

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLIE EASA FARAH JR.,

Respondent.

Supreme Court Case No.
SC22-472

The Florida Bar File No.
2018-00,181 (02A)

THE FLORIDA BAR'S REPLY BRIEF

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REPLY ARGUMENT

It is not a new or novel tactic for a respondent to defend alleged misconduct by deflecting to conduct by another lawyer or an infirmity in the bar's investigation. In this case, Mr. Farah attempts both: he places all blame on Norwood Wilner for every act of misconduct in the Federal *Engle* Actions, while claiming that the bar performed no investigation. (See AB:45). Based on these two arguments, the answer brief asserts that Mr. Farah should receive no sanction for his role as co-counsel in 1,250 civil claims the federal court found by clear and convincing evidence were frivolously filed and maintained by Mr. Wilner and Mr. Farah in violation of the Florida Rules of Professional Conduct. (TFB-Ex.2, pg.130). The bar will address both arguments, then address the due process arguments regarding uncharged rule violations and Mr. Farah's alternative request for remand for a sanction hearing.

I. Mr. Farah cannot delegate his non-delegable ethical responsibilities to his co-counsel and thereby escape discipline for violating Rules 4-1.3, 4-1.4(a), and 4-1.16.

A. Deflection to Mr. Wilner:

In attempting to lay all blame on Mr. Wilner, the answer brief asserts the referee properly ignored thousands of lawsuits in which Mr. Farah was co-counsel of record and confined review to 163 cases originating from his firm. Though some of these cases were also dismissed as frivolous filings,

Mr. Farah dissociates from these cases as well, stating that he only evaluated the claims pre-suit, but he referred them to Mr. Wilner, who then “took possession of, filed, and ... later advocated” these cases. (AB:21). In this manner, Mr. Farah absolves himself of all responsibility for anything that happened in the litigation.

The referee’s confined review to 163 cases would be warranted if (1) Mr. Farah had not agreed to co-counsel, divide fees, and assume joint legal responsibility for the Federal *Engle* Actions; and (2) the inclusion of Mr. Farah as co-counsel on these cases was unauthorized, because Mr. Farah did not assume any role in the litigation. Both would have to be established to justify the limited review. Neither were.

First, Mr. Farah claimed entitlement to a 50% share of attorneys’ fees for all of the Federal *Engle* Actions. (See IB:30-31). The answer brief reaffirms Mr. Farah’s belief that he was entitled to this equal share. (AB:20). Second, Mr. Farah knowingly appeared as co-counsel in all Federal *Engle* Actions. Rather than admit this plain fact, the answer brief instead argues extensively about whether the inclusion of Mr. Farah’s signature block on complaints was explicitly authorized. This assertion would bear relevance if offered in support of a broader argument that Mr. Farah was mistakenly listed as co-counsel of record in the Federal *Engle*

Actions. But the answer brief never makes that assertion, because Mr. Farah's status as co-counsel was the legal basis for his claim to half of the attorney's fees. Since Mr. Farah's defense is nevertheless predicated on his claim that he assumed no responsibility for *any* of the litigation by never authorizing the use of his signature block, the bar will address this issue in more detail. (See AB:3).

The referee erred in finding that Mr. Farah was not culpable because he did not know his name would appear on complaints filed by Mr. Wilner. (See T1:51-53). Mr. Farah's sworn statements and letters to the bar repeatedly establish that he knowingly and jointly represented every plaintiff in the Federal *Engle* Actions. His specific knowledge of the manner in which he initially appeared as co-counsel of record is irrelevant.

