffs were entitled to act in their own best interests without regard to the interest of the others. Therefore, if Progressive offered a settlement that allocated the proceeds entirely to the Gold Coast plaintiffs to the exclusion of anyone else, there was no legal or moral impediment to accepting it.

The record is completely devoid of any evidence to suggest that the Gold Coast case was a class action suit, or that the Gold Coast bad faith clients had any

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[7] *See* Fla. R. Civ. P. 1.220; *Masztal v. City of Miami*, 971 So. 2d 803 (Fla. 3d DCA 2007); *Fung v. Florida Automobile Joint Underwriting Ass'n*, 905 So. 2d 193 (Fla. 3d DCA), *rev. denied*, 915 So. 2d 1196 (Fla. 2005).

fiduciary duty to healthcare providers who were not plaintiffs in that suit. No attorneys, not the bad faith attorneys or the PIP attorneys, had retainers to represent any health care providers for bad faith except with the 37 Gold Coast bad faith clients. And the Gold Coast bad faith clients did not want all the potential bad faith claims of all the possible health care providers to be part of their Gold Coast bad faith suit. In addition, the bad faith statute specifically *prohibits class action law suits* and pursuant to statute, the 37 Gold Coast plaintiffs were not class representatives, and never could be. As stated in the statute, "[t]his section shall not be construed to authorize a class action suit against an authorized insurer ..." Fla. Stat. § 624.155(6).

Without the class action framework, there was no way the bad faith lawyers could protect the interests of the Gold Coast clients and at the same time represent the interests of this large group of strangers. The providers who were not Gold Coast plaintiffs fell into two general categories: those with perfected bad faith claims and those with unperfected claims. There were inherent tensions between the Gold Coast plaintiffs and the two other sub-groups of providers, and problems associated with each sub-group that were self-evident and insurmountable.

The submission of a Civil Remedy Notice ("CRN") *is not* a bad faith claim and *does not signify* that one will be viable if the claim is perfected:

The filing of a Civil Remedy Notice ("CRN") with the Florida Department of Insurance does not mean that a bad faith case has been perfected or that the client has a bad faith claim. A CRN puts the insurer on notice that a claim for a specified amount must be paid within 60 days. As noted in TFB's Consent Judgment with Gary Marks, it is simply "a first step towards asserting potential bad faith claims against Progressive."[8] If the claim is not paid within 60 days and the insurer then pays the claim *after* the 60 day time frame expires, the health care provider has a *potential* bad faith claim. In actuality, the providers who were not Gold Coast bad faith clients were just PIP claimants with outstanding PIP claims who had filed CRNs to try to get the PIP claims paid. Whether Progressive's handling of their claims constituted bad faith would have to be determined on a case by case basis – an analysis that had not even begun.[9] They first had to win their PIP suits.

For the health care providers with mere unperfected bad faith claims, their goal was to recover PIP benefits. That was what they hired Lentner to do. The prospect of making a bad faith claim was remote, if they had even given it any thought at all. Each of these providers had unique individual circumstances. For these providers, the significance of having a *potential* bad faith claim (by virtue of having submitted a CRN) was that it could be used as leverage to extract payment

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[8]. *The Florida Bar v. Gary Howard Marks*, SC 13-392.

[9]The lack of commonality was another reason a class action was not legally viable.

of the PIP claim. In the end, Lentner's clients were offered, and accepted, 100% of their PIP benefits and interest in exchange for releasing what was in the vast majority of cases merely a potential, unperfected bad faith claim of undetermined merit. The amount paid to the non-Gold Coast PIP clients was the most they could receive pursuant to the attorney-client fee contract [**Tab154**, *PIP Contingency Fee Contract*].

Without the class action framework, there was no way the bad faith lawyers could protect the interests of the Gold Coast clients and at the same time represent the interests of this large group of strangers. The providers who were not Gold Coast plaintiffs fell into two general categories: those with perfected bad faith claims and those with unperfected claims. There were inherent tensions between the Gold Coast plaintiffs and the two other sub-groups of providers, and problems associated with each sub-group that ultimately became complex and insurmountable. The inherent flaws in the bad faith lawyers' conception of a giant bad faith "group action" set the stage for a flawed settlement and may indeed have made a flawed settlement inevitable. We believe this should be taken into account when considering the less than ideal manner in which the settlement occurred.

Lentner had a responsibility to keep his clients confidences:

There were two distinct classes of clients that were involved in two distinct settlements. Lentner represented numerous health care providers in hundreds of

PIP suits. Each of these clients retained Watson PA, the firm Lentner worked for, to represent them in PIP suits only. The contract of employment did not authorize Watson PA to represent these providers in a bad faith action. [**Tab154**, *PIP Contingency Fee Contract*]. Each of these clients received 100% of the PIP benefits and interest owed them by Progressive and knowingly agreed to forego any *potential* bad faith claim.

The second distinct class of clients was those clients that retained Watson PA to represent them in a bad faith case. These clients, and these clients alone, controlled the bad faith case and ultimately settled their case against Progressive. Neither Lentner, nor Ms. Watson, nor Watson PA, received any fees from the bad faith case and sacrificed well over a million dollars in PIP fees in connection with the Progressive settlement.

Lentner had a responsibility to keep his client's confidences. The Referee's findings that Lentner was required to discuss Progressive's confidential settlement offer made to the Gold Coast clients, with his PIP clients that were not part of that lawsuit,[10] would violate Rule 4-1.6 Confidentiality of Information (2004). In 2004, the Florida Bar rules relating to client confidences stated the following:

> [A]s a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be compelled only in

[10] See RR p. 22.

> accordance with recognized exceptions to the attorney client and work product privileges.
>
> *The lawyer's exercise of discretion not to disclose information under rule 4-1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with the law through assurances that communications will be protected against disclosure*. (Emphasis supplied). *Amendments to Rules Regulating Florida Bar*, 933 So.2d 417, 423 (Fla. 2006) (showing this language was in effect in 2004).

Pursuant to the Bar rules in effect in 2004, Lentner's exercise of his discretion not to disclose information under rule 4-1.6 should not be subject to reexamination. Lentner adhered to his obligations not to disclose client confidences of the Gold Coast Bad faith clients with those clients who were not part of this multi-plaintiff action. Further, Lentner had no duty to advise the status of that case to clients that were not part of the Gold Coast bad faith case. *See Brennan v. Ruffner*, 640 So.2d 143 (Fla. 4th DCA 1994) (An attorney has no separate duty to advise a shareholder of matters if the attorney only represents the corporation).

