IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, CASE NO. SC09-2057

Complainant, TFB NO. 2008-10,927(13C)

v.

TIMOTHY ALLEN PATRICK,

Respondent.
_____/

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar will be referred to as "The Florida Bar" or the "Bar." Respondent, Timothy Allen Patrick, will be referred to as "Respondent."

"ROR-Guilt" will refer to the Report of Referee dated April 27, 2010, containing the Referee's findings of fact and recommendations as to guilt.

"ROR-Sanctions" will refer to the Report of Referee, Discipline Hearing dated May 7, 2010.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

"TT" will refer to the transcript of proceedings held on March 25, 2010.

"Respondent's Exhibit" and "TFB Exhibit" will refer to exhibits admitted at the March 25, 2010, Final Hearing. "TFB Sanctions Exhibit" will refer to exhibits admitted at the May 7, 2010, hearing.

SUMMARY OF ARGUMENT

The Referee correctly found that Respondent promised to indemnify his client for any judgment he might incur for the insurer's attorney's fees. Although the testimony of Dr. Newman alone would be sufficient to support this finding, the finding was also supported by corroborating facts and circumstances.

The Referee also correctly found that Respondent's payment of the appellate attorney fees of attorney Caldevilla were an improper inducement to Dr. Newman to continue the litigation. This conclusion is a recommended finding of fact and should be upheld because it is supported by competent, substantial evidence; a *de novo* review would be inappropriate.

Finally, the Referee's recommended sanction is supported by current case law and should be adopted by this Court.

STANDARD OF REVIEW

The standard of review for evaluating a referee's findings of fact and recommendations as to guilt is whether the findings of fact and conclusions concerning guilt are supported by competent, substantial evidence in the record. *Florida Bar v. Shoureas*, 892 So.2d 1002, 1005 (Fla. 2004). The Florida Bar agrees with Respondent that this standard of review applies to this Court's review of the Referee's finding that Respondent promised to indemnify his client for any fee award to the insurer.

Respondent argues that the Referee's recommendation of guilt as to Rule 4-1.8(e) for payment of a portion of his client's appellate attorney fees should be reviewed *de novo* because Respondent claims this issue is solely a question of law. The Bar contends that the finding of a violation is a factual determination and should be affirmed if supported by competent, substantial evidence.

The Florida Bar agrees with Respondent that in reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because ultimately it is this Court's responsibility to order the appropriate sanction. As a general rule, this Court will not second-guess a referee's recommended discipline as long as it has a

reasonable basis in existing case law. *Florida Bar v. Maurice*, 955 So.2d 535, 541 (Fla. 2007).

ARGUMENT

ISSUE I: The Referee's Finding Regarding Respondent's Promise to Indemnify Was Supported by Substantial, Competent Evidence

Respondent represented Dr. Craig Newman on two claims under PIP for $24 each, plus statutory attorney fees which would go to Respondent. ROR-Guilt, p.2, paragraphs IIb and IIc. "Because the defending insurance company, Progressive, had previously made offers of judgment, Dr. Newman risked being liable for the insurance company's attorney fees if his claims were unsuccessful. *Id.*, p.3, paragraph IIh. At mediation, Progressive offered to settle the cases for approximately $2,500, which more than covered Dr. Newman's claims, but would not have covered the time and expenses Respondent had already invested in the cases. *Id.*, p.3, paragraph IIj. The Referee found that Dr. Newman was inclined to accept the settlement offer, but was induced to reject it because Respondent promised that, if the case was unsuccessful, Respondent would pay any fee award to Progressive. *Id.*, pp. 5-6, paragraph IIaa. Respondent sought review of this finding, The Bar contends that the Court should uphold the ruling because it is supported by substantial, competent evidence.

Respondent correctly notes that this Court will uphold recommended findings of fact by a referee provided that those findings are supported by

substantial, competent evidence. *Florida Bar v. Shoureas*, 892 So.2d 1002 (Fla. 2004). Respondent, however, relies on *Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970), to argue that the Bar's burden of proof of clear and convincing evidence cannot be met by the testimony of a single witness without corroboration. Respondent misunderstands the holding of *Rayman*, which was further clarified by *Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999). A single witness's testimony can meet the burden of clear and convincing evidence, unless that testimony is evasive, inconclusive, and inconsistent. In any event, the Referee's finding in this proceeding was supported by more than just the testimony of Newman.

