IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee, Case No. SC00-689

v. TFB File No. 1999-01,366 (8A)

HAROLD SILVER,

Respondent/Appellant.
_____/

ANSWER BRIEF

Edward Iturralde, Bar Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 886350

John Anthony Boggs, Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 253847

John F. Harkness, Jr., Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

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

Undersigned counsel does hereby certify that the Answer Brief of Complainant/Appellee is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

TABLE OF CONTENTS

TABLE OF CITATIONS

Rules Regulating The Florida Bar

Other Authorities Cited

PRELIMINARY STATEMENT

Appellant, Harold Silver, will be referred to as Respondent, or as Mr. Silver throughout this brief. The appellee, **The Florida Bar**, will be referred to as such, or as the Bar.

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

References to the transcript of the hearing before the Referee on August 10, 2000, shall be by the symbol **TR** followed by the appropriate page number.

References to exhibits shall be by symbols **CX** or **RX**, corresponding to Complainant's exhibit or Respondent's exhibit, respectively, and followed by the number given to the exhibit by the Referee followed by the appropriate page number.

References to Respondent's initial brief shall be by symbol **IB** followed by the appropriate page number.

References to specific pleadings will be made by title.

STATEMENT OF THE CASE AND FACTS
STATEMENT OF THE CASE

On March 30, 2000, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. Both were timely answered by Respondent. The parties engaged in discovery. On July 12, 2000, the referee held a Pre-Trial Conference and heard argument on a Motion to Dismiss for failure to state a cause of action which was filed concurrently with Respondent's answers to the complaint and requests for admissions. That motion was denied. On August 10, 2000, a final hearing was held in this matter. The Report of Referee was signed on September 15, 2000, finding Respondent guilty of violating Rule 4-1.15 (Safekeeping Property), Rules Regulating The Florida Bar, and not guilty of Rule 4-8.4(c) (Engaging in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation), Rules Regulating The Florida Bar. The Referee recommended that Respondent receive a public reprimand by publication in the *Southern Reporter* and that costs in the amount of $4,053.06 be imposed against Respondent.

A timely Petition For Review of the report was filed on October 9, 2000, by Respondent, instituting these proceedings.

STATEMENT OF THE FACTS

Complainant generally agrees with the facts as set forth in both the Report of Referee and Respondent's Initial Brief. The following statements are made to highlight the notable exceptions to Complainant's agreement with the facts outlined in those documents and to emphasize the facts considered to be highly relevant.

Mr. Arthur "Willy" Pogue was a regular customer of Mr. Silver's firm over the past two decades. TR p.144-147. One of these representations involved an injury received by Mr. Pogue in a laundromat known as Wash King. Mr. Silver and Mr. Pogue entered into a standard personal injury contingency fee contract. CX7 pp. 70-73. The former Mrs. Pogue subsequently signed on to the contract for representation on her consortium claim. During the Wash King representation, Mr. Silver was also representing Mr. Pogue on two separate matters regarding his children. Mr. Silver secured his fees in the child dependency and child support matters by an addendum to his hourly contract regarding those matters. CX7 p.78. The addendum assigned Respondent a right to collect his fees and costs from any Wash King settlement or judgment.

Mr. Pogue sought treatment for his injuries from several health care providers, including Ramadan Hand Institute (hereinafter "Ramadan"). Mr. Pogue's treatment at Ramadan did not begin until March 1996 - after both the contingency contract and

hourly contract with addendum were executed.

Beginning with Mr. Pogue's first visit, Ramadan requested assurances of payment from Respondent as Mr. Pogue did not possess the means to pay for treatment. TR pp.21-24. Respondent provided Ramadan with numerous assurances that they would be paid after attorney's fees and costs. CX1-6. However, these assurances never explicitly stated that "after attorney's fees and costs" included the other matters relating to Mr. Pogue's children or any other representation. TR pp. 169-174. Respondent testified, however, that he intended that phrase to include all of Mr. Pogue's cases. Id.