STANDARD OF REVIEW

A lawyer's misconduct must be proven by clear and convincing evidence. *See The Florida Bar v. Neu*, 597 So.2d 266, 268 (Fla. 1992). A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. *See The Florida Bar v. Barrett*, 897 So.2d 1269, 1275 (Fla. 2005). This Honorable Court's scope of review in attorney discipline actions is broader for legal conclusions than it is for factual findings and should uphold the referee's

recommended sanction if it has a "reasonable basis in existing law. *See Florida Bar v. Wohl*, 842 So.2d 811, 815 (Fla. 1996).

Even assuming the Referee's findings of fact are affirmed, a sixty (60) day suspension would be the appropriate sanction.

SUMMARY OF THE ARGUMENT

Prior to meeting and becoming co-counsel with the bad faith lawyers, Lentner was an outstanding PIP lawyer with no Bar complaints or discipline and an excellent reputation of consistently winning PIP litigations. Although the Gold Coast Bad Faith case seemed initially like a good idea, it turned worthless and risky for the named plaintiffs with the development of case law. Still, Watson PA had millions of dollars of time in PIP fees invested in hourly PIP cases. The five lawyers in the Watson firm had spent four years litigating over 700 PIP files in various areas of the State of Florida. In comparison, the bad faith lawyers were co-counsel to only to 37 PIP providers [**Tab154**, *PIP Contingency Fee Contract*]; L. Stewart was therefore motivated to exaggerate the value of the bad faith case at expense of PIP because he specifically agreed that he had no share of PIP case fees.

There were two distinct classes of clients that were involved in two distinct settlements. Lentner represented numerous health care providers in hundreds of PIP suits. Each of these clients retained Watson PA, the firm Lentner worked for,

to represent them in PIP suits only. The contract of employment did not authorize Watson PA to represent these providers in a bad faith action. [**Tab154**, *PIP Contingency Fee Contract*]. Each of these clients received 100% of the PIP benefits and interest owed them by Progressive and knowingly agreed to forego any *potential* bad faith claim. The second distinct class of clients consisted of those clients that retained Watson PA to represent them in a bad faith case. These clients, and these clients alone, controlled the bad faith case and ultimately settled their case against Progressive. Lentner, Ms. Watson, or Watson PA did not receive so much as a single penny from the bad faith case and sacrificed well over a million dollars in PIP fees in connection with the Progressive settlement.

Stewart brought an extensive and expensive litigation with allegations of conspiracy, fraud, and breach of fiduciary duty to insert himself in to the underlying PIP cases. Judge Crow found no civil torts whatsoever. Judge Crow simply found an "unjust enrichment" theory as an equitable device to somehow compensate the bad faith lawyers for recovering PIP fees that they expressly disclaimed, in writing. The proper forum for the resolution of this dispute was the civil trial heard by Judge Crow in 2008, not by a Bar disciplinary proceeding. TFB claims that at the April 2004 mediation, Progressive offered $3.5 million to settle the universe of bad faith claims of all the clients and that "Drs. Fishman and

Stashak rejected the offer and neither the bad faith claims nor the PIP benefit claims were settled." [TFB br. at p. 8].

The Referee erroneously ordered Lentner to pay $856,789.00 to the Fund inasmuch as: (1) no evidence was presented that any claims had been made to the Fund; and (2) no payments were made out of the fund. The record is devoid of *any* evidence that: (1) there was any monetary loss to Lentner's Gold Coast bad faith and/or PIP clients; (2) payments were paid out of the Fund; and (3) Lentner was not charged with a violation Rule 3-5.1(h), which is the only rule violation allowing for payment to the Fund. Absent substantial competent evidence of these factors, there is no authority for the Referee to require Lentner to make "payment of $856,789.00 to the Client Security Fund as a condition of reinstatement." [RR 30]. "Furthermore, in *Florida Bar v. Rogowski*, 399 So.2d 1390, 1391 (Fla. 1981) this Court rejected a referee's recommendation that the subject attorney pay money into the Fund because, as here, 'no funds were paid out of the [F]und,' holding that '[t]here is no authority for this Court in a disciplinary proceeding to require a payment that is not for restitution or the payment of costs.'" *The Florida Bar v. Frederick*, 756 So.2d 79, 89 (Fla. 2000). Likewise, in Lentner's case, no funds were paid out of the Fund and the Referee's recommendation that he pay $856,789.00 to the Client Security Fund as a condition of reinstatement should be rejected.

It is disingenuous that TFB is prosecuting violations (some of a technical nature) in a complex transaction wherein there was no harm to Lentner's clients and the only complainants were co-counsel to the Gold Coast bad faith case. *No client of Lentner's has ever claimed a violation* of Rule 4-1.7(b) (Conflict of Interest); Rule 4-7(c) (Explanation to Clients); Rule 4-1.8(g) (Settlement of Claims for Multiple Clients); Rule 4-1.4(b) (Duty to Explain Matters to Client); Rule 4-8.4(c) (Dishonesty, fraud, deceit, misrepresentation); Rule 3-4.3 (Acts Contrary to Honesty); or Rule 4-1.5(f)(5) (Closing Statement Required).

ARGUMENT

I. The Referee's Report effectively *reverses* the Honorable Judge David Crow's Final Judgment entered in favor of Lentner that he did not individually benefit from the Progressive settlement and essentially implies that Lentner's receipt of disbursements was improper.

This Honorable Court has long held that "[d]isciplinary actions cannot be used as a substitute for what should be addressed in private civil actions against attorneys. They are not intended as forums for litigating claims between attorneys and third parties..." *Florida Bar v. Della-Donna*, 583 So.2d 307, 312 (Fla. 1989), yet that is precisely what TFB has intended to do; and, what the Referee's Report ultimately does, is overturn the judgment rendered by Judge Crow in the *Attorneys Fees Dispute*. In the case before Judge Crow, the bad faith lawyers posited several theories for holding Lentner individually liable for an unjust enrichment award. Judge Crow *did not* find Lentner individually liable in any manner, and he *did not*

pierce the corporate veil. And for good reason: there is no proof to support piercing the corporate veil. The lawful receipt of disbursements by Lentner did not violate the Rules of Professional Conduct and the Referee's finding that Lentner should pay the Client Security Fund in excess of $800,000.00 effectively nullifies Judge Crow's finding that Lentner was not personally liable to the bad faith lawyers for any claims.

This outcome subverts the purpose of the Bar Rules. The *Preamble* to Chapter 4 of the Rules of Professional Conduct states that the rules "are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule." *Amendments to Rules Regulating Florida Bar*, 933 So.2d 417, 423 (Fla. 2006).