In *Rayman*, two attorneys were accused of accepting money to bribe the judge handling a case. The complaining witness testified that he gave approximately $2,600 to one of the attorneys and separately gave approximately $2,400 to the other attorney. An attorney retained by the complainant for a civil claim testified that the complainant claimed to have given $5,000 in a single payment to only one of the attorneys. *Rayman*, 238 So.2d at 597. No evidence was offered to explain or clarify the discrepancy. Under those circumstances, the Court held that the testimony of a single witness, which was confused and contradictory about key facts of the alleged misconduct, could not alone support a finding of misconduct to the

standard of clear and convincing evidence. *Id.* at 598. The problem in *Rayman* was the unexplained contradictory evidence, not the reliance on a single witness; the Court even noted that the complaining witness's testimony, standing alone, would have been "certainly sufficient" to support the referee's findings. *Id.* at 597.

In *Fredericks*, the Court confirmed that a single witness is sufficient to support factual findings to a standard of clear and convincing evidence, provided that the testimony is not evasive, inconclusive, and inconsistent. The *Fredericks* court noted that the testimony of the witness in question did not contain major inconsistencies; therefore, *Rayman* did not apply. *Fredericks*, 731 So.2d at 1251. The attorney's argument essentially was a mere complaint that the referee failed to credit the attorney's testimony over that of the witness. Because the referee is in a unique position to evaluate the credibility of witnesses, this Court in *Fredericks* deferred to the referee's assessment; this Court should do likewise in this proceeding. *Id.*

Furthermore, in this proceeding, the Referee had more supporting evidence for his findings than merely the testimony of Dr. Newman. As the Referee noted, Dr. Newman's behavior during the course of the litigation was consistent with his testimony. ROR-Guilt, p.6, paragraph IIcc. For example, when the initial appellate decision was adverse, Dr. Newman

immediately called Respondent demanding that Respondent fulfill his promise to indemnify for the award to Progressive. The moment the indemnification promise became relevant, Dr. Newman immediately raised the issue. In addition, Dr. Newman's testimony was consistent with the interests of the parties. Proceeding after mediation meant high risk and zero reward for Dr. Newman, but low risk and a potentially high reward for Respondent. Finally, Dr. Newman's testimony was especially credible because it was detailed and consistent, like the witness in *Fredericks*.

By contrast, Respondent's testimony was both uncertain and inconsistent with his own behavior. Respondent claimed to remember little from the mediation conference other than his claim that no indemnification promise was ever discussed and that Respondent offered no advice to Dr. Newman about whether to settle the matters. TT, pp.106, 109, 184, and 216-217. The only topic Respondent recalled being discussed was the amount of time and costs he had already invested into the case, though he claimed that issue was not raised in an effort to discourage settlement. TT, pp. 105 and 185. In addition, Respondent's behavior was inconsistent with his own testimony. According to Respondent, the first he heard of any purported indemnification promise was in the phone call from Dr. Newman after the initial appellate decision was adverse. TT, pp.115 and 198. In that call,

according to Respondent, Dr. Newman accused Respondent of entering into a highly unethical agreement. Yet, Respondent did not withdraw but proceeded to agree to pay a portion of Caldevilla's fees in order to pursue further appellate remedies. Respondent's reaction is inconsistent with being surprised by false accusations of serious ethical misconduct by a client. The Referee was best-positioned to evaluate the credible testimony of Dr. Newman in contrast to the inconsistent and uncertain testimony of Respondent. This Court should accept the Referee's recommended findings of fact, which are supported by competent, substantial evidence.

In his brief, Respondent argues that Dr. Newman's testimony was evasive and contradicted by documentary evidence, but the record does not support that contention. As noted above, Dr. Newman was clear and consistent about all of the relevant details related to Respondent's misconduct. Respondent does not even challenge Dr. Newman's testimony on these points, but claims his testimony regarding the terms of his representation by Caldevilla was evasive. Like the witness in *Fredericks*, Dr. Newman gave clear and consistent testimony which amply supports the Referee's findings.

Respondent also points to numerous documents, such as the retainer agreement and various letters, and claims that their failure to mention the

indemnification promise undermines Dr. Newman's credibility. The documents in question, however, were all written prior to the mediation conference at which the promise was made. Respondent's Exhibit 1 and 2-B; TFB Exhibits 2 and 3. The documents could not possibly have memorialized a promise which had not yet been made so their silence about that promise has no evidentiary value. Respondent is merely rehashing arguments of credibility which have been resolved by the Referee, who was better-positioned to evaluate the testimony. The Referee's findings should be adopted by this Court.

