IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

vs.

HAROLD SILVER,
Respondent.
_____/

SUPREME COURT NO. SC00-689
TFB File No. 1999-01,366(8A)

On Review of the
REPORT OF THE REFEREE
Honorable Jack Springstead
Circuit Judge

_____

INITIAL BRIEF OF RESPONDENT

_____

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NOTE ON ABBREVIATIONS

In the interest of brevity, the following abbreviations are used: BAR = Florida Bar, Complainant; SILVER = Harold Silver, Respondent; CX_:_ = Complainant's Exhibit, with the exhibit number before and the page number after the colon; RX_:_ = Respondent's Exhibit, with the exhibit number before and the page number after the colon; T_:_ = Transcript of Hearing, with the volume number before and the page number after the colon. RR:_ = Report of Referee, page number.

STATEMENT OF THE CASE AND FACTS

Prior to August, 1995, SILVER had served a client named Arthur Willie Pogue, Sr. as an attorney and legal counselor on numerous occasions for approximately nineteen years; developing a close and trusting relationship. T1:144-147. In fact, Mr. Pogue still owed SILVER some $50.00 on a Will that SILVER had prepared for him in 1993 or 1994. CX18:1. On August 15, 1995, Mr. Pogue suffered personal injury in a fall at a business known as Wash King Laundromat and on August 18, 1995, SILVER and Mr. Pogue entered into a contingent fee contract for representation in the Wash King matter. CX7:70-73.

On December 22, 1995, Mr. Pogue requested SILVER to represent him in two family law matters, unrelated to the Wash King personal injury case; one was an ongoing dependency matter regarding Mr. Pogue's children (case 87-1256-CJ) and the other was a lawsuit against Mr. Pogue regarding child support (case 95-4188-CA). SILVER requested that the hourly fees for the two family law cases be secured by a lien against the proceeds of the Wash King personal injury matter, and on December 22, 1995, SILVER and Mr. Pogue entered into an hourly rate contract which included a typewritten

addendum as follows:

> As further consideration for continuing representation in this case, client hereby irrevocably assigns to THE FIRM a right to receive fees and costs from any settlement or judgment from the WASH KING, INC. case. This is due to client's difficulty in making payments, and to ensure that THE FIRM will not withdraw because of non-payment. CX7:78.

In March of 1996, Mr. Pogue began evaluation and treatment at Ramadan Hand Institute (hereinafter "RHI") for the injuries sustained in the Wash King incident; on March 26, 1996, RHI contacted SILVER to request assurance that "our balance will be protected upon settlement." CX2:1. SILVER responded on March 29, 1996 that "...I shall protect Ramadan Hand Institute out of any proceeds I may receive for the patient, after attorney fees and costs are paid." CX3:1. On April 18, 1996, SILVER sent a follow up letter in which he stated, "I intend to protect any and all doctors involved upon final settlement in this case. CX1:4 On July 16, 1996, RHI sent an identical form letter to SILVER, again requesting protection of its charges (CX4:1), to which SILVER apparently did not further respond.

On December 18, 1996, SILVER sent a letter to RHI requesting medical information on Pogue, and included therein a "Medical Assignment" dated August 18, 1995, and executed by Mr. Pogue. CX5:3. SILVER's letter states the Medical Assignment "...permits me to pay the doctors out of any settlement proceeds, after attorney fees and costs are paid first." CX5:1. The Medical Assignment form itself authorizes payment of health care bills from the proceeds of any recovery "...after attorney fees, paralegal

fees, law clerk fees, and all costs and expenses of my attorneys are paid first." CX5:3. The August, 1995, Medical Assignment was not acceptable to RHI, which notified SILVER by letter dated December 23, 1996, that the "Medical Assignment is outdated." RX9:1. On December 30, 1996, SILVER again wrote to RHI, enclosing an identical Medical Assignment dated December 30, 1996. CX6:2. SILVER's letter states that he is providing a "current Medical Assignment, ...which permits me to pay your bills, after attorney fees and costs, as far as any settlement will go." CX6:1.

There was apparently some confusion, because on January 23, 1997, SILVER again wrote to RHI and enclosed yet another Medical Assignment, this one dated January 23, 1997. CX7:49. SILVER's letter stated the Medical Assignment authorized him "...to pay the medical facilities and doctors out of any settlement I might receive. Of course, this is after attorney fees and my costs." CX7:48. SILVER's letter went on to state,

> Upon receipt of this information, I will endeavor to effectuate a settlement with the defendant's insurance company and will certainly protect the hospital and doctor so far as the money will go, after attorney fees and costs are paid. (Emphasis added.) CX7:48.

On or about May 2, 1997, SILVER received a check in the amount of $3,937.58 on behalf of Mr. Pogue from Nationwide Insurance Company, paid under the general liability medical expense coverage of the Wash King Laundromat. RX3:1. Mr. Pogue and SILVER testified without contradiction that the check was made out to Mr. Pogue only. T1:133; T2:187. On May 27, 1997, Mr. Pogue approved an accounting which distributed the funds as follows: (a) $1,312.53

as a 33.3% contingent fee to SILVER; (b) $1,027.28 in costs to SILVER; (c) an excess amount of $1,597.77 applied to unpaid fees for SILVER's work in family law case 87-1256-CJ. CX9:1. SILVER freely admitted he did not notify RHI or any other health care provider that funds had been received; and further that he (SILVER) had a superior lien against those funds based on his August 18, 1995, contingent fee contract the addendum to the December 22, 1995, hourly contract on the family law matters. T2:189-190; 192-193. It is clear that the check received in May, 1997, was not intended to be a final settlement of Mr. Pogue's claim against Wash King. RX4:1.

On April 16, 1998, SILVER wrote a "demand letter" to Nationwide Insurance regarding the Wash King matter. CX22:1. In that letter, SILVER asserted medical expenses of $20,285.26 (CX22:4), total unpaid past damages of $84,964.81 (CX22:5), and future damages of $161,874.00 (CX22:6), for a total claim of $244, 838.81. CX22:6.

On July 15, 1998, Cathy Marion Pogue, Mr. Willie Pogue's wife, endorsed the August 18, 1995, contingent fee contract between Mr. Pogue and SILVER in the Wash King case, authorizing SILVER to pursue any consortium claim she might have against Wash King. CX7:72.

At some time in early September, 1998, Medlink Management Services, Inc., (which operates RHI) sent SILVER a form entitled "Letter of Protection/Lien for Medical Services." CX7:51. SILVER made some changes on the Medlink form and returned it by letter

dated September 10, 1998, which states, in relevant part, "Enclosed please find your requested letter of protection, with some small changes. I trust it meets with your approval." CX7:50. On the form itself, SILVER made a handwritten addition of "and costs" and a typewritten addition of "but subject to any order of a court of competent jurisdiction." The changed sentence thus reads (with SILVER's changes underlined) as follows:

> I hereby further give a lien on my case to said provider against the net proceeds to the extent of full reimbursement after attorney's fees <u>and costs</u> of any settlement, judgment, or verdict which may be paid to my attorney or myself as the result of any injuries for which I have been treated or injuries in connection therewith, <u>but subject to any order of a court of competent jurisdiction</u>. CX7:51.

The document, as so amended, was signed by Mr. Pogue and SILVER on September 10, 1998.

Willie and Cathy Pogue began having marital difficulties and on March 2, 1999, SILVER wrote to Cathy Pogue to advise her that she should seek the advice of another attorney regarding her consortium claim and that any dispute with Willie Pogue over the proceeds of the Wash King case would have to be resolved without SILVER's involvement. CX25:1. Nonetheless, having been informed of the potential conflict of interest, Mrs. Cathy Pogue authorized SILVER to represent her at the Mediation Conference in the Wash King case. RX8:1,2.