In order to pierce the corporate veil, it must be proven that the individual defendant used the corporation fraudulently or for an improper purpose, resulting in injury to the plaintiff. *See Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1119-21 (Fla. 1984); *Seminole Boatyard, Inc. v. Christoph*, 715 So. 2d 987, 990 (Fla. 4th DCA), *rev. denied*, 727 So. 2d 903 (Fla. 1998); *Langworthy &*

Assocs., Inc. v. Meadowlawn Pharmacy, Inc., 629 So. 2d 892, 893-94 (Fla. 2d DCA 1993), *rev. denied*, 639 So. 2d 979 (Fla. 1994). These requirements apply to closely held professional service corporations, *see* § 621.07, Fla. Stat. (2009); *Rashdan v. Tanveer A. Sheikh, M.D., P.A.*, 706 So. 2d 357, 357-58 (Fla. 4th DCA 1998); *Porlick v. Compton*, 683 So. 2d 545, 548-49 (Fla. 3d DCA 1996), *rev. denied*, 695 So. 2d 701 (Fla. 1997), and to attorney owned professional associations. *See Presley v. PoncePlaza Assocs.*, 723 So. 2d 328, 329 (Fla. 3d DCA 1998); *Agan v. Katzman & Korr, P.A.*, 2004 U.S. Dist. LEXIS 4158 (S.D. Fla. 2004); *In re: Warmus*, 276 B.R. 688, 697 (S.D. Fla. 2002).

The Referee finds that because Lentner received "disbursements on his behalf from the Watson and Lentner firm operating account, totaling $1,127,500.00 within a year that the proceeds of the Progressive settlement were deposited into the operating account", that Lentner somehow acted improperly and/or that he is responsible to pay a portion of the judgment rendered against Watson PA. The Referee also points to an April 19, 2005 letter agreement between Lentner and his then-wife, Laura Watson. [RR 18]. These findings have no bearing on the issues in this case for the following reasons:

1. TFB withdrew, and the Referee ultimately directed verdict in favor of Lentner, on Rule 5-1.1(f) (disputed ownership of trust property). There were no trust violations in this case against Lentner.

2. The bad faith attorneys are not third party beneficiaries to the April 19, 2005 letter agreement between Ms. Watson and Lentner, drafted in contemplation of their divorce and became part of the marital settlement agreement. The divorce court retains jurisdiction to enforce its own orders. *Hoskin v. Hoskin*, 349 So.2d 755, 757-58 (Fla. 3d DCA 1977). Thus, if there is a right of enforcement it lies in the Broward Circuit Court where the decree was entered.
3. The statute of limitations has expired on the April 19, 2005 letter agreement. *See* Fla. Stat. § 95.11(2)(b) (applying a five year statute of limitations).
4. The April 19, 2005 letter agreement does not support the bad faith lawyers position that Ms. Watson and Lentner each owe Watson, PA 50% of the amount of the judgment because the bad faith lawyers are not third party beneficiaries of the agreement, nor did the bad faith lawyers move to intervene as parties to the divorce action. *See Adler v. Adler*, 365 So. 2d 411 (Fla. 3d DCA 1979).

Further, the Referee seems to draw an improper conclusion that Lentner should be accountable for Watson PA's debts because in marketing materials he "was described as a 'partner' of Watson & Lentner."[RR 19]. This conclusion is contrary to the Terminology of the Rules Regulating the Florida Bar. In the

Terminology section of the 2004 rules, "'Partner' denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation." *Amendments to Rules Regulating Florida Bar*, 933 So.2d 417, 424 (Fla. 2006). Watson PA was not a partnership and Lentner was not a partner; and though it was a professional association, and as noted by the Referee, Lentner "did not have ownership interest in the firm."[RR 19].

There is no evidence that: (1) the source of the money that funded Lentner's bonus came from the Progressive settlement; and (2) Lentner's bonuses were taken for any fraudulent or improper purpose — a requirement to pierce the corporate veil. As Judge Crow correctly concluded when he determined that Lentner is not personally liable for the debts of Watson PA, "[g]enerally when a corporation is allegedly unjustly enriched, an action against individual directors, officers or shareholders will not lie simply because the assets can ultimately be traced from the corporation to the individual as long as the corporation retains its legal existence. *See e.g. United States v. Dean Van Lines*, 531 F.2d 289, 292-93 (5th Cir. 1976)." [**Tab I** *Complaint* Exhibit A, p. 21]. Evidence that corporate assets can be traced into the hands of a corporate officer or shareholder is insufficient, by itself, to pierce the corporate veil. *See Ally v. Naim*, 581 So. 2d 961, 963 (Fla. 3d DCA 1991); *Robertson-Ceco Corp. v. Cornelius*, 2007 U.S. Dist. LEXIS 23762 (N.D.

Fla. 2007).[11] The judgment rendered by Judge Crow did not make a single finding of wrongful conduct by Lentner. The unjust enrichment claim in the case before Judge Crow was based on an implied or quasi-contract theory. It was not a tort action, and it was not based on tortious conduct. *Cf. Marshall-Shaw v. Ford*, 755 So. 2d 162 (Fla. 4th DCA), *rev. denied*, 779 So. 2d 272 (Fla. 2000) (involving an action for restitution as a remedy for tortious conversion of property). Judge Crow did not find Lentner, Ms. Watson, or Watson PA liable for any tort claims.

It bears repeating that the rules of professional conduct do not create a basis for civil liability and are not intended to provide ammunition for litigants to use against opponents. *See Loreen I. Kreizinger, P.A. v. Sheldon J. Schlesinger, P.A.*, 925 So. 2d 431, 433 (Fla. 4th DCA 2006), *rev. denied*, 949 So. 2d 198 (Fla. 2007).

II. The Referee's *erroneous* recommendation that Lentner pay $856,789.00 to the Client Security Fund is tantamount to an impermissible fine, not permitted as a condition of discipline

The Referee erroneously ordered Lentner to pay $856,789.00 to the Fund inasmuch as: (1) no evidence was presented that any claims had been made to the Fund; (2) no payments were made out of the Fund on Lentner's behalf; and (3) Lentner was not charged with a violation Rule 3-5.1(h), which is the only rule

[11]To the extent the Referee's holding is based on fact findings, it should be reviewed to determine whether the findings are supported by competent, substantial evidence or whether they are clearly erroneous. *See Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956). The trial court's legal conclusions are reviewed *de novo*. *See Price Waterhouse Coopers, LLP v. Cedar Resources, Inc.*, 761 So. 2d 1131, 1133 (Fla. 2d DCA 1999).

violation allowing for payment to the Fund. Absent substantial competent evidence of these factors, there is no authority for the Referee to require Lentner make "payment of $856,789.00 to the Client Security Fund as a condition of reinstatement." [RR 30]. "Furthermore, in *Florida Bar v. Rogowski*, 399 So.2d 1390, 1391 (Fla. 1981), this Court rejected a referee's recommendation that the subject attorney pay money into the Fund because, as here, 'no funds were paid out of the [F]und,' holding that '[t]here is no authority for this Court in a disciplinary proceeding to require a payment that is not for restitution or the payment of costs.'" *The Florida Bar v. Frederick*, 756 So.2d 79, 89 (Fla. 2000). Likewise, in Lentner's case, no funds were paid out of the Fund and the referee's recommendation that he pay $856,789.00 to the Client Security Fund as a condition of reinstatement should be rejected.