ISSUE II: The Referee Correctly Found that Respondent's Payment of a Portion of Caldevilla's Appellate Attorney's Fees Violated Rule 4-1.8(e)

After winning one case and losing one case at trial level, the cases proceeded on appeal to the circuit court. The circuit court ruled in Progressive's favor on both cases, resulting in substantial liability for Progressive's attorney fees pursuant to the offers of judgment. After that result, Respondent and Newman sought the services of attorney David Caldevilla to pursue additional appellate remedies. Unlike prior appellate counsel who was to be paid on a contingency basis, Caldevilla was to be paid on an hourly basis. TT, p.116. Respondent agreed to pay one-half of Caldevilla's fee. TT, p.117. The Referee concluded that these payments

constituted an improper financing of litigation in violation of Rule 4-1.8(e), ROR-Guilt, p.8, paragraph IV. Respondent sought review of that finding. Because the Referee's finding is supported by substantial, competent evidence, this Court should uphold that finding.

Respondent argues that the Referee's recommendation on this issue is a conclusion of law and should, therefore, be reviewed *de novo*, but the Bar disagrees. The Florida Bar does not contend that the payment of appellate attorney fees would violate Rule 4-1.8(e) as a matter of law in all circumstances. Rather, the Bar contends that Respondent's payment of these appellate attorney's fees under the circumstances and terms under which they were paid was an improper inducement. The purpose of the rule is to prevent having attorneys encourage the pursuit of litigation that would not otherwise be brought. Comment, Rule 4-1.8. In this instance, Respondent's funding of the Caldevilla appellate attorney fees was intended to extend litigation which would otherwise have terminated. The finding of a violation is therefore a factual determination on which the Referee should be accorded greater deference. The Referee's recommended finding should be upheld because it is supported by substantial, competent evidence.

The evidence presented at the final hearing strongly supports the Referee's conclusion. Respondent's own behavior demonstrates that he

considered the payment to be an improper inducement, rather than a mere advancing of fees. First, Respondent claims that he treated those fees as litigation costs which he was advancing consistent with other litigation costs pursuant to the Report of Referee. But the Retainer Agreement called for Respondent to pay all costs of litigation, not half, and Respondent did pay the full cost of other expenses, such as court reporters and experts. TT, pp. 121-123; Respondent's Exhibit 1. The fact that Respondent only agreed to pay half demonstrated that he viewed the Caldevilla attorney fees as something different.

Second, Respondent's deceptive behavior regarding the payment of the fees demonstrates that he viewed it as an improper inducement. Respondent never told Caldevilla that he had agreed to pay half of the fees. When Caldevilla discovered that Respondent had been making payments and asked Respondent about it, Respondent feigned surprise. TT, pp.141-142. Respondent knew he had agreed to pay those fees but felt the need to conceal that fact from Caldevilla. One cannot imagine Respondent being similarly evasive about the payment of a court reporter or expert.

Third, Respondent's behavior in abandoning the payment of Caldevilla's fees demonstrates his dishonest intent. Respondent paid half of the fees while the appeals were proceeding. When the adverse decisions

were received, however, Respondent stopped paying his half of the fee, leaving Caldevilla to collect from Dr. Newman. *See,* Respondent's Exhibit 23. Again, one cannot imagine Respondent behaving similarly with regard to genuine litigation costs, such as court reporter fees or expert fees. Respondent's conduct demonstrated his dishonest intent and supported the Referee's finding that Respondent's payment of one-half of Caldevilla's fees constituted an improper inducement.

Finally, the timing of the agreement to pay Caldevilla's fee demonstrates that it was intended as an improper inducement. At the time the issue arose, Dr. Newman had received the adverse appellate decisions from the circuit court and was demanding that Respondent fulfill his promise to indemnify Dr. Newman for any attorney fee judgment in favor of Progressive. Those circumstances, combined with the unusual manner in which Respondent handled those fees compared to the way he handled genuine costs, provide ample support for the Referee's conclusion that Respondent's payment of those fees was an improper inducement.

ISSUE III: The Referee's Recommended Sanction is Appropriate

After considering the evidence of this misconduct as well as evidence related to aggravating and mitigating factors, the Referee recommended that Respondent be suspended for one year and also be required to take an ethics

course and pass the ethics section of the Florida bar examination. Given the seriousness of the misconduct, the harm caused to the client, and Respondent's disciplinary history, the Referee's recommended sanction is appropriate and should be upheld.

Because this Court has ultimate responsibility for attorney discipline, it exercises broader discretion in reviewing recommendations of discipline than in reviewing recommended findings of fact. Nevertheless, this Court will generally not second-guess a referee's recommended sanction as long as it has a reasonable basis in existing case law. *Florida Bar v. Maurice,* 955 So.2d 535, 541 (Fla. 2007). The Referee's recommended sanction is supported by a reasonable basis on existing authority, and should be accepted by this Court.