On May 11, 1999, Mr. Pogue agreed at a mediation conference to settle the Wash King case for $22,500.00. CX8:1. Mr. Pogue had instructed during the mediation that he (Mr. Pogue) simply had to

receive at least $6,500.00 in the settlement in order to pay debts already overdue. T1:131. Mr. Pogue and his wife, Cathy Marion Pogue, were having marital difficulties and that it had been agreed that Cathy Pogue was to receive exactly $2,000.00 for her consortium claim in the Wash King case. T1:137; T3:265. SILVER told Mr. Pogue that SILVER could adjust his fees in order to ensure that Mr. Pogue actually received at least $6,500.00. T1:131; T1:149. Mr. Pogue told SILVER that he would not agree to any settlement which would not give him a recovery of $6,500.00. T1:148. Mr. Pogue also understood, then and now, that he still owes RHI and Doctor Osborne for his medical treatment and can still be sued by them for the unpaid balance. T1:160-161; T3:307.

On May 18, 1999, in SILVER's absence from the State of Florida (T3:195-196) SILVER's secretary mailed to Dr. Owen B. K. Osborne, M.D., c/o Ramadan Hand Institute (and to each health care provider who had treated Mr. Pogue) a letter stating that the amount of the settlement was very small and there would not be enough to pay all health care providers their full amount. CX21:4 The letter requested the recipient to accept 30 cents on the dollar as payment, because the alternative for Mr. Pogue was bankruptcy. CX21:4. SILVER testified that through inadvertence by his secretary, no separate copy of that letter was addressed to RHI. T2:196-197.

On May 24 and May 25, 1999, respectively, Cathy Marion Pogue and Arthur Willie Pogue, Sr., approved an accounting prepared by SILVER in the Wash King case, showing that SILVER had reduced his

fees to $6,000.00, and costs to $2,309.11. CX10:1,2. Then on May 28, 1999, Mr. and Mrs. Pogue both endorsed an addendum to the Wash King accounting showing the amounts to be paid to each health care provider and the amount agreed to be paid to Mrs. Pogue as her consortium settlement ($2,000.00). CX11:1,2. On May 28, 1999, Mr. Pogue also signed a letter instructing SILVER as follows.

> Notwithstanding my medical assignment which was directed to you only, I hereby direct you to pay to Ramadan Hand Institute and to Dr. Osborne, $1,500.00 each out of my settlement on my case. Thank you. CX14:1

Both SILVER and Mr. Pogue testified that they had discussed that Mr. Pogue was still liable for these medical bills and could be sued by RHI and Doctor Osborne. T1:160-161; T3:307. Mr. Pogue requested SILVER'S secretary to type the foregoing letter for him to document his instructions to SILVER. T1:142;156.

On May 27, 1999, SILVER mailed a check to RHI in the amount of $1,500.00 and a check to Doctor Osborne in the amount of $1,500.00. CX1:22. The cover letter stated, in part,

> Due to a small outcome in Mr. Pogue's lawsuit, it is with regret that he will not be paying the full amount owed to Dr. Osborne nor to Ramadan Hand Institute. I, too, have had to cut my fees tremendously. CX1:22.

SILVER consistently asserted that he had the right to substantially all of the $22,500.00 settlement in the Wash King case by virtue of his charging lien in the Wash King case itself and the liens Mr. Pogue granted on December 22, 1995, in the contract for the family law cases. T3:248. SILVER produced summaries of his billings to demonstrate the calculations he relies upon. Essentially, one summary shows that when the Wash King case

was settled in May, 1999, SILVER was owed a total of $19,595.49 (RX1:1) and subtracting Cathy Pogue's consortium settlement of $2,000.00 results in $904.51 for distribution to Mr. Pogue and/or his creditors. RX1:2. The second summary shows SILVER entitled to an additional fee of $618.92 for work done on the family law cases after May, 1999, which leaves only $285.39 for distribution to Mr. Pogue and/or creditors. RX2:2.

Mr. Pogue testified without contradiction that he and Mrs. Pogue took a Memorial Day weekend trip to St. Augustine in an attempt to revive their marriage, but Mrs. Pogue had - unbeknownst to Mr. Pogue - made side arrangements with a boyfriend. T1:138. Mr. Pogue testified that Mrs. Pogue and her boyfriend stole approximately $350.00 from his wallet while he was sleeping (T1:138), in addition to funds expended for hotel rooms, meals and various purchases. T1:139. When Mr. Pogue discovered his wife's activities, he filed a criminal complaint against her. T1:138. He also instructed SILVER, on June 1, 1999, to withhold the funds for Mrs. Pogue's consortium claim until Mr. and Mrs. Pogue could resolve their dispute. T1:138; CX13:1.

Mrs. Pogue agreed to repay Mr. Pogue $1,500.00 for the St. Augustine incidents.. T1:139. Accordingly, on June 3, 1999, Mr. and Mrs. Pogue entered into a marital settlement agreement in their divorce case, prepared by Gainesville attorney Nancy Baldwin (t!:139) which states, "Wife shall receive the amount of five hundred dollars ($500) from settlement of Husband's legal suit." RX7:1.

On June 3, 1999, RHI hand delivered a letter to SILVER which rejected the aforesaid checks as full payment of the hospital and surgeon's bills, respectively. CX7:52. The letter further stated that the two checks would be held for a period and then deposited as partial payments on the respective bills. The letter further demanded full payment not later than June 7, 1999, or "...we will refer the above amounts to our attorney, Mr. Herb Webb, for further collection action." CX7:53.

On June 8, 1999, SILVER prepared and Cathy Marion Pogue executed a release of her Wash King consortium claim for payment of $500.00 (CX23:1) and received SILVER's trust account check in the amount of $500.00. CX24:1.

On June 8, 1999, SILVER prepared and Pogue executed a document entitled "Assignment" which states as follows:

> I, ARTHUR WILLIE POGUE, a/k/a ARTHUR WILLIE POGUE, SR., hereby confirm all and any written and oral agreements that I have had with the Law Offices of Harold Silver, P.A. and Harold Silver, Esquire, whereby I agreed to reimburse them all attorney fees and costs out of other cases to wit: case of DOR & Orton vs. Pogue, case number 95-4288-CA and case number 87-1256-DP (or 87-1256-CJ) out of the proceeds of the Wash King case. This paper is a confirmation of an assignment to them effective on the first day that they represented me in these particular cases.
> I have read or had the above explained to me and I sign this voluntarily. CX12:1.

On June 9, 1999, Herbert Webb, Esq. wrote to SILVER, demanded payment in full on behalf of RHI and Doctor Osborne, and provided a list of "cases relevant to this issue" stating, "The Florida Bar has provided the additional cases when requested regarding an opinion in a similar case." CX7:56. Mr. Webb expressed RHI's

position as follows:

> The letter of protection states that you would pay the Hospital's claim to the extent that money is available after attorney's fees and costs are paid. (Emphasis added.) CX7:56.
>
> * * *
>
> It is my client's position that both you and your client have a fiduciary and contractual obligation to pay the bill for medical services to the extent of funds received. The Hospital's claim is not subject to equitable adjustment or offset. CX7:57.

SILVER later discovered the "similar case" referred to by Mr. Webb involved an RHI patient named Michael York and an attorney named D. Andrew Vloedman, with RHI asserting a duty to honor a "letter of protection" under Rule 4-1.15, Rules Regulating the Florida Bar. Mr. Webb's May 28, 1999, letter to Mr. Vloedman listed the very same cases Mr. Webb listed in his letter to SILVER. RX5:1.

On June 14, 1999, Mrs. Paula Webb (then Paula Emerson) initiated her complaint to the BAR regarding SILVER. CX1:1. Ms. Webb felt SILVER had misled RHI. T1:33On cross-examination, however, Ms. Webb testified that no one at Medlink had ever inquired as to how many other medical providers had outstanding bills in the case (T1:88) nor did anyone from Medlink inquire as to how much SILVER might be claiming in attorney's fees and costs. T1:89. Ms. Webb "understood" that attorney's fees are limited to 33% or 40% of a recovery and never asked the amount to which SILVER was claiming entitlement when he provided the letters and Medical Assignments. T1:89-90. She never asked her attorney husband whether attorney's fees and costs could be higher than the percentages she "understood." T1:92. Ms. Webb further believed it

was SILVER's duty to disclose the amounts of competing liens and not the duty of Medlink to inquire. T1:116.