Importantly, and as previously noted, *Judge Crow did not find that the Watson and Lentner clients were shortchanged in any manner.* If he had, he would have been obligated to ensure the clients were compensated in some manner such as disgorging the fees from the Watson firm, not simply ordering Watson PA to compensate the bad faith lawyers for their efforts in recovering the PIP attorney fees.

Significantly, Lentner was not charged with a violation of Rule 3-5.1(h)(Forfeiture of Fees). That rule provides in pertinent part:

> In the case of a clearly excessive fee, the excessive amount of the fee may be ordered returned to the client, and a fee otherwise prohibited by the Rules Regulating the Florida Bar may be ordered forfeited to The Florida Bar Client's Security Fund and disbursed in accordance with its rules and regulations. Rule 3-5.1(h)(Forfeiture of Fees).

The Referee's recommendation that Lentner pay $856,789.00 to the Fund has no reasonable basis in existing law and the applicable rules. In *The Florida Bar v. Dove*, 985 So.2d 1001 (Fla.2008), this Court reiterated that "[f]ines are not permitted disciplinary cases" and "the clear language of Rule Regulating the Florida Bar 3-5.1(h) only permits disgorgement to the Client Security Fund" if the attorney charges "a prohibited fee, an illegal fee, or an excessive fee as required by rule 3-5.1(h). *See Florida Bar v. St. Louis*, 967 So.2d 108, 123-24 (Fla. 2007)." *Id.* at 1011.

Accordingly, the recommendation that Lentner pay $856,789.00 to the Fund as a condition of reinstatement has no reasonable basis in existing law, or the applicable rules, is tantamount to a fine, and effectively acts as a permanent disbarment as Lentner has no manner in which to pay off this fine. The Referee's recommendation must be reversed.

In the underlying attorneys' fees case, the Complainants acknowledge that Watson, PA was winning virtually 100% of its PIP cases and obtaining full benefits plus interests for all clients. This also meant that Watson, P.A.'s accrued fees were earned and would eventually be paid by Progressive Insurance. In April

2004 these fees were approximately $10,000.00 per case and Stewart estimated the level of attorneys' fees awards for the PIP claims over the next several years was between $25 to $30 million dollars. [**Tab 100**, Stewart's 4/15/2004 Confidential Mediation Statement, pp. 4, 6].

III. The Referee *erroneously* found there was an aggregate settlement of the individual PIP cases because they were settled at the same time as the Gold Coast Bad Faith Case, because each PIP client received 100% of the amount due pursuant to their contracts with Watson PA

The settlement of the Gold Coast bad faith case was in fact an aggregate settlement as contemplated by rule 4-1.8 (g). But the settlement of the PIP claims for the individual PIP health care providers was not an aggregate settlement. There were two distinct classes of clients that were involved in two distinct settlements. Lentner represented numerous health care providers in hundreds of PIP suits. Each of these clients retained Watson PA, the firm Lentner worked for, to recover unpaid PIP benefits. No recovery was affected by how much Lentner or the other clients received. Each client had differing amounts owed, depending upon the number of patients, how much and what kinds of services each client billed, and the date the services were performed. In the settlement, each client recovered 100% of the PIP benefits owned and the interest owed them by Progressive. Further, each client was advised that, in order to receive the benefits owed them by Progressive, they would have to give up any "potential" bad faith claim they may have. The clients decided to take the offer. The contract of employment did not

authorize Watson PA to represent these providers in a bad faith action. Each of these clients received 100% of the PIP benefits and interest owed them by Progressive and knowingly agreed to forego any *potential* bad faith claim.

The second distinct class of clients consisted of those clients that retained Watson PA to represent them in a bad faith case. These clients, and these clients alone, controlled the bad faith case and ultimately settled their case against Progressive. Neither Lentner nor Watson PA received any fees from the bad faith case and sacrificed well over a million dollars in PIP fees in connection with the Progressive settlement.

The record is completely devoid of any evidence to suggest that the Gold Coast case was a class action suit, or that the Gold Coast bad faith clients had any fiduciary duty to healthcare providers who were not plaintiffs in that suit. Yet, the Referee *erroneously* applies class action principles to the Gold Coast bad faith clients, and TFB mistakenly relies on *The Florida Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011), *which was a class action settlement*. *Adorno* is inapposite to these proceedings, because the multi-plaintiff Gold Coast bad faith case *was not* a class action suit and the settlement did not include a putative class. In a class action suit, the attorneys have a fiduciary duty to the putative class, and it was this breach of the fiduciary duty to the putative class that Adorno violated. *Id.* at 1025. There was no duty owed by the Gold Coast bad faith clients to those who were not part of

the suit. Notably, the bad faith statute specifically prohibits class action law suits and pursuant to statute, the 37 Gold Coast plaintiffs were not class representatives, and never could be. As stated in the statute, "[t]his section shall not be construed to authorize a class action suit against an authorized insurer ..." Fla. Stat.§ 624.155(6).

Importantly, the Referee found that Lentner was *not guilty* of a violation of Rule 4-1.7(a) [a lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless: (1) the lawyer reasonable believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation]. [RR 19].

IV. Lentner did not violate Rule 4-1.7(b) and (c) or 4-1.4(b) inasmuch as Lentner made disclosures to his clients in accordance with the attorney-client contracts in effect and under the 2004 rules.

Importantly, an attorney only has a duty to pursue or advise a client regarding matters that fall within the scope of the contracted legal representation. *See Kates v. Robinson*, 786 So.2d 61, 64-65 (Fla. 4th DCA 2001). The Referee seems to have held Lentner to a higher standard. There were two distinct classes of clients that were involved in two distinct settlements. Lentner represented numerous health care providers in hundreds of PIP suits. Each of these clients retained Watson PA, the firm Lentner worked for, to represent them in PIP suits

only. [**Tab154**, *PIP Contingency Fee Contract*]. The second distinct class of clients consisted of those clients that retained Watson PA to represent them in a bad faith case. These clients, and these clients alone, controlled the bad faith case and ultimately settled their case against Progressive. Each distinct class of clients was advised regarding matters that fall within the scope of the contracted legal representation. Lentner had no duty to pursue a bad faith claim on behalf of his clients that were not part of the Gold Coast bad faith case. Lentner's duty, pursuant to contract, was to recover PIP benefits and interest owed them by Progressive. Each of Lentner's clients received 100% of the PIP benefits and interest due.