Mr. Farah's interrogatory answers contain several statements further confirming he jointly represented all plaintiffs in the Federal *Engle* Actions from the beginning:

- “[T]he Farah Firm responds **“Yes” as to all clients.** . . . The Farah Firm lacks knowledge as to the dates when attorney-client relationships were established with **the other clients** [beyond the 163 cases] whom **The Farah Firm jointly represented** along with The Wilner Firm, Lieff Cabraser, Motley Rice, **and/or other co-counsel.**”
- “Regarding the 163 clients for whom The Farah Firm was initially responsible, The Farah Firm is producing a

spreadsheet indicating the status of each case in federal court. . . ***The Farah Firm lacks knowledge as to the other clients whom the Farah Firm jointly represented*** along with The Wilner Firm, Lieff Cabraser, Motley Rice, ***and/or other co-counsel.*** . . .”

- “As the Special Master is aware, the Engle cases were originally filed in groupings of roughly 220 clients per action. The Farah Firm was listed as counsel of record, subordinate to The Wilner Firm, which was listed as lead counsel, in each bundled action. Thereafter, the Court severed the actions into discrete cases for individual clients. ***The Farah Firm then appeared as counsel of record in each individual action*** in the aforementioned manner. . . . Thus, The ***Farah Firm became counsel of record*** for each plaintiff ***between*** the dates of ***August 16, 2007*** (3:07-cv-760-J-25HTS) ***and February 12, 2008*** (3:08-cv-165-J-25HTS).”
- “The Farah Firm had contact prior to becoming counsel of record with all 163 clients it directly contributed to the Engle cases. Although ***The Farah Firm appeared as co-counsel of record for additional clients secured by The Wilner Firm***, The Farah Firm did not directly communicate”

(TFB-Ex.7, pg.7-8) (emphasis added).

Collectively, these sworn answers establish that Mr. Farah was “co-counsel” and “jointly represented” “all clients” when he appeared as counsel “between the dates of August 16, 2007 . . . and February 12, 2008.” There is no claim that the filings were unauthorized. Nevertheless, the answer brief suggests Mr. Farah would have freely accused Mr. Wilner of falsifying thousands of pleadings if the bar simply asked him. (AB:38).

The answer brief's representation is belied by Mr. Farah's answer to the formal complaint, which asserted that between 2007 and 2008, Mr. Farah's firm contacted "nearly all of the *Engle* progeny clients and obtained permission to continue the representation, file complaints on their behalf, pursue *Engle* Fund claims, and to associate with the Wilner Firm." (Tab#6, ¶16).

Nowhere in Mr. Farah's letters to the bar (TFB-Ex.8-10), answers to requests for admissions (Tab#40), answers to the special master's interrogatories (TFB-Ex.7), answers to the bar's interrogatories (Tab#39), or his pretrial memorandum (Tab#43) does he allege that he should not be sanctioned because he never authorized his signature block on pleadings. In fact, his sudden claim at trial contradicts his argument in federal court:

The complaints were drafted, filed, and signed by the Wilner Firm. . . . Farah is not suggesting that he be absolved of all responsibility because he was not the particular signor or filer of these documents; rather, he suggests only that as a non-signor his liability should be proportionate to his responsibility.

(TFB-Ex.3, pg.9). Mr. Farah apparently reconsidered that position, never informed the bar, claimed it for the first time at trial, and now asserts that the bar failed to investigate by not asking that specific question.

Mr. Farah's answer brief claims that the placement of his signature block was "arbitrarily typed." (AB:20). It was not. Mr. Farah's interrogatory

answers reference Mr. Wilner's authority to sign documents on behalf of the Farah firm:

In approximately September 2011, Lieff Cabraser joined the litigation team. Mr. Wilner negotiated the terms of the partnership, which were memorialized in a written agreement among counsel. Mr. Wilner signed the agreement on The Farah Firm's behalf.

(TFB-Ex.7, pg.17). Notably, Mr. Wilner's authority to bind Mr. Farah's firm was not an issue regarding this written agreement. The answer brief relies on this very action as "an example of diligence" by Mr. Farah (see AB:49), who purportedly allowed a lawyer who falsified thousands of pleadings to continue to bind Mr. Farah's firm and dilute his share of attorney's fees. The inclusion of his signature block only became problematic for Mr. Farah when asserting to the bar that he was not responsible for *any* misconduct in the federal litigation.