Ms. Webb acknowledged the similar case where Medlink was attempting to enforce letters of protection against attorney Andrew Vloedman and his client, Michael York. T1:101-102. She stated that Medlink had filed a lawsuit against Mr. York (T1:108) but not a BAR complaint against Mr. Vloedman. T1:107. Mr. Vloedman had deposited the recovered funds with the court (T1:101) and she did not believe Mr. Vloedman had done anything wrong. T1:107-108.

Ms. Nancy Moses testified that she was employed as a Deputy Clerk of Court in Alachua County, Florida. T2:287. Ms. Moses acknowledged that she had been subpoenaed to produce the court's file in Medlink vs. York, case number 99-CA-2088, and that she was experienced at handling court files and understanding what was documented therein. T2:287-288. Ms. Moses testified that D. Andrew Vloedman was a defendant in the case. T2:288 Ms. Moses further testified over objection that she had diligently searched the file as requested by SILVER's trial counsel and could find no indication that any funds had been deposited with the court in that case. T2:288-290.

On March 29, 2000, the FLORIDA BAR filed its COMPLAINT charging SILVER with violating Rules 4-1.15 (Safekeeping Property) and 4-8.4(c) (Engaging in Conduct involving Dishonesty, Fraud, Deceit or Misrepresentation) of the Rules Regulating the Florida Bar. SILVER responded with an AMENDED ANSWER, MOTION TO DISMISS, and AFFIRMATIVE DEFENSES. The final hearing was held August 10,

2000. Complainant placed twenty-six (26) exhibits into evidence and called as witnesses Paula Webb (f/k/a Paula Emerson), Arthur Willie Pogue, Sr., Respondent SILVER and James Wells. Respondent placed eight (8) exhibits into evidence and called as witnesses Nancy Moses and Respondent SILVER. The Report of the Referee was forwarded to this Court on September 15, 2000. Respondent timely petitioned for review.

SUMMARY OF THE ARGUMENT

The evidence fails as a matter of law to reach the "clear and convincing" standard required to find professional misconduct.

The legal conclusion underlying the recommendation that SILVER is Guilty of violating Rule 4-1.15 is inconsistent with law previously pronounced by or approved by this Court.

The recommendation that SILVER is Guilty of violating rule 4-1.15 is an *ex post facto* condemnation of conduct which was not wrongful at the time, and should be prospective only.

The findings of fact fail to provide the elements to support a recommendation that SILVER is Guilty of violating rule 4-1.15.

The costs claimed by the BAR include disallowed costs and inappropriate costs because the BAR pursued a frivolous charge.

ARGUMENT

I. THE EVIDENCE IS NOT CLEAR AND CONVINCING.

A. The Formal Charges, Defenses, and Disposition.

1. The BAR formally charged SILVER with two violations of the Rules Regulating the Florida Bar. The first charge was a violation of Rule 4-1.15, Safekeeping Property. The second charge was a violation of Rule 4-8.4(c), Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation.

2. SILVER moved to dismiss for failure to state a cause of action, asserting that the BAR's allegations in the COMPLAINT were insufficient to state all the required elements of the charges. SILVER also alleged a number of facts he asserted as affirmative defenses that he acted in good faith and with no intent to violate

any rule of professional conduct.

3. SILVER moved to dismiss the charge of Dishonesty, Fraud, Deceit or Misrepresentation (hereinafter the "fraud" charge), asserting the BAR had failed to allege a single statement that was not true at the time it was made. SILVER argued that without such an untrue statement, there was no possibility of showing the necessary intent to engage in fraud. The pretrial motion was denied without prejudice. SILVER raised the motion to dismiss again at the close of all the evidence, but the referee declined to hear it at that time (approximately 8:20 p.m., after a trial which had lasted approximately ten and one-half hours). T3:426-427.

4. Having heard all the evidence in the case, the referee stated,

> There was no evidence whatsoever offered or received which showed any intent by Respondent to mislead, defraud, misrepresent, or engage in any dishonesty. RR:11.

The referee's actual ruling on the fraud charge was as follows:

> Whether Respondent was correct or incorrect as to the priority of his liens, he showed consideration and generosity to everyone involved, and there is no proof of a preplanned scheme of dishonesty, fraud, deceit or misrepresentation. RR:13.

5. The referee's ruling on the Failure to Safeguard Property was as follows:

> Rule 4-1.15(c) covers "disputed ownership" and requires an attorney to retain in the trust account funds to which the attorney and another party claim disputed interests. Respondent clearly did not retain the Wash King funds. Therefore the issues are: (a) his subjective intent in distributing the funds, and (b) the objective validity of his belief that his liens were so superior to MedLink's liens as to be essentially indisputable. Respondent has maintained that he had the legal right to take essentially all of the

> Wash King settlement pursuant to his attorney liens, leaving only a few hundred dollars to be contested by the client and the medical providers. Instead, he believes he distributed his money to the clients and the doctors, attempting to ensure some satisfaction to everyone. If his belief was objectively valid under Florida law, then he had no wrongful intent in distributing funds which he validly believed to be his property to distribute as he saw fit.
>
> Based on the evidence presented in this case, this Referee finds although Respondent made a good faith attempt to distribute the settlement funds in a fair manner so that everyone involved would receive something of value and no one would go empty handed, that he failed to safeguard the interests of Ramadan and Osborne in that he failed to present the matter to a court of competent jurisdiction to make a proper determination of how the funds should be distributed when it was obvious, or should have been obvious, that these two medical providers would not be willing to accept less than the amount owed to them. Although his actions appear to be well-intentioned, they were not appropriate, and in violation of Rule 4-1.15. (Emphasis in original.) RR:12-13.

B. Applying the Standards of the Law.

1. In a BAR discipline proceeding, the referee must require charges of attorney misconduct to be proven by evidence rising to the "clear and convincing" standard. Florida Bar v. Neu, 597 So.2d 266, 268 (Fla. 1992). The element of intent is a threshold necessity to proving attorney misconduct involving dishonesty, fraud, deceit, or misrepresentation. Id., 268. Further, clear and convincing evidence,

> ...must be of such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitation, as to the truth of the allegation sought to be established. State v. Mischler, 488 So.2d 523, 525 (Fla. 1986).

Accordingly, the referee was absolutely correct in ruling on the fraud charge. In a ten and one-half hour evidentiary hearing, "There was no evidence whatsoever offered or received which showed any intent by Respondent to mislead, defraud, misrepresent, or

engage in any dishonesty." RR:11.

2. Is the evidence then clear and convincing that SILVER engaged in misconduct by failing to protect the medical provider's "interests" (if any) in the Wash King proceeds? If this Court read nothing whatsoever of this case except the Report of Referee, would the following statement by the referee leave a "firm belief and conviction" that there was misconduct by SILVER?

> Absence of fraud or intent to deceive: Yes. Mr. Silver was attempting to resolve the situation to the best of his ability under the circumstances and honestly thought his actions were proper. (Emphasis added.) RR:14.

3. Further, is the evidence of misconduct clear and convincing in light of the following discussion of the referee?

> Respondent has maintained that he had the legal right to take essentially all of the Wash King settlement pursuant to his attorney liens, leaving only a few hundred dollars to be contested by the client and the medical providers. Instead, he believes he distributed his money to the clients and the doctors, attempting to ensure some satisfaction to everyone. If his belief was objectively valid under Florida law, then he had no wrongful intent in distributing funds which he validly believed to be his property to distribute as he saw fit. (Emphasis in original.) RR:12.

Does the following recitation by the referee establish the "firm belief and conviction" required to find SILVER guilty of professional misconduct?