As to the Gold Coast bad faith clients, Lentner also adhered to his duties to appropriately advise them of the matters regarding the bad faith suit. Both the June 16, 2004 letter and the affidavits signed by each of Watson, PA's clients in the Gold Coast bad faith case, completely contradict any findings or conclusions by the Referee that the clients were not informed of the settlement by Lentner. Portions of the affidavits are identified here:

> **SETTLEMENT OF THE BAD FAITH CASE**
>
> In May of 2004 I was contacted by my lawyers and advised that there was an opportunity to settle all of my remaining PIP cases with Progressive if I was willing to drop my bad faith claims. I was willing to do this and authorized Watson & Lentner to enter into such a settlement.

> Subsequently, I was advised that a settlement on those terms with Progressive had not been approved by all of the health care providers. *My lawyers then relayed a settlement offer from Progressive for the bad faith case whereby I would share $1,750,000.00 with the thirty five other named plaintiffs in the bad faith case. In addition, in a separate settlement of outstanding PIP cases, I would receive full payment of all outstanding PIP claims together with interest and costs of litigation. In this arrangement, Watson & Lentner settled on the amount of attorney's fees they would receive for their work on our PIP cases*.
>
> *I received a letter from Larry Stewart which I understood to be in his advice that I not settle the bad faith case.* I also received a letter from Watson & Lentner which explained that there was a disagreement between Larry Stewart and Watson & Lentner about how to handle the bad faith case and whether it should be settled. (Emphasis supplied).

These affidavits contradict virtually all of the Referee's findings and conclusions that Lentner did not make proper disclosures to his clients regarding the settlement.

No attorneys had bad faith retainers to represent any health care providers or bad faith except for the 37 Gold Coast plaintiffs. Lentner testified, and the affidavits from Watson, PA's clients confirm, that it was their understanding that the $3.5 million offer was to settle *all the bad faith claims of all the healthcare providers,* including the PIP clients that were not parties to the Gold Coast bad faith case. As stated in the affidavits:

> In April of 2004 I am told that a mediation was held in the Fishman/Stashak case. I was not invited to attend the mediation even though I was a named plaintiff. I was not told of any strategy for the mediation and I was not asked to authorize any particular deal.

> I am told that at the mediation, Larry Stewart made a demand for a sum of money to settle not just the claims of the thirty six plaintiffs in the Fishman/Stashak case, but of more than four hundred other health care providers that were not in the case. *I am also told that an offer was supposedly made by Progressive at the mediation which was to be divided between approximately 440 different health care providers, even though there were only thirty six plaintiffs in the case.*
>
> I was not asked if I wanted to accept that offer. I am told that Larry Stewart rejected Progressive's offer without consulting with any of the named plaintiffs other than Drs. Fishman and Stashak.(Emphasis supplied).

The Gold Coast bad faith clients did not want all the potential bad faith claims of all the healthcare providers to be part of their Gold Coast bad faith suit.

Lentner had a responsibility to keep his clients confidences:

Lentner had a responsibility to keep his client's confidences. The Referee's findings that Lentner was required to discuss Progressive's confidential settlement offer made to the Gold Coast clients with clients that were not part of that lawsuit[12] would violate Rule 4-1.6 Confidentiality of Information (2004), and should not be reexamined by this Honorable Court. In 2004, the Florida Bar rules relating to client confidences stated the following:

> [A]s a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be compelled only in accordance with recognized exceptions to the attorney client and work product privileges.

[12] See RR p. 22.

> *The lawyer's exercise of discretion not to disclose information under rule 4-1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with the law through assurances that communications will be protected against disclosure*. (Emphasis supplied). *Amendments to Rules Regulating Florida Bar*, 933 So.2d 417, 423 (Fla. 2006) (showing this language was in effect in 2004).

Lentner would have violated Rule 4-1.6 Confidentiality of Information (2004), if he had disclosed, as the Referee suggests, to the numerous health care providers in hundreds of PIP suits, who were not clients in the Gold Coast bad faith case the privileged details of the settlement offer. Each of these clients received 100% of the PIP benefits and interest owed them by Progressive and knowingly agreed to forego any *potential* bad faith claim. The second class of clients controlled the bad faith case and ultimately settled their case against Progressive.

V. The Referee *erroneously* found Lentner violated Rule 4-8.4 (b) and (c) and Rule 3-4.3 inasmuch as there was no substantial competent evidence that Lentner violated these rules.

Despite the conclusion that "[t]here is clear and convincing evidence Darin Lentner knowingly and intentionally deceived clients to obtain the necessary releases, and that he did so with the specific intent to benefit himself and Laura Watson" [RR 25], the Report makes no finding of fact that Lentner made any misrepresentation to anyone. The Report, at page 22, states that "Lentner'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 of the information about the settlement with Progressive, entirely to further his own interests." Which clients did Lentner allegedly withhold information about the settlement?

There were *two distinct classes* of clients that were involved in *two distinct settlements*. Lentner represented numerous health care providers in hundreds of PIP suits. Each of these clients retained Watson PA, the firm Lentner worked for, to represent them in PIP suits only. The contract of employment did not authorize Watson PA to represent these providers in a bad faith action. [**Tab154**, *PIP Contingency Fee Contract*]. Each of these clients received 100% of the PIP benefits and interest owed them by Progressive and knowingly agreed to forego any *potential* bad faith claim. The second distinct class of clients, and those clients alone, controlled the bad faith case and ultimately settled their case against Progressive. Lentner, Ms. Watson, or Watson PA did not receive so much as a single penny from the bad faith case and sacrificed well over a million dollars in PIP fees in connection with the Progressive settlement.

After the settlement of the Bad Faith case, a settlement of all of Watson, PA's PIP suits was obtained. The first class of clients – those who had individual PIP cases but were not plaintiffs in the Gold Coast bad faith case – received 100% of the benefits and interest owed and a letter advising them that this was recovered.

The second class of clients – those who were part of the Gold Coast bad faith case – received a detailed letter explaining the negotiations and the previous offer and events. [RR 12]. Lentner also had a verbal, in depth discussion with his bad faith clients about the amounts they were to receive, that he wasn't trying to keep anything secret, that the June 16, 2004 letter adequately explained the settlement, and was the equivalent of a closing statement.