Mr. Farah swore that he was "heavily involved in working cases, including the submission of claims against the Engle Trust Fund." (TFB-Ex.7, pg.16). Though the latter may be true, the former is not because the trust fund was not a part of the litigation. The answer brief explains that before this Court set aside the class action verdict, the parties to the class action negotiated the creation of a \$600,000,000.00 trust fund. (AB:4). The funds were for the benefit of class members, regardless of the outcome on

appeal. *Id.* The answer brief asserts that Mr. Farah gave up his existing caseload to manage approximately 100 employees in compiling and processing fund submissions. *Id.*

The answer brief continues the tactic of conflating Mr. Farah’s processing of claims to a trust fund—which was established before decertification of the class in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006)—with legal work in the subsequent federal litigation initiated one year after the *Engle* opinion. He similarly conflated the two at trial when asked about the legal work he performed in the federal litigation. (See T1:82-83). In asserting entitlement to 50% of the attorneys’ fees in connection with the Federal *Engle* Actions, the answer brief defines Mr. Farah’s work in submitting claims as “non-litigation responsibilities in connection with the *Engle* cases which entitled his firm to compensation equal to Wilner.” (AB:20). It again asserts that “Farah’s responsibilities were ***unconnected to the litigation*** except for his role in evaluating the 163 cases Wilner took possession of, filed, and ... later advocated.” (AB:21) (emphasis added).

This is a departure from Mr. Farah’s answer to the formal complaint stating that he contributed significant labor “***in connection with the litigation.***” (Tab#6, ¶10) (emphasis added). Given the answer brief’s

clarification on the matter, Mr. Farah was not entitled to 50% of attorneys' fees from thousands of federal lawsuits for "non-litigation responsibilities" that he further admits were "unconnected to the litigation." (AB:20-21). Confusingly, the answer brief later asserts that the bar did not rebut Mr. Farah's testimony claiming he aided in the litigation by managing over 100 people. (See AB:50). Though the trust fund and the federal litigation may have shared overlapping goals of compensating individuals injured by tobacco company defendants, the trust fund was never a part of the federal litigation.

To be entitled to an equal share of fees, a lawyer must "accept substantially equal active participation *in the providing of legal services.*" Rule 4-1.5(f)(4)(D)(iii) (emphasis added). In addition to conceding that Mr. Farah did not provide legal services, the answer brief provides several examples of Mr. Farah failing to meet this standard:

- After the court ordered plaintiff's counsel to review the viability of remaining cases in December 2010, "**Farah played no role** in this case review process, certification, or recommendation of disposition." (AB:4-5);
- When Lief Cabraser appeared as co-counsel and evaluated pending claims, "**Farah did not participate** in the Lief Cabraser review. . . ." (AB:5);

- During a June 2011 hearing, the federal court expressed concern about the viability of all pending cases, and “**Farah did not attend** that hearing.” (AB:5);
- The federal court held a hearing on sanctions “**on December 13, 2016**. Then, **for the first time during the Engle litigation, Farah personally appeared in court**. . . . He was essentially an observer.” (AB:7);
- “**Farah was not involved in the litigation conduct** that the District Court found to run afoul of Rule 11.” (AB:7);
- “**Farah’s responsibilities were unconnected to the litigation** except for his role in evaluating the 163 cases Wilner took possession of, filed, and for which Wilner advocated.” (AB:21);
- “**Farah was not the signor and never “advocated” for the position** for which he is now being criticized.” (AB:41); and
- “However, **he [Farah] was not responsible for vetting the Wilner-generated clients**. . . .” (AB:48).

(emphasis added).