> The failure to send Ramadan a letter requesting a reduction in their bill may have been an office oversight, but it is one for which Mr. Silver is ultimately responsible. The evidence is also clear that Mr. Silver did not negotiate with Ramadan and Dr. Osborne for an agreed reduction in their fees as he did with the other medical providers, and the funds were distributed by Mr. Silver, with his client's acquiescence, without taking the matter to an independent third party for review. Mr. Silver argued that his contract with Mr. Pogue gave him a superior lien to the funds. While this may or may not have been the case, it was not for Mr. Silver to

> unilaterally make such a decision. The matter should have been placed before a court of competent jurisdiction for a decision as to how the funds should be appropriately distributed. (Emphasis added.) RR:9

Does being "ultimately responsible" for another person's "oversight" constitute clear and convincing evidence of misconduct? Does "should have been" (taken to court) sound more like 20-20 hindsight than convincing evidence of misconduct? Does "may or may not have been" (superior legal rights) sound a bit wishy-washy, rather than a "firm belief and conviction?"

4. The problem here is really not that SILVER was dishonest or unscrupulous, but that the law as it presently stands would permit some attorney, at some time, under some circumstances to be dishonest or unscrupulous. What if SILVER was absolutely correct under existing law, to the point that any lawsuit brought to contest his liens would be legally "frivolous?" Do we now find a lawyer guilty of misconduct because he knew the law much better than a third-party creditor?

5. In the next section of this ARGUMENT, respondent will show that SILVER was absolutely correct as to his rights under the existing law of liens. Respondent then asks the Court to determine whether acting correctly under existing law constitutes misconduct simply because the BAR would prefer a different act.

II. ESTABLISHED LAW PRECLUDES THE CONCLUSION REACHED.

A. The Law of Liens Establishes Priorities.

1. It was reasonable for SILVER to request his client to provide a lien against the personal injury proceeds when Mr. Pogue

requested representation on the two family law cases on December 22, 1995. CX7:78. Florida courts have specifically approved a contract which subjects unrelated property to a lien for payment of attorney's fees. Amacher v. Keel, 358 So.2d 889, 890 (Fla. 2nd DCA 1978); Sabin v. Butter, 522 So.2d 939, 940 (Fla. 3rd DCA 1988) *cause dismissed sub nom* Phoenix Collection, Ltd. v. Butter, 531 So.2d 168 (Fla. 1988).

2. There is an excellent overview of the general law in Florida regarding liens in Volume 14, Florida Jurisprudence, 2nd Edition, *Liens.* Moreover, there is an excellent overview of the particular law governing attorney's charging liens and retaining liens in Daniel Mones, P.A. v. Smith, 486 So.2d 559 (Fla. 1986). One of the key points in Mones is that a charging lien is limited to the recovery obtained in that specific lawsuit, and is enforceable by the court with jurisdiction over that suit. Id., 561. On the other hand, a retaining lien may be asserted regarding amounts owed for any legal work done for that client, regardless whether the funds, property, or materials held are related to the matter in which the amounts owed were incurred. Id., 561. Moreover, the attorney and client may modify a charging lien by a contract which expressly subjects other property to the charging lien. Sabin v. Butter, 522 So.2d 939, 940 (Fla. 3rd DCA 1988), *cause dismissed sub nom* Phoenix Collection, Ltd. v. Butter, 531 So.2d 168 (Fla. 1988). Where the clients expressed the intent that the real property described in a written assignment was to serve as

security for legal fees not related to the real property, the document was sufficient to create an equitable lien against the realty in favor of the attorney. Amacher v. Keel, 358 So.2d 889, 890 (Fla. 2nd DCA 1978).

3. The general rule applicable to priority of liens is "first in time, first in right." United States v. First Federal Savings & Loan Assn. of St. Petersburg, 155 So.2d 192, 193 (Fla. 2nd DCA 1963) *citing to* United States v. City of New Britain, 347 U.S. 81 (1954) *sub cite* Rankin & Schatzell v. Scott, 12 Wheat. 177 (1827). Accord, Richardson Tractor Company v. Square Deal Machinery & Supply Company, 149 So.2d 388, 390 (Fla. 2nd DCA 1963).

B. SILVER Had Lawful Liens On the Settlement Funds.

1. It is beyond dispute that SILVER had an enforceable first priority charging lien against the proceeds of the Wash King case, inasmuch as there would be no "pot" to divide without the attorney's efforts in obtaining the it. Mones, 561. Thus, SILVER had a right to a 40% contingency fee of $9,000.00 (of the $22,500.00 settlement) and his costs of $2,309.11.

2. Mr. Willie Pogue agreed both verbally and in writing to use the Wash King proceeds to secure SILVER's attorney's fees and costs in the two family law matters and the Will. That agreement appears as an addendum to the contract he signed on December 22, 1995. CX7:78. Mr. Pogue re-affirmed that agreement by approving the May, 1997, accounting whereby the excess funds received from Wash King's "med-pay" coverage were applied to unpaid fees in the dependency case. CX9:1. Finally, Mr. Pogue re-affirmed those

agreements on June 8, 1999, (CX12:1) when it appeared RHI might initiate litigation over unpaid medical bills.

3. The December 22, 1995, addendum created a legitimate lien. It might be called an "equitable lien" as recognized in Amacher v. Keel, *supra,* or it might be called a "modified charging lien" as recognized in Sabin v. Butter, *supra.* Once the funds from the Wash King case were actually in SILVER's hands, he could impose on them a "retaining lien" for the amounts owed in the other cases, as described in Mones, *supra.* The amounts owed to SILVER for the other cases totaled (in June, 1999) some $8,286.38 ($19,595.49 - 11,309.11). RX1:1. Thus, SILVER's belief that his charging and retaining liens entitled him to essentially all ($19,595.49) of the Wash King proceeds ($22,500.00 minus Mrs. Pogue's 2,000.00 = 20,500.00) was objectively valid under Florida law.

C. SILVER's Liens Had Priority.

1. What, then, of SILVER's belief that he was entitled to priority of his liens over the liens of RHI and Doctor Osborne? SILVER's lien was created and memorialized in writing on December 22, 1995. The very earliest possible agreement to "protect" the RHI bills was SILVER's memo of March 29, 1996, in which he specifically stated an exception for attorney's fees and costs. CX3:1. Ms. Webb agreed that March, 1996, is the first time Medlink relied on the letter of protection. T1:84. In fact, it is arguable that by requesting SILVER to execute RHI's own form in September, 1998 (CX7:51), Medlink nullified SILVER's previous

statements he would "protect" Medlink's bills. Thus, under the general principle of "first in time is first in right" SILVER was entitled to priority of his December 22, 1995, lien over Medlink's medical liens.

2. There is one case, however, in which a Florida court unexplainedly departed from the law of liens and determined that contract law determined the result. In Berger v. Silverstein, 727 So.2d 312 (Fla. 3rd DCA 1999), a health care provider obtained from the attorney a "contract/lien" agreeing to withhold such sums from the recovery "as may be necessary" to protect the health care provider. The case settled for $27,500.00 and the attorney took his fee of $11,000.00 and costs of $14,691.82, leaving only $1,808.18 for the client and provider. The provider sued the attorney for breach of the "contract/lien," and the trial court granted summary judgment on the attorney's claim that his charging lien was superior to the health care lien.

The Silverstein appellate court decreed that the law of liens was inapplicable, inasmuch as the case was brought on the contract between the attorney and the provider.

> Contrary to Silverstein's position, we do not resolve this case on the law of competing liens. Rather, we find that the execution of the document in question created a binding and enforceable contract between the parties.
>
> * * *
>
> Nothing in the agreement suggested that Berger would have to stand in line behind the attorneys' financial interest in the case. Id., 313.

In fact, the concurring judge emphasized that a lien law analysis would have compelled a different result in the case.

> The attorney had some two (2) years invested in the matter prior to his agreement directly with the therapist. Unquestionably, the attorney had a charging lien against the first proceeds recovered on behalf of his client, however the effect of his agreement with the therapist was to partially or wholly divest himself from enforcing that lien. Nesbitt, J., concurring, 313.

3. Thus, Silverstein does not change the law of competing lien priorities. However, even under Silverstein's contract-law analysis, SILVER remains in a superior position. SILVER repeatedly notified RHI that he asserted his interest's priority over RHI's interest. RHI indeed was on notice it would "...stand in line behind..." SILVER's interest. Id., 313. T1:66, l. 14-18; CX7:56. RHI simply never inquired as to how large an interest it was standing behind. T1:89, l. 14-20.