In late April or early May 1997, Respondent received a check from Wash King's insurance provider in the amount of $3,937.58, payable to Mr. Pogue, under the general liability medical expense coverage (medpay). RX3. Respondent deposited the check in his office account and distributed that payment by taking a 33.3% contingency fee (1,312.53), costs (1,027.28), and the balance as a payment toward hourly fees in the dependency case (1,597.77). TR 190, CX9. Mr. Pogue consented and agreed to this distribution. Respondent did not notify Ramadan, or any other medical provider, that he had received these funds prior to distributing them. TR pp.189, 192. Obviously, none of the medical providers received any funds from this disbursement.

On September 10, 1998, Respondent and Mr. Pogue signed a form prepared by

Ramadan entitled "Letter of Protection/Lien for Medical Services." CX7 p.51. This document was the last assurance provided by Mr. Silver, and the most comprehensive. RR p.4. The document contains no specific mention of any of Mr. Pogue's other cases.

Respondent and Mr. Pogue attended a mediation conference on May 11, 1999. Mr. Pogue initially did not want to accept the offer of $22,500 because he did not believe that there would be enough to pay all of his bills and he wanted at least $6,500 for himself. TR pp.130-132. Mr. Silver offered to reduce his fees and negotiate with the medical providers, which convinced Mr. Pogue to accept the offer. Shortly thereafter, Mr. Silver received a check from the insurance company in the amount of $22,500.00. CX20. On or about May 18, 1999, Mr. Silver instructed his secretary to prepare letters to Mr. Pogue's medical providers seeking a reduction in their billings. TR pp. 195-198. Letters were sent out to all the medical providers, except for Ramadan. However, Dr. Osbourne, a physician working out of the hospital was sent a compromise letter addressed, "care of" Ramadan. CX 21(Composite). While Osbourne did work out of the hospital's clinic, at that time Ramadan and Osbourne billed separately. TR p. 11. Respondent was apparently aware of both bills. CX22.

Respondent prepared an initial accounting regarding the settlement proceeds. CX10. Both Mr. and Mrs. Pogue endorsed the accounting on May 25, 1999, and May 24, 1999, respectively. The accounting included a $50.00 deduction for costs which

was actually a debt Mr. Pogue owed to Respondent for a will prepared several years earlier and a $127.00 deduction for costs from the dependency case. TR pp. 209-210. Between May 18 and May 28, 1999, Respondent (or his office), contacted the medical providers other than Ramadan and Osbourne and reached agreements as to the amounts to be paid. TR pp.202-206. On May 28, 1999, Mr. and Mrs. Pogue signed an amended accounting which documents the payments to the various medical providers, including $1500.00 each to Ramadan and Dr. Osbourne. CX22. On or about that time, most of the funds were distributed by Respondent as indicated in the accountings.[1] CX19.

Upon receiving the pair of $1500.00 checks from Mr. Silver, Ramadan requested an accounting and requested that the funds not be disbursed until an agreement could be reached. CX1 pp.23-25. Respondent replied that client confidentiality prohibited him from disclosing the details of the settlement. Ramadan's agents and Mr. Silver exchanged several more letters. In them, additional details regarding the distribution were revealed after Mr. Silver obtained his client's consent

[1] One exception to the correctness of the distribution involves a listed payment of $2,000.00 to Mrs. Pogue for her consortium claim. Mrs. Pogue actually received $500.00. The difference is due to a botched attempt to reconcile marital difficulties during a trip to St. Augustine. Mrs. Pogue took cash out of Mr. Pogue's wallet while he was sleeping and left to rendevous with her new boyfriend. Mr. and Mrs. Pogue entered into a side agreement to divide her portion in this manner.

to discuss them. TR p.251-254. He told Ramadan for the first time that the funds had been distributed and stated his belief that he had the right to almost the entire amount of the settlement based on the fees and costs due on all of the various cases of Mr. Pogue.

It is undisputed that Mr. Silver and his client signed numerous documents declaring their intent to protect Ramadan's bill from the settlement proceeds; that Mr. Silver did not notify Ramadan of his claim to additional fees and costs from Mr. Pogue's unrelated cases; that Mr. Silver did not hold either the medpay funds or the final settlement funds in trust until either an agreement between ALL the medical providers and Mr. Pogue could be reached or an impartial third party determined the proper distribution; and that Mr. Silver distributed the settlement proceeds prior to notifying Ramadan.