The only means of legal entitlement to an equal share was to assume equal responsibility for the legal representation. See *Halberg v. W.M. Chanfrau, P.A.*, 613 So. 2d 600, 602 (Fla. 5th DCA 1993) (upholding a fee splitting agreement because language in the agreement was “sufficient to prove that the referring attorney had, or assumed, a legal responsibility for the representation of the client”). By his own admission, Mr. Farah did not assume an equal share of responsibility for the performance of legal services. The answer brief does not address this issue meaningfully.

Instead, the answer brief falsely asserts that the bar's position is that Mr. Farah became equally responsible "simply because Wilner's firm listed Farah's name on the complaints." (AB:12). Other than conflating Mr. Farah's work on the trust fund with work in the litigation, the only arguments in the answer brief regarding Mr. Farah's right to 50% of the fees is based on Mr. Wilner's failure to complain about the fee splitting arrangement, and the district court's failure to address the issue. (AB:22). But Mr. Farah's and Mr. Wilner's fees were disgorged, which mooted any issue of fee apportionment between the two lawyers. (AB:9).

Mr. Farah's equal responsibility is a matter of law, not an issue of fact based on his alternative arrangement with Mr. Wilner. A lawyer "may not delegate that duty [to comply with the Rules of Professional Conduct] to another under the umbrella of advice of counsel and thereby create a defense to a violation of those Rules." See *The Florida Bar v. St. Louis*, 967 So. 2d 108, 118 n.3 (Fla. 2007) (quoting *People v. Katz*, 58 P.3d 1176, 1187 (Colo. P.D.J. 2002)). Mr. Farah cannot delegate his ethical duties by agreement and then complain the bar is attempting to "create vicarious ethical responsibility" based on this improper delegation. (See AB:39).

Mr. Farah asserts he can delegate his equal responsibility as co-counsel to Mr. Wilner because of a comment in Rule 4-5.1, which

addresses the limits of a lawyer's responsibilities regarding the conduct of others within the lawyer's firm. (AB:39). Mr. Farah was not charged with violating Rule 4-5.1 because there was no supervisory role between him and Mr. Wilner, who are employed by separate firms. The answer brief is correct in asserting, "The Bar ignores the comment to Rule 4-5.1." The non-binding comment to the inapplicable rule is irrelevant.

Mr. Farah's quibble over the absence of his "wet ink" signature and his assertions that he did not review the complaints are attempts to escape discipline based on intentional ignorance. If he lacked knowledge of the merits of claims, he should have become informed. If he lacked the means to verify the merits of claims, he should have withdrawn. The federal court found that it had "the inherent authority to sanction Wilner and Farah for filing **and maintaining** these cases, as doing so violated the Florida Rules of Professional Conduct and their responsibilities as officers of this Court." (TFB-Ex.2, pg.130) (emphasis added). The answer brief, however, is mostly focused on the initial filings, likely because Mr. Farah's complete inaction for the years that followed is indefensible. In doing so, the answer brief simultaneously argues that (1) Mr. Farah was entitled to 50% of the attorney's fees based on his substantial contributions; and (2) Mr. Farah

performed no legal services and undertook no responsibility for the litigation effort. The two positions are inherently irreconcilable.

B. Deflection to the bar's investigation:

Mr. Farah claims the bar conducted no investigation, because it did not depose him or anyone else, and he was the only bar witness called at trial. (AB:23, 45). The answer brief wrongly conflates the bar's actions *after* the formal complaint was filed with the assertion that no investigation took place *before* the formal complaint was filed. Mr. Farah claimed at trial that he had no way of knowing the scope of the grievance committee's investigation. (T1:117). His answer to the formal complaint similarly stated that he was "without knowledge" of the actions taken by the Board of Governors or materials documenting the board's decisions. (Tab#6, ¶3). Mr. Farah repeatedly disclaimed any personal knowledge of the scope of the grievance committee's investigation. Consequently, the referee lacked any record evidence to support the finding that no investigation took place. The answer brief asserts that "[t]here is nothing in the record which refutes that finding." (AB:12). There is nothing in the record that supports the finding either. Argument of counsel is not evidence. *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365 (Fla. 1974).