4. SILVER did, in fact, have a good faith - and objectively valid - belief that he was legally entitled to some $19,595.49 of the Wash King proceeds and that he could choose to distribute that amount to himself, his clients, (Cathy Pogue's consortium share had been set at $2,000.00) and to health care providers as his (SILVER'S) best judgment dictated. If SILVER honestly believed he was distributing his own money and the established law supports that belief, how could there be "misconduct" in acting in accordance with the established law?

D. SILVER Did Protect Medlink's Interest.

1. The referee stated the facts as follows:

> It is undisputed that SILVER was entitled to a 40% contingent fee on the $22,500.00 settlement, or $9,000.00, plus his costs and expenses of $2,309.11. SILVER also had at least a justiciable claim to an additional $8,286.38 ($19,595.49 total) in fees and costs on the Will and family

> law matters. SILVER could have legally taken his $11,309.11 fee and costs, paid Cathy Pogue her $2,000.00, and kept $8,286.38 in the trust account, giving everyone notice that $904.51 was available for distribution.
>
> What SILVER did instead was to reduce his undisputed $9,000.00 fee by $3,000.00, paying that amount instead to RHI and Doctor Osborne. SILVER reduced his due and owing fees and costs by $8,531.20 to give those funds to Mr. and Mrs. Pogue. Even then SILVER would still have some $2,659.69 in trust, and he could have informed all the other health care providers that he had superior liens and would take the funds unless they filed suit to contest the priority of his liens. Instead, SILVER distributed the remainder to the other health care providers.

2. As stated, SILVER could have legally given everyone notice that $904.51 was available and that he was taking the rest unless someone filed a legal challenge. However, given the clarity of the law of liens recited above, any suit by Medlink would have been frivolous, and subject to sanctions under § 57.105, Fla.Stat. Further, Dr. Klein had already filed suit and was about to obtain a judgment of approximately $2,000.00 against Mr. Pogue. T3:321; 323. Thus, Medlink would also be "standing behind" Dr. Klein (as a judgment creditor) for the available $904.51. The bottom line is that Medlink would have gained nothing whatsoever and might even have been liable for attorney's fees (under § 57.105, Fla.Stat.) if it challenged SILVER's liens.

4. When SILVER reduced his fee by $3,000.00 and sent that amount to Medlink, it did not cancel Medlink's cause of action against Arthur Willie Pogue. T1:68-69. What it did, however, was to give Medlink a sum of money which it could not have obtained through the court system. Prior to that payment, all Medlink had was an inferior lien on the settlement funds and a legal cause of

action against a poor man (unlikely to own executable assets). Without SILVER's attempt at fairness to all, Medlink would have walked away with zero. Yet, the BAR claims SILVER "failed to safeguard Medlink's interests." There was already insufficient money to go around; yet the BAR insists there should have been additional litigation - with the attendant expense and delay. This is an ivory tower view, out of touch with the real world. The BAR would have preferred a different approach, but in real life SILVER did protect Medlink's interests by giving them $3,000.00 instead of an expensive court defeat on a lien law challenge.

III. THE CONCLUSION IS *EX POST FACTO*.

A. The BAR Substituted Its Preference For The Law.

1. Throughout the case below, the BAR repeatedly argued as a basic truism that SILVER had some legal duty to affirmatively disclose the existence and amount of his attorney's lien based on past legal work. In its proposed REPORT OF REFEREE, the BAR argued this position extensively.

> Page 4: Neither this form nor any of the prior letters written or signed by respondent directly stated that attorney's fees and costs included the fees and costs of the other family law cases. (Emphasis added.)
>
> Page 7: ...Mr. Silver did not affirmatively disclose to Ramadan his claim to the personal injury funds to pay for fees and costs in the family law cases. (Emphasis added.)
>
> Page 8: Mr. Silver argued that his contract with Mr. Pogue gave him a superior lien to the funds. While this may or may not be the case, it was not for Mr. Silver to unilaterally make such a decision. (Emphasis added.)
>
> Page 9: As Ms. Emerson-Webb asked rhetorically at the hearing, "When can a letter of protection be trusted?" The answer must be: always.

2. Notably the BAR's theory cites no legal authority for this mystical duty and attempts to place medical providers in a higher position than any other creditor in Florida, who must make diligent inquiry as to the status of competing liens. There is no legal authority of any kind to require such an affirmative disclosure where the creditor has not made an inquiry.

3. The BAR's theory also happens to contradict the law established by this Court a long time ago, in Daniel Mones, P.A. v. Smith, 486 So.2d 559 (Fla. 1986).

> Unlike a charging lien, a retaining lien covers the balance due for all legal work done on behalf of the client regardless of whether the property is related to the matter for which the money is owed to the attorney. Id., 561.
>
> * * *
>
> The district court's reliance on Florida Bar Integration Rule, Article XI, rule 11.02(4) is also unjustified. Rule 11.02(4) expressly provides that it does not "preclude the retention of money or other property upon which the lawyer has a valid lien for his services or ... preclude the payment of agreed fees from the proceeds of transactions or collections." Id., 562.
>
> * * *
>
> Respondent [Smith, the client]...asserts the settlement offer would not have been accepted if the client had known the extent of the lawyer's claim and his intention to retain the lion's share of the funds for current and past-due fees. (Emphasis added.) Id., 563, Boyd, C.J., dissenting.
>
> * * *
>
> Again, if the client had known at the time of the settlement offer that the lawyer intended to retain part of the settlement as satisfaction of his claim.... (Emphasis added.) Id., 564, Boyd, C.J., dissenting.

Thus, the five majority justices clearly understood that even the lawyer's client was unaware of the amount of the potential attorney's retaining lien, yet they ruled that the lawyer had no duty to affirmatively disclose that even to his own client. Now the BAR conjures up some mystical duty to disclose to a third-party

creditor what the law does not even require be disclosed to the client himself. And the BAR wants this Court to find lawyer misconduct based on this mystical (i.e., non-existent) "duty."

4. The Mones court specifically stated that Integration Rule 11.02(4) did not preclude the attorney's retaining lien at issue therein, quoting the text of the rule. Id., 562. The precise language quoted by the Mones court is included verbatim in the commentary explaining the rule SILVER is accused of violating.

> This is not to preclude the retention of money or other property upon which the lawyer has a valid lien for his services or to preclude the payment of agreed fees from the proceeds of transactions or collections. Comment, Rule 4-1.15, Rules Regulating the Florida Bar.

B. The Referee Substituted His Preference For The Law.

1. The REPORT OF REFEREE is replete with statements characterized by the words "...should have...," but without any legal authority as to the source of the perceived duty.

> Page 8: The Florida Bar alleges that Mr. Silver has violated Rule 4-1.15 (Safekeeping Property) for failing to notify Ramadan and Dr. Osborne of receipt of the medpay and settlement funds and failing to hold those funds in trust until all parties negotiated a settlement or a third party arbitrated the dispute.
>
> * * *
>
> Page 9: Mr. Silver argued that his contract with Mr. Pogue gave him a superior lien to the funds. While this may or may not be the case, it was not for Mr. Silver to unilaterally make such a decision. The matter should have been placed before a court of competent jurisdiction for a decision as to how the funds should be appropriately distributed.
>
> * * *
>
> Page 10: When an attorney issues a letter of protection, the receiver believes that the attorney will honor his word and not distribute funds to the client until after the medical bill is paid in full or another agreement is reached. By making a distribution of the medpay and settlement funds to his client without reaching another agreement, or, failing to do so, resolving the dispute appropriately, Mr. Silver broke

his word.

* * *

Page 12: ...although Respondent made a good faith attempt to distribute the settlement funds in a fair manner so that everyone involved would received something of value and no one would go empty handed, that he failed to safeguard the interests of Ramadan and Osborne in that he failed to present the matter to a court of competent jurisdiction to make a proper determination of how the funds should be distributed when it was obvious, or should have been obvious, that these two medical providers would not be willing to accept less than the amount owed to them. Although his actions appear to be well-intentioned, they were not appropriate, and in violation of Rule 4-1.15.