Ramadan subsequently lodged a complaint against Mr. Silver which resulted in the instant case.

SUMMARY OF ARGUMENT

Respondent contends that the Referee erred in finding him guilty of violating Rule 4-1.15 because the findings were not rendered by clear and convincing evidence. Respondent apparently wishes this Court to re-weigh the evidence. Respondent has failed to realize that the standard for review of attorney discipline cases is not clear and convincing evidence. Rather, the appropriate standard on review is that the judgment of the referee will not be overturned if there is competent substantial evidence in the record to support the referee's findings of fact. Further, the party contending that the referee's findings of fact and conclusions of guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings, or that the record evidence clearly contradicts the conclusions. Respondent has failed to meet that burden.

Respondent also argues that the Bar failed to prove a violation of Rule 4-1.15(c). Respondent bases his argument on the lack of a specific finding regarding the passage of a reasonable amount of time and a disagreement with the Referee's finding that Ramadan "obviously" would dispute the claim. The record shows that Ramadan was not given any time to dispute the distribution until after the funds had been distributed. Further, Respondent should have known that Ramadan would dispute his distribution of funds based on Ramadan's numerous requests for assurance of payment. Finally,

Respondent fails to address section (b) of Rule 4-1.15.

Respondent argues in Section II of his brief that he did not violate Rule 4-1.15 because he had a lien superior to any lien that may have been established by the letters of protection. But Respondent fails to recognize that his ethical duties are independent of and superior to any legal claim that he may have to the settlement proceeds. Essentially, his ethical duty to hold disputed funds in trust until the dispute is resolved by an impartial arbiter or by agreement is "first in time, first in right" as his ethical duties arise from his license to practice law. Further, Respondent did not comply with lien law and ignores the contractual relationship created by his letters of protection. The Referee correctly found that Respondent violated Rule 4-1.15, Rules Regulating The Florida Bar.

In Section III of Respondent's Initial Brief, he contends that the Referee's finding would be *ex post facto* and therefore if he indeed violated the Rule, the law was unclear and, therefore, it should only be applied prospectively and not against him. Rule 4-1.15 pre-dated Respondent's misconduct and was sufficiently clear.

Finally, Respondent argues that the award of costs was unnecessary, excessive, improperly authenticated, and disproportionate. Respondent failed to object to the costs and, therefore, waived his rights to object on review. Additionally, all of the listed costs are allowable under Rule 3-7.6; are within the discretion of the Referee to

award; can be assessed against the Respondent when the Bar is successful in whole or part; and should not be disturbed on review, absent abuse of discretion by a Referee.

ARGUMENT

The Respondent's Initial Brief argues five points. The first and fourth points of Respondent's argument relate to the sufficiency of the evidence adduced at trial to prove a violation of Rule 4-1.15. The Bar will respond to those points jointly in the first section of argument by demonstrating that the Referee ruled correctly based upon the evidence and that Respondent has failed to carry his burden of showing that the Referee's decision is unsupported by competent evidence.

The next section of the Answer Brief will respond to the second and third points of Respondent's Brief. In those sections, Respondent argued that law of liens should apply to this disciplinary proceeding, rendering him innocent of all charges, or, alternatively, that a finding of guilt would be creating new law which should only be applied prospectively and not to him. The Bar responds that the applicable law in question is a long standing ethical rule regarding the treatment of funds held in trust whose distribution is disputed by a third party. The Bar also argues that if any legal (rather than ethical) issue is raised by the facts of this case, it is one of contract and not liens. Finally, the Bar contends that even under lien law Respondent was wrong to distribute the settlement funds in the manner he selected.

Respondent's last and only remaining issue involves the costs assessed by the Referee in this proceeding. The Bar responds to his final argument in the third and final

section of its Answer Brief. Under section III, the Bar counters Respondent's unsupported allegations by stating that he waived any rights he may have had by failing to object. Additionally, the Bar asserts that Respondent has failed to demonstrate that the award is unnecessary, excessive, improperly authenticated, or that the Referee abused his discretion.