The answer brief is deflecting in response to the special master's finding that Mr. Farah "conducted no investigation" regarding the viability of claims, which is also referenced in the bar's formal complaint. (See TFB-Ex.1, pg.73; Tab#1, ¶37). Further, the bar asked for and received from Mr. Farah (1) a written response to the federal court order; (2) another written response after the grievance committee sought additional information; and (3) a third written response regarding the grievance committee's notice of review. (See generally TFB-Ex.8-10). All written responses by Mr. Farah were submitted by his counsel during the investigation and prior to a finding of probable cause. Mr. Farah was provided and took advantage of several opportunities to explain himself pursuant to Rule 3-7.4(h) during the investigation he now claims never took place.

Mr. Farah also maintains that the bar conducted no investigation because it prosecuted the case by only calling him as a witness, and his testimony was found to be credible and unrebutted. (AB:45-46). This conflates the bar's litigation strategy with the scope of the underlying investigation. Further, Mr. Farah's credibility is immaterial. As explained *supra*, he argues that he was not tasked with diligence in the litigation or communicating with clients because he delegated his responsibilities under Rules 4-1.3 (diligence) and 4-1.4(a) (communication) to Mr. Wilner. This

assertion is an issue of law, not an issue of fact. The bar additionally argued that Mr. Farah violated Rule 4-1.16 (declining or terminating representation). Mr. Farah's claimed inability to verify the accuracy of pleadings filed by Mr. Wilner required his withdrawal, because he admitted in federal court that he had no means of complying with the Rules of Professional Conduct. (See TFB-Ex.3, pg.3) ("With respect to the lawsuits contributed by the Wilner Firm, before the filing deadline neither Farah nor F&F had access to Wilner's client files or any ability to evaluate the thousands of cases that Wilner contributed."). The answer brief offers no specific argument regarding this rule violation. The other uncharged rule violations are addressed *infra*.

The referee's report found that the bar erred in relying on the federal court order to establish Mr. Farah's guilt because the burdens of proof differed. (ROR:16). First, the federal court order was a final adjudication that Mr. Farah was guilty of misconduct, which is "considered as conclusive proof of the misconduct." Rule 3-4.6(a). Second, the federal court order applied the same clear and convincing evidence standard applicable in lawyer disciplinary proceedings. (See IB:33-34). The answer brief offers no argument in support of this mistaken holding by the referee, other than to shift argument to instead state that the district court did not find Mr. Farah

committed the three rule violations charged. (See AB:26). This draws too fine a distinction on the federal court order, which did not merely refer the matter to the bar for investigation as repeatedly asserted throughout the answer brief. Instead, it explicitly held that “the Court has the inherent authority to sanction Wilner and Farah for filing and maintaining these cases, as doing so violated the Florida Rules of Professional Conduct.” (TFB-Ex.2, pg.130). The bar identified three rule violations at issue established by the factual findings of the federal court order.

II. The uncharged violations of Rules 4-1.5(f)(2) and 4-1.5(f)(4)(D)(iii) are properly before this Court.

Mr. Farah does not contend that his failure to obtain written contingency fee agreements or a written fee splitting agreement with Mr. Wilner for the thousands of cases in which he appeared as co-counsel was outside the scope of the bar’s complaint. Instead, he states the bar’s complaint contains “oblique references” to the matter. (AB:13). He also concedes that the bar raised these additional matters before the referee. (AB:32). This Court has original jurisdiction. Art. V, § 15, Fla. Const. Because the underlying facts forming the basis of the uncharged violations are within the scope of the formal complaint and were raised to the referee, this Court has the discretion to find Mr. Farah guilty of these additional rule

violations. See *The Florida Bar v. Fredericks*, 731 So. 2d 1249, 1253 (Fla. 1999).