There is nothing misleading in these letters and the Report's failure to identify any information that could have misled a single client, makes it impossible to fully address this issue. Further, the letter advises that the Gold Coast bad faith clients have the right to consult with the bad faith lawyers:

> The choice you now have is whether to continue as a party in the Bad Faith Case or to accept the PIP Settlement and the amount we have confidentially made known to you. *Since you are represented both by the Stewart Firm and us in the Bad Faith Case you have the right to consult with us, with them or anyone else as your advisor.* Please bear in mind, however, that the terms and amount of the PIP Settlement are agreed to be confidential and may not be disclosed to anyone other than your accountant. Violation of this confidentiality agreement will result in loss of the settlement for all concerned and a return to continued litigation. [**Tab 113**].

The fact that Progressive required confidentiality in the settlement is not unusual. The meeting with Progressive was initiated by Amir Fleischer, and as set forth in his Consent Judgment, "[he] agreed to the meeting and, at Progressive's insistence, did not inform the bad faith lawyers or the other PIP lawyers, with the exception of his partner, Gary Marks." *The Florida Bar v. Amir Fleischer,* SC 13-391,Consent

Judgment of May 14, 2015, at p. 6.

Thus, there is no evidence that Lentner acted dishonestly, fraudulently, deceitfully, or by making any misrepresentation to anyone. At best, pursuant to the Black Letter Rules, Lentner acted negligently. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist, or that a result will follow, which failure is a deviation from the standard care that a reasonable lawyer would exercise in the situation." Florida Standards for Imposing Sanctions, Black Letter Rules.

VI. The Florida Bar's request for disbarment is not supported the Referee's Report and has no reasonable basis in existing law and the applicable rule.

A. Disbarment is not supported by existing case law:

The facts do not support the extreme sanction of disbarment. Disbarment is "designed to be imposed in cases where rehabilitation is highly improbable and the conduct is egregious." *The Florida Bar v. Mason*, 826 So.2d 985, 989 (Fla. 2002). Importantly, the Referee did not propose that Lentner be disbarred. [RR 30]. This Honorable Court should uphold the Referee's recommended sanction if it has a "reasonable basis in existing law." *See Florida Bar v. Wohl*, 842 So.2d 811, 815 (Fla. 1996).

To be clear, the Referee's Report: (1) *did not find* Lentner charged his clients an illegal, prohibited, or clearly excessive fee; (2) *did not find* Lentner

misappropriated clients funds; (3) *did not find* Lentner guilty of trust account violations; and (4) *did not find* Lentner misused his clients funds or acquired a pecuniary interest adverse to his clients. Indeed the Referee ruled in favor of Lentner on the sole trust account allegation 5-1.1 (f) [disputed ownership of trust property]. [RR 3]. Lentner was not charged with violating a fiduciary relationship of any nature and the Referee — like Judge Crow -- did not find that Lentner had a fiduciary duty with the bad faith lawyers. [RR 19].

This was a complex transaction with no actual injury to the clients' property by any alleged misconduct. It should not be over looked that the only complainants were co-counsel to the Gold Coast bad faith case.[13] It is clear that Lentner certainly can be rehabilitated, and arguably already has been since the events of 2004. This complex transaction was the one and only time Lentner has had any blemish on his record. At best, pursuant to the Black Letter Rules and as previously stated, Lentner acted negligently.

Pursuant to the Standards for violations of duties owed to clients, rule 4.13 is most appropriate. That rule requires a public reprimand "when a lawyer is negligent in dealing with client property and causes injury or potential injury to a

[13] *No client of Lentner's has ever claimed a violation* of Rule 4-1.7(b)(Conflict of Interest); Rule 4-1.7(c)(Explanation to Clients); Rule 4-1.8(g) (Settlement of Claims for Multiple Clients); Rule 4-1.4(b) (Duty to Explain Matters to Client); Rule 4-8.4 (c)(Dishonesty, fraud, deceit, misrepresentation); Rule 3-4.3 (Acts Contrary to Honesty); or Rule 4-1.5(f)(5)(Closing Statement Required).

client." Standard 4.13. Lentner has conceded that a sixty (60) day suspension is appropriate.

The cases relied upon by TFB in seeking this sanction are inapposite to this case. First, TFB relies on *The Florida Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011), *which was a class action settlement*. The record is completely devoid of any evidence to suggest that the Gold Coast case was a class action suit, or that the Gold Coast bad faith clients had any fiduciary duty to healthcare providers who were not plaintiffs in that suit. Yet, the Referee *erroneously* applies class action principles to the Gold Coast bad faith clients. *Adorno* is inapposite to these proceedings because the multi-plaintiff Gold Coast bad faith case *was not* a class action suit and the settlement did not include a putative class. In a class action suit, the attorneys have a fiduciary duty to the putative class, and it was this breach of the fiduciary duty to the putative class that Adorno violated. *Id.* at 1025. But there was no duty owed by the Gold Coast bad faith clients to those who were not part of the suit. Notably, the bad faith statute specifically prohibits class action law suits and pursuant to statute, the 37 Gold Coast plaintiffs were not class representatives, and never could be. *See* Fla. Stat.§ 624.155(6).

Next, TFB relies on *The Florida Bar v. St. Louis*, 967 So.2d 108 (Fla. 2007) for its plea for disbarment. In the *St. Louis* case, the firm entered into an agreement with the DuPont Corporation wherein the firm agreed not to bring any

future Benlate claimants in exchange for compensation, which is a clear violation of Rule 4-5.6 (b)(restriction on right to practice). In addition, the respondent violated Rule 4-3.3 (candor toward a tribunal); Rule 4-5.1(c) (responsibilities of a partner); Rule 4-8.1(a)(knowingly making a false statement of material fact); Rule 4-8.1(b) (failure to disclose a fact necessary to correct a misapprehension); Rule 4-8.4(a) (violating or attempting to violate the rules of professional conduct); and Rule 4-8.4(c)(engaging in conduct involving misrepresentation). *Id.* at 118. *The Referee did not find Lentner guilty of any of these rule violations.* There is nothing similar about the *St. Louis* case and the Lentner case and TFB's reliance on *St. Louis* is misplaced.

Lastly, TFB cites *Florida Bar v. Kaufman*, 684 So.2d 806 (Fla. 1996), in support of its request for Lentner's disbarment. First, unlike Lentner, Kaufman had a disciplinary history, including a two-year probation and two public reprimands. In addition, Kaufman "hid his assets, lied about his assets and obstructed efforts to collect the judgment against him." *Id.* at 809. He also failed to respond to the Bar's complaint and discovery and subjected the referee to "numerous confusing and almost unintelligible pleadings" and engaged in bizarre behavior which resulted in the Referee ordering a psychiatric evaluation. *Id.* at 808-809. There simply is nothing similar in the Kaufman case that should lead this Honorable Court to disbar Lentner.