ISSUE I - THE REFEREE'S FINDINGS ARE SUPPORTED BY COMPETENT EVIDENCE AND ARE PRESUMED CORRECT

It is a well established principle of Florida law that a Referee's findings of fact enjoy a presumption of correctness that will be upheld unless the challenging party can show that the facts are unsupported by the evidence in the record, or are clearly erroneous. The Florida Bar v. Cox, 718 So. 2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983). Moreover, the Court will not re-weigh the evidence and substitute its judgment for that of the referee if there is competent substantail evidence to support the referee's findings. The Florida Bar v. MacMillan, 600 So. 2d 457, 459 (Fla. 1992), as cited in The Florida Bar v. Lecznar, 690 So. 2d 1284, 1287 (Fla. 1997). Further, "[t]he party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings, or that the record evidence

clearly contradicts the conclusions." The Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996). Throughout his brief, Respondent has attempted to point out what he feels are conflicts in testimony or cite evidence to support his claims of innocence. In The Florida Bar v. Herzog, 521 So. 2d 1118, 1119-20 (Fla. 1988), this Court held that where there is conflicting evidence concerning the disputed issues, the referee, as our fact finder, properly resolves conflicts in the evidence. Where the referee has resolved such conflicts and has made his recommendations, the party contesting a referee's findings of fact and conclusions of guilt carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. The Florida Bar v. Spann, 682 So.2d 1070, 1073 (Fla. 1996).

Respondent argues that, despite the Referee's finding that he violated Rule 4-1.15 by clear and convincing evidence, a dissection of selected portions of the Report of Referee seems to indicate that the Referee was actually not convinced. Respondent wishes this Court to believe that the Referee, despite his findings, really intended for Respondent to be found not guilty of violating Rule 4-1.15.

Respondent makes absolutely no reference to the evidence in this first section of his brief. The reason for this failure should be clear: there was ample record evidence to support the Referee's finding's. Mr. Silver and his client agreed on

numerous occasions to protect Ramadan. TR pp. 12, 18-28, 165-174; CX1, 5 & 6. By entering into these agreements with Ramadan, Respondent knew or should have known that Ramadan expected their bills to be paid. Respondent also knew of his client's debt to Ramadan, as reflected in his demand letter. CX22. Respondent distributed all but $2,000.00 (including his fees and costs) from trust on May 28, 1999. CX19. Ramadan was not aware that a settlement had been reached until on or about that date, when Ramadan received the pair of $1,500.00 checks. Therefore, Respondent: a) failed to promptly notify a third person with an interest (Ramadan) of his receipt of funds; b) failed to deliver to Ramadan the funds it was entitled to receive; c) failed to render a full accounting upon Ramadan's request; and d) failed retain the settlement proceeds, including the fees and costs form the other cases, in trust until the dispute was resolved. Any one of the above listed failures is a violation of Rule 4-1.15. The record supports four distinct violations of the rule.

Respondent also argues that the findings of the Referee are legally insufficient; essentially an extension of argument that the evidence is not clear and convincing.

Section (c) of Rule 4-1.15 states:

> **(c) Disputed Ownership of Funds.** When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn at a

> reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept by the lawyer until the dispute is resolved.

Here, the Respondent knew that Ramadan was claiming an interest in the settlement proceeds. Respondent never informed Ramadan that he was claiming fees and costs from other cases, unrelated to Mr. Pogue's Wash King injury, until after Ramadan submitted its claim to an attorney for collection (TR p.29) and much after the funds had already been disbursed. It is clearly impossible for Ramadan to dispute Respondent's claim to additional fees and costs from other representations without receiving notice that such claims exist. Respondent, on the other hand, was aware of Ramadan's claim yet he did not hold the funds in trust "until the dispute is resolved." Unless the rule is interpreted to mean that the lawyer in possession of the disputed funds is entitled to unilaterally resolve the dispute in his favor, a result that is patently absurd, the Referee was correct to find Respondent in violation of the rule.

Section (b) of Rule 4-1.15 states:

> **(b) Notice of Receipt of Trust Funds; Delivery; Accounting.** Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law, or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the lawyer or third person is entitled to receive and,

> upon request by the client or third person, shall promptly render an accounting regarding such property.