This Court should exercise that discretion.¹ Other than complaining about “improper bootstrapping” and “fundamental unfairness,” the answer brief mostly distinguishes the bar’s case law on the facts, without explaining the relevance of those factual distinctions. (See AB:29-30). If the formal complaints in those prior cases contained more specific allegations absent from the formal complaint in this matter, these factual distinctions might bear relevance. But the answer brief only offers conclusory assertions that the formal complaint in this case did not place Mr. Farah on notice of the nature and extent of the misconduct at issue.

Further, Mr. Farah’s defense to the charged violations was that he undertook no responsibility. This is an effort to benefit from his failure to reduce his fee splitting arrangement to writing or explain his legal duties in written contingency fee agreements. Both would have explained the scope of his legal duties, but because Mr. Farah never took that necessary step, he attempts to capitalize from an asserted ambiguity of his own making. Mr. Farah relies on the absence of written agreements to argue that he

¹ Contrary to the answer brief’s argument, the bar is not asserting that “a lawyer can (or should) always be charged with new accusations after the lawyer was found not guilty by the Referee.” (AB:29).

assumed no responsibility for legal services, then complains that the bar asserted rule violations based on the absence of written agreements. This Court should find him guilty of violating Rules 4-1.5(f)(2) and 4-1.5(f)(4)(D)(iii).

III. Remand of this case for a sanction hearing is not required.

Mr. Farah argues that in the event this Court rejects the referee's finding of not guilty, the matter must be remanded for a sanction hearing so that the parties can present aggravating and mitigating factors. The bar's initial brief did not ask this Court to remand the matter to the referee, and instead sought Mr. Farah's 30-day suspension from the practice of law. The bar did not seek remand based on this Court's holding in *The Florida Bar v. Cocalis*, 959 So. 2d 163 (Fla. 2007). Specifically, the referee in *Cocalis* did not find that the respondent violated a bar rule and instead recommended referral to a practice and professionalism program. *Id.* at 164. Diversion to such a program in lieu of a finding of guilt under Rule 3-5.3(i)(2) is not a sanction. This Court held that diversion was inappropriate. *Id.* at 166. Despite the referee's failure to render any findings of guilt, this Court did not remand the matter, reasoning as follows:

Here, the referee made no recommendation of discipline. Diversion alone is not a sanction. Therefore, we proceed in determining the appropriate sanction without remanding this matter to the referee for further proceedings and for guidance

review existing caselaw and the Florida Standards for Imposing Lawyer Sanctions.

Id. at 167 (internal citation omitted).

The *Cocalis* opinion then analyzed the applicable standards and case law in determining that a public reprimand was the proper sanction.

Therefore, the bar's initial brief argued the applicable standards and case law supporting imposition of a 30-day suspension. (See IB:51-58). Based on this Court's original jurisdiction, remand to a referee is not mandated prior to imposing a sanction.

CONCLUSION

Given the nature of the violations at issue, the applicable Standards for Imposing Lawyer Sanctions, the harm caused to the legal system and the public, and the relevant case law, this Court should find that Mr. Farah violated Rules 4-1.3, 4-1.4(a), 4-1.16, 4-1.5(f)(2), and 4-1.5(f)(4)(D)(iii). Based on these violations, this Court should impose a 30-day suspension.

Respectfully submitted,



Mark Lugo Mason, Bar Counsel

CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 26th day of June, 2024, and a true and correct copy of the foregoing has been furnished via e-service to Henry M. Coxe, III, Co-Counsel for Respondent, at hmc@bedellfirm.com, Brian T. Coughlin, Co-Counsel for Respondent, at btc@bedellfirm.com, and Michael J. Korn, Co-Counsel for Respondent, at MKorn@kornzehmer.com and Lhatcher@kornzehmer.com.



Mark Lugo Mason, Bar Counsel

CERTIFICATE OF TYPE SIZE & STYLE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Arial. The word count is 3,983 words. It has been calculated by the word-processing system, and it excludes the content authorized to be excluded under the rule, but it includes any footnote.



Mark Lugo Mason, Bar Counsel