B. Marks & Fleischer, participants in the settlement, received suspensions of less than six months, not disbarment:

One of the architects of the settlement, attorney Gary Marks, entered into a Consent Judgment with TFB for a ninety-one (91) day suspension in *The Florida Bar v. Gary Howard Marks*, SC 13-392. As to his partner, Amir Fleischer, TFB recommended a four (4) month suspension. *The Florida Bar v. Amir Fleischer,* SC 13-391. The function of the Standards for Imposing Lawyer Discipline is to ensure there is consistency in the penalties imposed for misconduct. They are designed "to promote level of sanctions in an individual case" and "consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdiction." Florida Standards for Imposing Lawyer Sanctions, Purpose and Nature of Sanctions, Standard 1.3. The divergence in the proposed penalties agreed to by TFB with the architects of the settlement in question and the plea for disbarment of Lentner respectfully makes no sense.

C. The following aggravating factors should be rejected:

1. 9.22(b) – Dishonest or selfish motive:

The conduct of Lentner that the Referee condemns consists of nothing more than advising the clients to accept a settlement. For purposes of this case, the advice should be viewed from the perspective of the clients' interests, rather than those of the lawyers, before it is condemned as being unethical and self-serving. The decision to settle the Gold Coast bad faith case belonged to the clients, who

resoundingly rejected adding more plaintiffs to the case. It is undeniable that the PIP lawyers could not have settled the Gold Coast case on their own. They were representing clients whose approval was needed to reach a settlement.

From the point of view of the Gold Coast plaintiffs, the settlement made perfect sense. It would have been contrary to their best interests to continue down the path advocated by the bad faith lawyers. A quasi-class settlement would have diluted their recovery. In view of the damages limitations imposed by *Campbell* and the Florida Tort Reform Act, the clients justifiably concluded Stewart's plan was not feasible.

The Gold Coast plaintiffs owed no duties to the other providers. Therefore, they were not morally or legally prohibited from accepting the $1.75 million settlement proposed by Progressive that included no compensation for providers, who were not Gold Coast plaintiffs. They acted rationally and in good faith in accepting the deal against the advice of the bad faith lawyers.

All of the lawyers are bound by the clients' good faith settlement decision, even if the decision was made without their participation and against their advice. "[I]f acting in good faith, the parties to an action may settle and adjust the same without the intervention of their attorneys." *Sentco, Inc. v. McCulloh*, 84 So. 2d 498, 499 (Fla. 1956). "[A] litigant is [not] required to hazard the outcome of litigation rather than settle the suit, simply because his attorneys are employed on a

contingency fee basis." *Id.* Rule 4-1.2(a), Rules Regulating the Florida Bar, provides: "A lawyer shall abide by a client's decision whether to settle a matter." Citing the Florida antecedent of this rule and *Sentco*, the Fifth Circuit Court of Appeals observed:

> An attorney never has the right to prohibit his client from settling an action in good faith.... A client by virtue of a contract with his attorney is not made an indentured servant, a puppet on his counsel's string, nor a chair in the courtroom. Counsel should advise, analyze, argue, and recommend, but his role is not that of an imperator whose edicts must prevail over the client's desire. His has no authoritarian settlement thwarting rights by virtue of his employment.

Singleton v. Foreman, 435 F. 2d 962, 970 (5th Cir. 1970). *See also Sinclair, Louis, Seigel, Heath, Nussbaum & Zavertnik, P.A.*, 428 So. 2d 1383, 1386 (Fla. 1983).

Settling also made sense from the point of view of the providers who were not Gold Coast plaintiffs. The Referee criticized Lentner because the providers released potential bad faith claims without any compensation. But these providers did not sign up for a bad faith quasi-class action. They were happy to receive full compensation for their PIP claims, thereby accomplishing the objective for which they had hired a lawyer. The PIP lawyers were under no ethical duty to advise their PIP clients of settlement money that was being offered to the Gold Coast plaintiffs.

The "plan" to sign up providers would involve several levels of speculation: that all or even most of the providers would sign up for a multi-plaintiff bad faith

case, that Progressive would put enough money on the table to possibly make a multi-plaintiff bad faith case settlement feasible, and that the Gold Coast plaintiffs would agree to increase the plaintiffs that diluted their recovery.

That the clients approved the settlement is beyond dispute. No client has contested it or complained that they were not treated fairly. The bad faith lawyers have not challenged the clients' settlement decisions. They accepted the settlement and the funds generated by it that were available as fees. The settlement was approved or ratified by all interested parties and lawyers. *See Kisz v. Massry*, 426 So. 2d 1009 (Fla. 2d DCA 1983) (a party ratifies a settlement by accepting its benefits, even if it was not in the first instance authorized by him); *Nagymihaly v. Zipes*, 353 So. 2d 943 (Fla. 3d DCA 1978).

Dividing $2.5 million – roughly the fees Watson PA received from the settlement -- by its 770 PIP files yields less than $3,300 per file. During the Gold Coast case, and in pretrial testimony in this case, Stewart endorsed fees of $10,000 per file. [**Tab 100**]. Thus, Watson PA accepted an amount for fees that was significantly less than the monies owed the firm, and Lentner showed no dishonest or selfish motive.

Most importantly, there was no claim by any of Lentner's clients that he put his, or Watson PA's attorneys' fees, above a good settlement for them or that he failed to act at all times in good faith and adhere to his fiduciary duty to his clients.

2. 9.22(c)-Pattern of misconduct:

Notwithstanding the Referee's finding that "Darin Lentner committed violations by participating in the MOU and the later AMOU, both of which violated the aggregate settlement and conflict of interest Rules" this misconduct was a single isolated incident in Lentner's twenty-four (24) year history as a Florida lawyer. TFB Complaint arises out of events occurring in 2004 and allegations contained in a civil action related to an attorney's fees dispute that occurred nearly a decade ago, from 2002-2004. At issue were the division of attorney's fees and at no time were amounts due clients in dispute, nor is there any allegation of misappropriation of client monies part of the inquiry. [RR[14] 1-31].

3. 9.22(f)- False Statements during the disciplinary process:

The Referee, without identifying any false testimony or false documentary evidence found "Darin Lentner was not truthful during his testimony in these proceedings" and relies on this as an aggravating factor for discipline. [RR 29]. Nothing in the Referee's Report identifies the *alleged* false testimony during any proceedings. While the record evidence reveals many conflicts in the memories and testimony of the witnesses, Lentner's testimony stood unimpeached from his 2008 trial testimony in the *Attorneys Fees Dispute* case tried before Judge Crow. Lentner *was not charged* with a violation of Rule 4-3.3(a)(1) Candor Toward the

[14] References to the Report of Referee shall be by symbol RR followed by the appropriate page number.

Tribunal (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal).