When Mr. Pogue and Mr. Silver executed the Letter of Protection/Lien for Medical Services (CX1 p. 8 hereinafter LOP/LMS), they explicitly created and recognized that Ramadan had an interest in the settlement proceeds. Additionally, the prior letters of Mr. Silver to Ramadan (CX1 pp. 4, 5) and Mr. Pogue's Medical Assignment (CX1 p.7) had this same effect. In the last clause of the LOP/LMS Respondent specifically promised "to withhold such client's sums from any settlement, judgment, or verdict as may be necessary to adequately protect [Ramadan]. " CX 1 p. 8. As discussed above, Respondent was aware of the amount his client owed to Ramadan.

Respondent argues that Ramadan (identified as Medlink in his brief) did receive notice of the settlement. IB p. 27. However, this is contrary to Respondent's own testimony.[2] He did not send Ramadan the same letter he sent to

---

[2] Q: But now, after reviewing your file, you would agree with me that Ramadan did not get a letter from your office, sir. Is that correct?

Respondent A: I don't mean to mince words with you, sir. As far as I know they did not get any. I have no file copy in my file.

* * *

A: Well it appears that they didn't receive it.

TR pp. 197-198.

Additionally, while Respondent or his staff contacted the other medical service providers to reach an agreed distribution of the proceeds, he did not do likewise for Ramadan:

all the other medical providers and he did not engage them in successful settlement discussions as he did with the other providers. TR pp. 201-206. It is undisputed that Respondent sent Ramadan two checks for $1500.00 towards over $15,000.00 in combined medical bills covering both Ramadan and Dr. Osbourne. Within a week of receiving the checks, Ramadan notified Respondent of their dissatisfaction and requested an accounting. CX1 pp. 23-24. Respondent replied that he was unable to do so due to client confidentiality.

Therefore, this Court should deny Respondent's request for relief as he has failed to demonstrate that the Referee's findings are unsupported by the record or clearly erroneous. Quite the contrary is, in fact, true: the Referee had more than competent, substantial evidence to conclude by clear and convincing evidence that Respondent violated Rule 4-1.15.

ISSUE II - THE REFEREE CORRECTLY FOUND THAT RESPONDENT VIOLATED RULE 4-1.15, RULES REGULATING THE FLORIDA BAR

	Q:	. . . Did you follow up on that call or did you contact their office again to either correct that number or reach an agreement with them?
Respondent	A:	I did not call and I don't believe my secretary called beyond that, because she had -- she conveyed to me that she had asked somebody on the phone, Please send us something in writing and we're waiting for something in writing. But after adding up all these numbers there just wasn't enough to go around regardless of what their settlement would have been. I think it would have been a futile act.

TR pp 205-206.

As discussed above, there was ample record evidence for the Referee to find that Respondent violated Rule 4-1.15. Respondent argues that the addendum to his hourly representation contract to represent Mr Pogue in the dependency and child support matters in which Mr. Pogue granted him an assignment to collect fees and costs from any proceeds resulting from the Wash King case created a lien superior to any claim that Ramadan may have. Respondent does not cite to any disciplinary case decided by this court but relies on cases involving fee disputes between attorneys and clients. One particularly relevant case ignored by Respondent is The Florida Bar v. Wagner, 212 So. 2d 770 (Fla. 1968). In *Wagner,* the attorney was accused of failing to promptly pay medical expenses and expert witnesses of his clients in four negligence cases. The Referee found Wagner guilty of the Canons of Professional Conduct in two instances and exonerated him in the other two. Similar to the case at bar, the Referee did not find that Wagner had engaged in any fraudulent or dishonest conduct. This Court, quoting the Referee with approval, stated:

> But the fulfillment of a lawyer's professional responsibilities . . . is not necessarily established by a showing that such acts of misconduct have not been committed. Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner that will cause laymen, and the public

generally, to have the highest respect for and confidence in the members of the legal profession. . . .