2. Unfortunately, Rule 4-1.15 itself provides no such authority. It neither prohibits the lawyer himself from making the initial determination of ownership; nor does it require a court to make that determination.

> 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 part belonging to the lawyer or law firm shall be withdrawn within 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 separate by the lawyer until the dispute is resolved. (Emphasis added.) Rule 4-1.15(c), R. Regulating Fla. Bar.

Where does the rule state the lawyer himself cannot make the initial determination of what part belongs to him? Where is the word "court?" Where precisely is the legal authority for the conclusion, "...it was not for Mr. Silver to unilaterally make such a decision." The plain and simple fact is that the rule contains no such authority. Nor can such authority be grafted *post facto* into the rule by interpretation; due process of law requires such a prohibition must be in the rule before the alleged violation.

3. Further, Rule 4-1.15(c) contains no legal authority for

the conclusion that the lawyer is constrained because an anticipated dispute "...was obvious, or should have been obvious."

> 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 part belonging to the lawyer or law firm shall be withdrawn within 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 separate by the lawyer until the dispute is resolved. (Emphasis added.) Rule 4-1.15(c), Rules Regulating the Florida Bar.

The words "...is disputed..." describe a present dispute, not an inchoate dispute. If this Court intended otherwise, the words to express that intent would have been easy enough to write: "...is disputed, or likely to be disputed,...." And fundamental due process requires the lawyer have notice of the dispute (or even a likely dispute). The words simply will not stretch so far as to transform a "hunch" that a third party might be "disappointed" into a current "dispute."

4. In this case, SILVER's secretary sent a letter dated May 18, 1999, informing Medlink that,

> Because circumstances required that we settle for a very small amount from the alleged tortfeasor, there will not be enough money to pay all the medical doctors and facilities their full amount. Therefore, we suggest that you accept $0.30 on the dollar. I have reduced my fee considerably. The alternative for Mr. Pogue is bankruptcy. CX21:4.

Ten days later (May 28, 1999), having heard nothing from Medlink, Silver wrote checks to Dr. Osborne and RHI. CX19:2. There was certainly time for Medlink to give notice of an actual dispute.

C. Medlink Had Notice And Failed to Act.

1. Ms. Paula Webb (formerly Ms. Paula Emerson) is a one-third

owner, President and Chief Financial Officer of Medlink Management Services, Inc., which operates RHI, among other entities. T1:8-9. Ms. Webb testified without contradiction that Doctor Osborne and RHI had separate billing offices. T1:11. The referee found that Ms Webb testified that RHI had not received notice of the settlement. RR:5. The BAR suggests therefore RHI was not notified by SILVER of the case settlement. T3:197. However, that theory is inconsistent with attachments to the initial complaint to the BAR, which claimed amounts due for both RHI and Doctor Osborne. CX1:9. Ms. Webb's complaint states that SILVER on April 18, 1996, January 3, 1997, and September 10, 1998, "...provided the hospital and surgeon with a Letter of Protection (see enclosed Exhibit "A")." (Underlining added.) CX1:2. However, the letters attached as her Exhibit "A" are addressed solely to RHI and not to the surgeon (Doctor Osborne). CX1:4,5,6. Further, the form Letter of Protection/Lien for Medical Services designed by and requested by RHI makes no mention whatsoever of the surgeon or any other doctor. CX1:8. Ms. Webb's letter of June 2, 1999, also rather contradicts her trial testimony. She states in that letter, "...we do not accept the checks as payment in full on our hospital bills and surgeon's bills in the amounts of $9,727.95 and $5,385.00, respectively for the medical treatment we provided to Mr. Pogue. (Underlining added.) CX1:23.

2. Other items tend to contradict Ms. Webb's testimony. In her initial complaint, she included a statement that the amount due to Doctor Osborne was $5,385.00. CX1:9. The attached computer

printout of Doctor Osborne's bill - with the amount $5,385.00 circled - is on a page entitled "Medlink Management Services, Inc. D/B/A Ramadan Hand Institute." CX1:21. In her July 28, 1999, follow up letter to the BAR, Ms. Webb included a computer printout bearing handwritten notations as follows.

05-24-99
375-8563
Virginia (LOP)

5385.00
4.00

$ 5,389.00 Balance

5/24 Att office called
Wanted Balance M
I gave them $5,389.00

(See, CX7:21.)

It is rather apparent that the "375-8563" was SILVER's office phone number and "Virginia" was the first name of SILVER's secretary in May, 1999. CX21:4. The two previous pages of the printout have the "Medlink d/b/a RHI" identifier on them, yet the amount is clearly Doctor Osborne's bill. CX7:19,20.

3. Finally, Ms. Webb's own words in her July 28, 1999, letter to the BAR rather dramatically contradict her trial testimony.

> Owen B. K. Osborne, M.D., is employed by Medlink Management Services, Inc. and his clinic office and billings are operated under the fictitious name of Ramadan Hand Institute. CX7:3, para. e.
>
> * * *
>
> As an employee of Medlink, the professional services provided by Dr. Osborne were billed under Medlink's fictitious name

> "Ramadan Hand Institute." CX7:3, para. 6.
>
> * * *
>
> ...Mr. Silver was fully aware that Dr. Osborne's claims were included. He had been provided billings from our office of both the hospital and physician's professional fees. CX7:5, para. b.

Ms. Webb's trial testimony simply is not credible on this point, which becomes critical when considering whether SILVER had any reason to believe his right to the funds was actually disputed or even potentially disputed.

4. Apparently as a result of the telephone call from SILVER's secretary on May 24, 1999 (CX7:21) RHI prepared a summary of Mr. Pogue's outstanding bills dated May 26, 1999. CX7:23. Mrs. Webb stated in her Bar complaint that these bills were hand delivered to SILVER's office on May 26, 1999, (CX1:2) but she testified at trial that it was hand delivered by courier on May 24, 1999, (T1:30) clearly an error, since it is dated two days later. There is no date stamp showing that it was received in SILVER's office (as compared with the date stamp showing receipt of other documents, such as CX7:52 and CX7:56) and there was no evidence whatsoever that SILVER actually received it. In fact, SILVER flatly denied receiving the May 26, 1999, letter. T2:203. The BAR offered no evidence that any such document was found in SILVER's files during the BAR investigation. Further, Ms. Webb's testimony is somewhat inconsistent with her letter which purports to be by "Hand Delivery" on June 2, 1999, but is date-stamped by SILVER's office as "Received June 3, 1999, by Hand Delivery." CX7:52. That June 2, 1999, letter makes quite specific reference to SILVER's letter

of May 27, 1999 (which enclosed two checks for $1,500.00) and to SILVER's letter of January 23, 1997 (which provided a Medical Assignment. CX7:52. Yet, the June 2 letter is completely silent as to the purported hand delivery of some fifteen to eighteen pages of computer billings on May 26, before SILVER's checks were written. Ms. Webb is so thorough in reciting details of other matters, it is difficult to believe she would not even have mentioned the hand delivery of the bills if it had actually occurred. In short, the evidence is hardly clear and convincing that SILVER actually received RHI's May 26, 1999, letter and bills. Without proof those bills were received, there is no evidence whatsoever to support the conclusion,

> ...it was obvious, or should have been obvious, that these two medical providers would not be willing to accept less than the amount owed to them. RR:12.

Without evidence that there was an actual dispute - of which SILVER had actual notice - on the day SILVER wrote the checks, there is no legal basis to find a violation of this Rule.

> ...the part belonging to the lawyer or law firm shall be withdrawn within 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 separate.... (Emphasis added.) Rule 4-1.15(c).