Importantly, there is no clear and convincing evidence to support the Referee's finding that "Lentner was not truthful during his testimony." [RR 29]. In the case of *The Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970), the Court accepted the definition of "clear and convincing" evidence articulated by the Supreme Court of New Mexico: "The law is well settled in this jurisdiction that the evidence to sustain a charge of unprofessional conduct against a member of the bar, wherein his testimony under oath he has fully and completely denied the asserted wrongful act, *must be clear and convincing and that degree of evidence does not flow from the testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances.*" *Id.* at 597. In order for evidence of deceit to be "sufficiently clear and convincing", it cannot be made on the basis of conflicting evidence. *Raymond* at 596, citing *State ex rel. Florida Bar v. Bass*, 106 So.2d 77 (Fla. 1958).

4. 9.22(i)-- Substantial experience in the practice of law:

While it is true that Lentner has been practicing law since 1991 and had extensive experience in PIP health care provider cases, he had *no experience* in bad faith litigation, multi-plaintiff cases, or complex litigation cases of any nature. It is because of his lack of experience in these areas and the lack of experience on the

part of the other attorneys at Watson PA that they did not handle the bad faith case without co-counsel experienced in these matters. As the Referee noted, "[f]or two years, the bad faith lawyers prosecuted the case against Progressive. The PIP law firms, including Watson PA, continued to litigate their clients' underlying PIP cases and sought to preserve potential bad faith claims of the PIP clients when settling individual PIP cases."[RR 7].

5. 9.22(j)—Indifference to making restitution:

It is well settled law that an attorney can only be ordered to pay restitution if an attorney is guilty of Rule 3-5.1(i). *The Florida Bar v. Walton, Jr.,* 952 So.2d 510, 514 (Fla. 2006) (Referee's recommendation to provide restitution was inappropriate because the Respondent was not charged with violating Rule 3-5.1(i), receiving a clearly excessive, illegal, or prohibited fee). *See also The Florida v. Smith*, 866 So.2d 41, 49 (Fla. 2004)("Pursuant to rule 3-5.1(i) and case law, this Court does not award restitution to clients unless it is related to excessive or illegal fees or theft of client funds or property".[15] In this case, Lentner *was not charged* with a violation of Rule 3-5.1(i) and *was not found guilty* of violating rule 3-5.1(i). Moreover, the only charged trust account violation — i.e. Rule 4-1.5(f)(disputed ownership of trust property) – was withdrawn by TFB after it rested its case; and the Referee directed a verdict in Lentner's on this rule. [RR 3].

[15] The bad faith lawyers and the PIP lawyers were co-counsel on the gold Coast bad faith case. There was no attorney-client relationship between them.

Pursuant to the Bar rules, the rule regarding restitution states:

> [T]he respondent may be ordered or agree to pay restitution to a complainant or other person if the disciplinary order finds that the respondent has received a clearly excessive, illegal, or prohibited fee or that the respondent has converted trust funds or property. Rule 3-5.1(i).

To be clear, Lentner has no previous grievance complaints and has never been ordered to pay restitution, not by Judge Crow in the *Attorneys Fees Dispute* case, and not by this Referee, though he ordered payment to the Client Security Fund. According to rule, if restitution is ordered, "[t]he disciplinary order or agreement shall also state to whom restitution shall be made and the date by which it shall be completed." Rule 3-5.1(i). No such order regarding Lentner has been entered.

It is without explanation that the Referee finds that "Darin Lentner has not made any efforts to pay restitution." [RR 29]. This finding directly conflicts with Judge Crow's Final Judgment for Lentner on all counts in the *Attorneys Fees Dispute* case. [RR 17]; [**Tab I** *Complaint* Exhibit A, pp. 19-23]. As to Lentner's letter agreement with Ms. Watson, entered in contemplation of separation and divorce, this agreement was entered years before the judgment in the *Attorneys Fees Dispute* case, the bad faith attorneys were not intended as third party beneficiaries, and were not identified as such and therefore could not enforce the agreement. But even if the bad faith attorneys were third party beneficiaries to this

agreement, this Court "has a firmly established policy against awarding restitution to third parties in disciplinary matters" and disciplinary actions "are not intended as forums for litigating claims between attorneys and third parties...." *Walton, Jr.,* at 516.

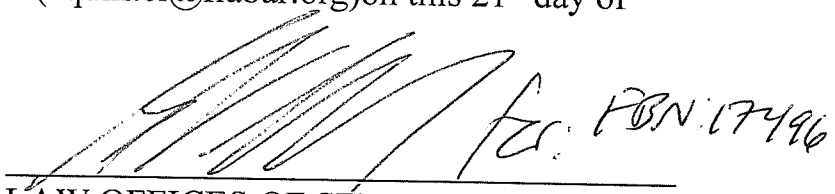
Under the fact of this case, Lentner could not possibly be on notice that he was expected to pay restitution. Indeed, no restitution was ordered in prior proceedings. The Referee's recommendation should be rejected inasmuch as there is no evidence in the record to support this finding and the evidence clearly contradicts the conclusions. Moreover, since restitution can only be ordered if an attorney is guilty of a violation of rule 3-5.1(i), the recommendation has no "reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions since Lentner was not charged with or found guilty of a violation of this rule. *See Florida Bar v. Brown*, 905 So.2d 76, 83-84(Fla. 2005)(Other internal citations omitted)." Walton, Jr., at 514.

CONCLUSION

For the foregoing reasons, Lentner respectfully requests that this Honorable Court reject TFB's recommendation for disbarment and impose a sixty (60) day suspension, and then reverse the Referee's recommendation that Lentner pay the Client Security Fund over $800,000.00.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Cross-Petitioner/ Respondent's Answer Brief and Cross Initial Brief has been filed via e-portal and furnished by email to Bar Counsel, Ghenete Elaine Wright Muir, Esq. (gwrightmuir@flabar.org), Alan Anthony Pascal, Esq. (apascal@flabar.org), and The Florida Bar Special Counsel, David B. Rothman, (dbr@rothmanlawyers.com), and Adria Quintela, Esq., Staff Counsel (aquintel@flabar.org)on this 21st day of September 2015.



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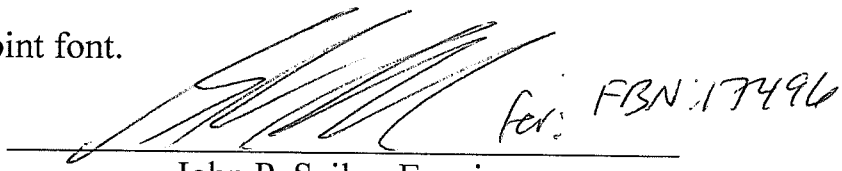
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief complies with the font requirements of Fla. R. App. 9.210(a)(2), as it is being submitted in Times New Roman 14-point font.



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