It is in the light of such professional responsibilities that the conduct of the respondent must be tested here. A lawyer who undertakes to assert and collect a personal injury claim for a client ordinarily and necessarily deals with a number of persons and agencies other than his client and the adverse party. The attorney does not prosecute his client's claim in a vacuum. During the course of investigating and preparing his client's case, the attorney must necessarily seek out witnesses of various kinds. In particular, his quest for evidence ordinarily leads him to treating physicians, hospitals, drug stores, and other persons and agencies who have rendered medical services to his client. . . .

The responsibilities of the attorney which arises as such relationships are established , and which come into focus upon receipt of funds in settlement or payment of his client's claim, are not entirely defined by the law of contracts. Quite apart from any legal duty on his part, the attorney has a professional duty to accomplish the disbursement of funds in a manner which accords a proper regard and respect for the rights of his own creditors and those of his client. Quite obviously, a lawyer may not arbitrarily, and in defiance of his client's instructions, see to it that all of his client's bills are paid in a manner that would destroy the trust and confidence essential to the attorney-client relationship. (citation omitted) On the other hand, it is well known that the doctors and others who have rendered medical services to the plaintiff generally expect to have their bills taken into account when the proceeds of the plaintiff's claim are disbursed. Although the attorney may not be bound in a strictly legal sense to fulfill the expectations of such creditors in every instance, he nevertheless has an obligation to avoid conducting himself in a manner which misleads creditors or which gives them reasonable cause to conclude that he

> has not given fair and due regard to their interests. If an attorney knows that such creditors look to him for payment, and if he has in fact retained funds with which to pay their bills, he should make every effort to persuade his client to permit him to make immediate payment of just and undisputed bills.

Wagner at 772-773 (emphasis added).

As Judge Raymond eloquently states, a lawyer's professional and ethical duties go beyond legal duties. Respondent should not have disbursed the settlement proceeds absent an agreement from all interested parties or a ruling from an impartial judge or arbiter. Either of those methods would have satisfied the mandate that the funds be held in trust "until the dispute is resolved" Rule 4-1.15(c), Rules Regulating The Florida Bar.

Furthermore, even assuming that legal rather than ethical considerations should dictate the outcome of this case, it is the law of contract, not liens, that prevails. Respondent candidly cited Berger v. Silverstein, 727 So. 2d 312 (3rd DCA 1999) and acknowledged that a contract/lien signed by both the client and attorney in favor of a medical provider resulted in a decision in favor of the medical provider. The document both Silverstein and his client signed was remarkably similar to the LOS/LMS signed by Respondent and his client. *See* CX1 p.8. The document authorized Silverstein, the attorney, to pay the medical provider for services rendered from any settlement, judgment or verdict. The attorney agreed to

observe the terms agreed to by his client and to withhold funds necessary to protect the medical provider. *Silverstein* at 313. A smaller than expected settlement was accepted and, after fees and costs were deducted, the client and medical provider were left with slightly more than $1,800.00 to split between them. The medical provider had rendered services amounting to over $16,000.00.

The service provider sued the attorney for breach of contract. Silverstein responded that he held a superior lien. The attorney initially prevailed on summary judgment. The Third District Court reversed, finding that contract law, not lien law governed the matter. The court found that nothing in the contract indicated that the provider's interest was inferior to the attorney's. *Id.* Respondent argues that even under *Silverstein* he acted appropriately because the LOS/LMS did state that Ramadan would recover after attorney's fees, to which Respondent added "and costs." The LOS/LMS consists of six sentences. The first sentence authorizes Respondent to pay the provider directly and to withhold sums from any settlement, judgment, or verdict necessary to adequately protect the provider. Nothing in this sentence indicates that the provider stands in line behind the attorney. The second sentence creates a lien in favor of the provider:

"against the net proceeds to the extent of full reimbursement after attorney's fees and costs of any settlement, judgment, or verdict which may be paid to my attorney or myself as a result of the injuries for which I have been treated or injuries in

connection therewith, but subject to any order of a court of competent jurisdiction." The underlined portions were added by Respondent. While this sentence does make Ramadan's interest secondary to Respondent's, it does so only to the extent of the fees and costs relating to the injuries that required treatment. The reason for this limitation is not merely the language contained in the document, but also the lack of any language indicating that there were other fees and costs that could potentially reduce Ramadan's claim. Although, Mr. Silver testified that he intended such language to cover all of Mr. Pogue's cases, he never discussed his intent with Ramadan in any manner. The remaining sentences indicate the client's acknowledgment of the debt regardless of settlement. The last sentence contains Mr. Silver's agreement to abide by the other terms and to withhold funds necessary to protect the provider's claim. Therefore, under the holding of *Silverstein*, Respondent's claim to attorney's fees on the other cases is inferior to Ramadan's interest. Indeed, the document might be reasonably interpreted to create both a contract in the first sentence, and a lien in the second. As the first sentence makes no mention of attorney's fees, all of Respondent's claims fees and costs might be inferior to Ramadan's claim.

Even under lien law, assuming that such law is relevant in this case, Respondent's assertions are still wrong. Traditionally, a lien is a charge,

encumbrance or security upon property for the payment of some debt, obligation, or duty. BLACK'S LAW DICTIONARY 922 (6th ed. 1990). "It does not constitute a right of property in the thing itself, but a right to levy on the property and sell it for the satisfaction of the debt." 34 FLA. JUR. 2D Liens §1 (1982). In order for liens to be perfected, the relevant parties must be notified of the claim. Additionally attorney's liens are creatures of the common law which reflect a claim or security interest in property and need to be enforced by a proper forum. The cases cited by Respondent involve fee disputes between attorneys and clients and an assertion of a retaining or charging lien. In Daniel Mones, P.A. v. Smith, 486 So. 2d 559 (Fla. 1986), this Court held that timely notice is a prerequisite to imposing a charging lien. In order to give timely notice of a charging lien, the attorney needs to file a notice of lien or pursue the lien in the original action. The Court affirmed the lower court's holding that merely filing an action was insufficient notice and reversed the finding that Mones was not entitled to a retaining lien. Mones, Like Silver, was representing his client in a variety of matters. One of the cases yielded a settlement of some $37,000.00 to which Mones claimed attorneys fees from both the case that yielded the settlement and prior cases. Mones, however, unlike Silver, proceeded to court to get a final determination of entitlement to the funds. Unlike this case as well is the fact that the dispute was only between attorney and client and did not

involve any third parties with possible liens or letters of protection. Mones, like Silver, was convinced that he had a valid charging and retaining lien. The trial court completely agreed, the Third Circuit completely disagreed, and the Supreme Court partially agreed and partially disagreed. One can only speculate how Respondent's ironclad assertions of indisputable judgment would have withstood judicial scrutiny.

If timely notice beyond the filing of a lawsuit is required to enforce a charging lien against a client fully aware of the lawyer's efforts, would not an assertion of a lien against a third person require some notice? Apparently Mr. Butter thought so. In Sabin v. Butter, 522 So.2d 939 (3rd DCA 1988), attorney Butter, secured his fee by having his client assign a lien on any property recovered in the proceeding and a mortgage on the client's marital homestead property. Butter recorded the contract and lien, giving notice to all the world and establishing his claim to priority. *Butter* at 940. Butter, like Mones but unlike Silver, filed suit to have court decide the propriety of his lien.

The Referee in this case correctly decided that Respondent's lien law issue is a red herring. RR p. 9. Whether Respondent would ultimately have prevailed on his lien argument presupposes that he should have submitted the issue to a court. As a close review of the cases cited by Respondent reveals, the outcome is not as

certain as he would like it to be.