D. Modification of The Rule Should Be Prospective.

1. It is absolutely clear that SILVER cheated no one in this case. It is equally clear that SILVER was dishonest to no one in this case. What emerges is that Medlink was disappointed because it made unrealistic assumptions about its liens in the Wash King case and failed to seek the information necessary to validly assess

its legal position. SILVER repeatedly asserted his interest in the case would be superior to Medlink's interest, and Medlink simply failed to inquire as to how large SILVER"s interest might be.

2. The appropriate remedy for RHI is a lawsuit contesting the priority of SILVER's liens. Although they threatened legal action in June, 1999, Medlink has done nothing to collect their unpaid bills except to make this complaint to the BAR. Medlink actually filed suit against a different attorney, Andrew Vloedman, involved in another controversy with Medlink over "letters of protection" for unpaid medical bills.

3. Ms. Webb testified that Medlink did not file a BAR complaint against Mr. Vloedman because he deposited the funds into the court. T1:101; 107-108. However, the Deputy Clerk of Court testified that no such deposit was made. T2:290. Medlink chose not to promptly avail itself of the opportunity to have a circuit court determine the priority of SILVER's liens, choosing instead to complain to the BAR. It is difficult to escape the feeling that Medlink is testing two different ways of putting teeth into its letters of protection, one lawsuit and one BAR complaint. It is similarly difficult to escape the feeling that the BAR would not have pursued this matter so vigorously if the complaining party were not a member of the medical establishment, with its proclivity to blame lawyers for various ills of society.

4. There is perhaps a vague feeling that strictly construing Rule 4-1.15(c) and applying it literally, in conformity with the established lien law, would create a loophole inviting abuse by the

unscrupulous. Even though SILVER used the lien law to give Medlink more than it could have obtained through legal process, another attorney might use the lien law to pay himself essentially all of the settlement funds available. Compare, Silverstein, *supra.* There is perhaps a vague feeling that everything SILVER did would have been "okay" if a judge had given prior approval. The BAR never really makes it clear why Medlink should not have to contest and prevail on the legal validity of SILVER's liens before the BAR pursues SILVER for "misconduct." The BAR takes the rather bizarre position that an attorney can act in conformity with existing law and yet still have acted in violation of BAR rules; that is, is the BAR not subject to the established law, like any other person or entity in this state?

5. Now the BAR seeks a ruling from this Court that the plain words of Rule 4-1.15(c) do not mean what they actually say; that "...is disputed..." means not "actually disputed," but rather "possibly disputed." No longer does "...reasonable time..." mean "reasonable time," but now means "however long it takes to resolve any possible dispute." And "...belonging to the law firm..." is no longer to be intelligently interpreted by the lawyer in light of Mones and Amacher and Sabin, but only by a judge - or worse yet - by a disappointed third party creditor.

6. Although what SILVER did was honorable and generous, the BAR wants to punish SILVER to dissuade the next lawyer from any unscrupulous behavior. If this Court is going to construe Rule 4-1.15 to preclude withdrawing funds when the lawyer has a reasoned

and valid belief that he has superior liens which are beyond anything but the most frivolous "dispute," that interpretation should be made prospective only, with adequate warning to practitioners that the words do not have their customary meanings.

IV. THE FINDINGS ARE LEGALLY INSUFFICIENT.

A. The Rule Provides Elements To Be Proven.

1. The rule SILVER is accused of violating is as follows:

> 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 part belonging to the lawyer or law firm shall be withdrawn within 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 separate by the lawyer until the dispute is resolved. Rule 4-1.15(c), Rules Regulating the Florida Bar.

2. Lawyers learn early in law school to diagram a statute and determine the elements which must be proven by the evidence. This rule may similarly be diagramed to obtain the required elements.

a. To require the lawyer to treat certain property as "trust property," three elements must be proven:

(1) in the course of representation;

(2) in possession of property;

(3) the lawyer and another party claim interests.

b. Then, to require the lawyer to keep separate the portion claimed by the lawyer, two other elements must be proven:

(1) a "reasonable time" has not passed; or

(2) the lawyer's right is "disputed."

B. The Findings Do Not Establish The Elements.

1. SILVER agrees the evidence and findings support the three

elements to require the Wash King settlement to be treated as trust property. The question then becomes whether the BAR proved by clear and convincing evidence those elements which would require SILVER to retain those funds in the trust account.

2. The finding of ultimate fact is stated by the referee as follows:

> Respondent has maintained that he had the legal right to take essentially all of the Wash King settlement pursuant to his attorney liens, leaving only a few hundred dollars to be contested by the client and the medical providers. Instead, he believes he distributed <u>his money</u> to the clients and the doctors, attempting to ensure some satisfaction to everyone. If his belief was objectively valid under Florida law, then he had no wrongful intent in distributing funds which he validly believed to be his property to distribute as he saw fit.
>
> Based on the evidence presented in this case, this Referee finds although Respondent made a good faith attempt to distribute the settlement funds in a fair manner so that everyone involved would receive something of value and no one would go empty handed, that he failed to safeguard the interests of Ramadan and Osborne in that he failed to present the matter to a court of competent jurisdiction to make a proper determination of how the funds should be distributed when it was obvious, or should have been obvious, that these two medical providers would not be willing to accept less than the amount owed to them. Although his actions appear to be well-intentioned, they were not appropriate, and in violation of Rule 4-1.15. (Emphasis in original.) RR:12-13.

3. The factual findings fail to establish the elements necessary to find a violation.

a. The referee failed determine whether SILVER's liens were superior to Medlink's liens (although the case law appears absolutely clear that SILVER's liens had priority). In fact, the referee states,

> If his belief was objectively valid under Florida law, then he had no wrongful intent in distributing funds which he validly believed to be his property to distribute as he saw fit.

While expressing a belief that the case hinged on the validity and priority of SILVER's liens, the referee did not decide that key issue. Moreover, the referee made no comment whatsoever regarding whether SILVER waited a "reasonable time" before withdrawing those funds to which his liens applied. Thus, the first element which might require the funds to be retained in trust is absent.

b. The second element is that there must be a dispute. The referee's finding is as follows:

> ...it was obvious, or should have been obvious, that these two medical providers would not be willing to accept less than the amount owed to them. RR:12-13.

That is, the referee did not find a dispute actually existed and did not even suggest that SILVER had notice that a dispute existed. The referee found it "obvious" that a dispute would occur.

4. On what grounds does such a finding rest? There is one sentence in the entire report addressing the facts underlying the conclusion a dispute was "obvious." That sentence is,

> Ms. Emerson-Webb initially refused the checks and demanded payment in full or an accounting. RR:7.

On its face that sentence shows the trust account checks were already written when the "dispute" arose. The evidence establishes that SILVER sent letters dated May 18, 1999, informing Medlink,

> ...there will not be enough money to pay all the medical doctors and facilities their full amount. Therefore, we suggest that you accept $0.30 on the dollar. I have reduced my fee considerably. CX21:4.

Ten days later (May 28, 1999), having heard nothing from Medlink, Silver wrote checks to Dr. Osborne and RHI. CX19:2. There was certainly time for Medlink to give notice of an actual dispute.

5. The rule clearly does not require the lawyer to anticipate every possible dispute concerning the priority of the attorney's lien. It requires scant imagination to conceive a set of facts which lead to an utterly absurd result of such a rule.

> Lawyer Smith represents Jones in a personal injury suit and claims a charging lien. Jones brings his car into mechanic Brown's shop for repairs, promising to pay Brown out of the suit proceeds. The jury verdict is barely enough to cover the costs of the expert witnesses and a reduced attorney's fee. Jones informs Lawyer Smith that Brown said "it just ain't right" for the lawyer to get all the money.

Under the interpretation urged by the BAR (and apparently accepted by the referee) Lawyer Smith would be obligated to hold the funds in trust because of the possible dispute by Brown. And apparently the BAR demands those funds must be held in trust until Brown agrees to a resolution or a court rules on Brown's possible dispute. Thus, where there is not enough money to go around, the BAR urges this Court to require the lawyer to spend still more time and money to resolve a "dispute" which is utterly meritless at best and non-existent at worst.

6. Perhaps it is difficult for BAR lawyers who receive a steady State paycheck to conceive of the impact of such a bizarre extension of the rule on private practitioners; who must pay income tax, unemployment tax, worker's compensation, health insurance, office rent and a secretary's salary out of those proceeds - before the lawyer can take a paycheck himself.

C. The Referee Added A Non-Existent Element.

1. Statements by the referee demonstrate the real concern with the way SILVER handled the Wash King proceeds.

> The matter should have been placed before a court of competent jurisdiction for a decision as to how the funds should be appropriately distributed. (Emphasis added.) RR:9.
>
> * * *
>
> ...he failed to safeguard the interests of Ramadan and Osborne in that he failed to present the matter to a court of competent jurisdiction.... RR:12

The reason for these "should haves" is related in another statement.

> When an attorney issues a letter of protection, the receiver believes that the attorney will honor his word and not distribute funds to the client until after the medical bill is paid in full or another agreement is reached. By making a distribution of the medpay and settlement funds to his client without reaching another agreement, or, failing to do so, resolving the dispute appropriately, Mr. Silver broke his word. (Emphasis added.) RR:10.

2. Thus, somehow, the "letter of protection" now becomes a magical document; no longer governed by the law of liens or the law of contract - not even by the words of Rule 4-1.15 - but governed by the expectations of the receiver. And the legal validity of those expectations is irrelevant? And if the verdict is so sparse that the lawyer gets no fee, just pays his costs and the expert and the court reporter? Does the doctor's expectation require the lawyer to pay the doctor's bill from his own pocket or face disciplinary action by the BAR? If there is fifty dollars remaining after costs, does the doctor's expectation nullify the retaining lien identified by this Court in Mones? Must the lawyer pay a fifty dollar filing fee for a court's order to release the fifty dollars in the trust account from the doctor's expectations? The implications of an expectation based rule are staggering.

3. Clearly, the referee actually meant SILVER should have

"covered his back" by getting a court ruling on the lien priorities. Presumably, then, SILVER would not be perceived as "breaking his word" to the doctor. Unfortunately, that is unlikely. Medlink was so incensed by SILVER's offer of $3,000.00 that Medlink filed the grievance which began this case. It is not difficult to imagine how Medlink would have responded to SILVER going into court claiming liens which left only $900.00 available. Even though it is clear Medlink received more money by SILVER's generosity than it could have possibly obtained by court action (See, Section II.D, above) it is doubtful that SILVER will ever enjoy a good reputation with Medlink or any of its employees. Ms. Webb specifically denied saying that she would not have filed this BAR grievance if she had known that SILVER had given up a lot of his fees. T1:61, l.20-24; T1:63, l. 13-18; T1:64, l. 1-23.

4. There is no wording in Rule 4-1.15 requiring the lawyer to resolve any fee dispute by taking it to court. Moreover, the rule has no wording requiring that the lawyer not disappoint the <u>expectations</u> of a doctor holding a letter of protection. The referee simply added an element which does not appear in the words of the rule. There is no legal justification for elevating the expectations of a doctor that an attorney will "keep his word" above the law which governs the liens of every other citizen of this state. This element does not exist in the rule and cannot with justice be construed into the rule *post facto.*

V. THE COSTS ARE EXCESSIVE AND DISPROPORTIONATE.

A. <u>Excluded Items Should Not Be Taxed As Costs</u>.

1. SILVER does not in any way concede that he has committed any violation and does not waive the arguments presented in sections I through IV above. In the event, however, this Court finds there was a violation and that costs are taxable to SILVER, the following is submitted as to the amount of those costs.

2. The BAR's motion for costs was served September 5, 2000. The referee did not wait ten days for SILVER's objections to the costs, and (except for travel expenses of the referee and his clerk) awarded costs identical to those requested by the BAR. RR:15. The costs awarded to the BAR include costs which are unnecessary, excessive and improperly authenticated and are therefore impermissible pursuant to Rule 3-7.6(0)(3), R. Regulating Fla.Bar.

3. Included is an item entitled, "Court Reporter's Fees." It is not authenticated as to how much of those court reporter charges are for per diem and transcripts of the Grievance Committee meeting. Those transcripts exist, as stated by the BAR's attorney at trial. T1:63, l. 19-22. At least one transcript was offered into evidence by the BAR, and excluded by the referee. T3:367-368. Thus, it quite appears that the BAR has attempted to have this Court impose costs on SILVER for items which were excluded from evidence because they were not used for impeachment. T3:368-369. The BAR would not be entitled to tax costs of those transcripts in any other civil action, and should not be allowed to do so here. See, Statewide Uniform Guidelines For Taxation of Costs in Civil Actions, para. 1.F. The burden of proving taxable costs is on the

prevailing party. Id., para. 1B.

B. Part Of The BAR's Case Was Legally Frivolous.

1. As previously noted, the BAR charged SILVER with violation of Rule 4-8.4(c), Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation. SILVER moved to dismiss that charge, asserting the BAR had failed to allege a single statement that was not true at the time it was made. SILVER argued that without such an untrue statement, there was no possibility of showing the necessary intent to engage in fraud.

2. As previously noted, having heard all the evidence in the case, the referee stated,

> There was no evidence whatsoever offered or received which showed any intent by Respondent to mislead, defraud, misrepresent, or engage in any dishonesty. (Emphasis added.) RR:11.

The referee's actual ruling on the fraud charge was as follows:

> Whether Respondent was correct or incorrect as to the priority of his liens, he showed consideration and generosity to everyone involved, and there is no proof of a preplanned scheme of dishonesty, fraud, deceit or misrepresentation. RR:13.

3. The trial began at 9:00 a.m. (T1:1) and concluded at 8:20 p.m. (T3:427); the BAR resting its case after 416 pages of proceedings. T3:417. Thus, more than a year after the initial complaint (CX1:1), after incurring $508.54 in investigative costs (RR:15), after a Grievance Committee evidentiary hearing (T1:64), and after ten and one-half hours of trial before the referee, the BAR was unable to even offer any evidence of "...any intent by Respondent to mislead, defraud, misrepresent, or engage in any

dishonesty." RR:11. It is difficult to avoid the conclusion the BAR continued to pursue the "fraud" charge as leverage to compel SILVER to "plea-bargain" on the lesser charge, "failure to safeguard." If any entity other than the BAR had taken a case to trial without any evidence supporting its claim, this Court would not hesitate to impose sanctions on that entity. The standard should be no less for the BAR, purportedly the guardian of attorney "ethics" for this Court.

4. That the BAR itself might engage in misguided conduct might be unthinkable to some. However, this Court has clearly contemplated that such a thing could happen someday. In Rule 3-7.6(0)(4), this Court provided for taxing a respondent's costs against the BAR in the event there is "...no justiciable issue of either law or fact..." raised by the BAR. Surely, if the Court has authorized awarding costs to a respondent, then it certainly contemplated reducing the BAR's costs when at least part of the BAR's case was similarly without factual or legal merit. The costs issue should be remanded for the BAR to prove what costs were related to each charge and costs related to the fraud charge costs should be disallowed.

CONCLUSION

Respondent prays the Court to find that SILVER is NOT GUILTY of violating Rule 4-1.15(c), R. Regulating Fla.Bar, and to remand this case for a hearing as to whether the charge of misconduct under Rule 4-8.4(c) was legally frivolous.

In the alternative, should the Court determine that SILVER is

guilty of violating Rule 4-1.15(c), SILVER prays the Court reduce the punishment to a private reprimand and remand this case for a hearing as to whether the charge of misconduct under Rule 4-8.4(c) was legally frivolous and/or whether the costs awarded to the BAR were excessive, unnecessary and inadequately authenticated.

In the alternative, should the Court determine that SILVER is guilty of violating Rule 4-1.15(c), SILVER prays the Court reduce the punishment to a private reprimand and remand this case for a hearing on the costs requested by the BAR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing was served on the following persons by U.S. Mail/hand delivery/interoffice this_____day of_____, 20____:Edward Iturralde, Esq., 650 Apalachee Parkway, Tallahassee, Fl 32399-2300.

_____

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