The Respondent also argues that the Referee's finding is *ex post facto* because, in his mind, neither the rule in question nor case law supports the finding. The doctrine of *ex post facto* originates from the Federal and Florida Constitutions which prohibit bills of attainder and ex post facto. U.S. Const. Art. 1, §10, cl. 1; Fla. Const. Art. 1, §10. The doctrine prohibits the state from retroactively enforcing a new penal law against an individual for an act that occurred in past. While the doctrine normally applies only to criminal laws, Rowe v. Agency for Health Care Admin., 714 So.2d 1108, (5th DCA 1998) *rev. den.* Rowe v. Agency for Health Care Admin., 727 So.2d 910 (Fla. 1999), it has been used to revoke administrative penalties imposed against other professionals. Willner v. Dept. of Prof. Reg., Board of Medicine, 563 So.2d 805 (1st DCA 1990). While it remains questionable whether the doctrine applies to disciplinary proceedings, such a determination is unnecessary in this case. Rule 4-1.15 was adopted by this Court effective January 1, 1987, years before the acts in questioned occurred. The Florida Bar re Rules Regulating The Florida Bar, 494 So.2d 977 (Fla. 1986.) Respondent should have been well aware of the provisions of Rule 4-1.15. As every member of The Florida Bar, he is charged with notice and held to know the standards of ethical and professional conduct. Rule 3-4.1, Rules Regulating The Florida Bar. Respondent

should also have known the holding of The Florida Bar v. Wagner, 212 So. 2d 770 (Fla. 1968), discussed in detail above, which has been the law in Florida since before Respondent joined the profession. However, Respondent argues that the applicable rule "neither prohibits the lawyer himself from making the initial determination of ownership; nor does it require a court to make that determination." IB p. 25. The Bar concedes that the rule does not prohibit Respondent from making the initial determination that he is entitled to funds from the proceeds of the settlement for fees and costs relating to any representation relating to that particular client. However, the Bar disputes that Respondent may then proceed to distribute the funds based upon this initial determination.

For the reasons set forth above, the Referee correctly found that Respondent violated Rule 4-1.15.

ISSUE III - THE REFEREE CORRECTLY ASSESSED COSTS AGAINST THE RESPONDENT

Respondent argues that the award of costs was unnecessary, excessive, improperly authenticated, and disproportionate. Respondent began his argument by reviewing the Referee's denial of Respondent's pre-trial and post-trial motions to dismiss. Respondent also moved to dismiss the charges in a letter to the Referee dated September 8, 2000, in which Respondent objected to the Bar's proposed Report of Referee. The Bar mailed its proposed Report of Referee with a cover letter and an affidavit of costs to both Respondent and Referee on September 5, 2000. Respondent admits in his brief that the affidavit of costs was served on September 5, 2000. IB p. 38. He then accuses the Referee of failing to wait ten days to allow him the opportunity to object.

Respondent is in error. The Referee did not sign the Bar's proposed report but rather incorporated portions of both parties proposals and added some original language. He did not sign the report until September 15, 2000, ten days after the proposed report and affidavit of costs were submitted. RR p. 15. Respondent did have opportunity to object and he availed himself of that opportunity in a four page letter that recites much of the same argument contained in his brief. Respondent failed to timely object to the costs and, therefore, waived his rights to object on review.

Additionally, all of the costs awarded are specifically listed and allowable under Rule 3-7.6(o). The awarding of costs is within the sound discretion of the Referee and should not be disturbed on review, absent abuse of discretion by a Referee. Rule 3-7.6(o)(2). Costs can be assessed against the Respondent when the Bar is successful in whole or part unless shown that the costs of the Bar were unnecessary, excessive, improperly authenticated. Rule 3-7.6(o)(3). Respondent has failed to meet this burden. In The Florida Bar v. Carson, 737 So.2d 1069, 1073 (Fla. 1999), this Court held that Carson should pay the costs assessed by the referee because the Bar was at least partially successful in prosecuting him, the costs assessed were taxable costs by Rule 3-7.6(o), the costs were substantiated by bar counsel affidavit, and there was no evidence in the record that showed the costs to be excessive. The Court should similarly uphold the decision of the Referee in this case.

CONCLUSION

For the many reasons set forth above, The Florida Bar respectfully requests that this Court adopt and approve the Report of Referee finding Respondent guilty of violating Rule 4-1.15, impose a public reprimand, and award the costs as recommended in the report.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. SC00-689, TFB File No. 1999-01,366(8A) has been mailed by certified mail #_____, return receipt requested, to Douglas W. Abruzzo, Counsel for Respondent, at his record Bar address of Post Office Box 714, Gainesville, Florida 32602, on this 4th day of January, 2001.

_____

Edward Iturralde, Bar Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 886350

Copy to Kathi Lee Kilpatrick