The Referee found two aggravating factors in Respondent's misconduct, each of which was appropriately found and considered. ROR-Discipline, p.3. First, the Referee noted Respondent's prior disciplinary history. On March 8, 2007, Respondent was ordered to receive a Public Reprimand by this Court. TFB Sanctions Exhibits 1-A and 1-B. Significantly, the misconduct at issue in the 2007 public reprimand cases was extremely similar to the misconduct at issue in this proceeding in that those cases involved situations in which Respondent was acting in his own

best interest rather than the best interest of his clients. In that proceeding, Respondent was found guilty for two separate instances of misconduct. In one instance, Respondent represented a patient on a PIP claim. Summary judgment was awarded against Respondent's client and Respondent appealed without consulting with the client about the possible consequences of that appeal. The appellate court also ruled against Respondent's client and a judgment was entered against him for approximately $15,000. Respondent delayed informing the client of the judgment for several months. In the other matter which was part of that Bar proceeding, Respondent represented a medical provider on a PIP claim. The insurer offered to settle the case, but Respondent rejected it without ever communicating the offer to the client. Respondent repeatedly made offers to settle the case, negotiating the amount of his attorney fee award without the knowledge of the client. While Respondent did not in either instance make a promise to indemnify the client as he did in this proceeding, the conduct was extremely similar in that Respondent ignored the interests of his client and focused solely on his own interests in the representation, treating the litigation as his own. In addition, on February 1, 2002, Respondent received an Admonishment for Minor Misconduct related to his handling of a PIP matter. The facts of that misconduct are somewhat different from those at issue in the current

proceeding. Respondent's admonishment was for a case in which he agreed to hold a check in trust pending execution of a release. When a dispute arose, Respondent deposited the check in his business account and did not execute the release. TFB Sanctions Exhibits 2-A, 2-B, and 2-C. Because Respondent's prior discipline was for similar misconduct, his disciplinary history is particularly aggravating. *See Florida Bar v. Temmer,* 753 So.2d 555, 559 (Fla. 1999).

The Referee also appropriately found that Respondent acted with a dishonest or selfish motive. Respondent placed his own interests above the interests of his client and, thereby, caused his client harm. The Referee's finding of this aggravating factor is also appropriate and well-supported by the record. In addition to the aggravating factors, the Referee also found one mitigating factor, character or reputation, based on the testimony of attorney Bradley Souders at the sanctions hearing. ROR-Sanctions, p.4.

Considering the relevant aggravating and mitigating factors, examination of relevant case law confirms that the Referee's recommended sanction is appropriate. For example, *Florida Bar v. Dawson*, 111 So.2d 427 (Fla. 1959), involved an attorney who was improperly fronting costs for clients under the then-current rule and was paying outside expenses as an

inducement for clients to utilize his services. The attorney in *Dawson* was suspended for a period of 18 months.

In *Florida Bar v. Abagis*, 318 So.2d 395 (Fla. 1975), the attorney was retained to handle a claim for termite damage on their home and later agreed to make mortgage payments on the home while trying to rent and/or sell the home. Instead, he failed to make the mortgage payments, allowing the home to go into foreclosure and failing to advise his clients of that fact. The attorney also failed to bring the original termite claim as agreed. As a result, the attorney was suspended for 4 months.

In *Florida Bar v. Neely*, 372 So.2d 89 (Fla. 1979), the attorney was suspended for 90 days for his self-dealing. In that case, the attorney was retained to represent the mortgage holders on a foreclosure matter. The attorney falsely advised that the borrowers had paid the mortgage and forwarded money to his clients. The attorney had actually caused the property to be conveyed to a corporation owned by him. *Neely* is particularly noteworthy because it was specifically addressed by the subsequent case of *Florida Bar v. Rotstein*, 835 So.2d 241 (Fla. 2002). In *Rotstein*, the attorney twice filed motions to enforce settlement agreements contrary to his client's wishes. In addition, the attorney created a backdated letter to conceal his allowing a statute of limitations to lapse. The attorney

in *Rotstein* was suspended for one year. This Court specifically held that *Neely* was inapplicable because it was outdated; more recent decisions have imposed stronger sanctions for attorney misconduct. Based on *Rotstein*, and particularly given the similar prior misconduct, the Referee's recommended sanction is appropriate and should be upheld.

Respondent argues for a reduced sanction based on cases involving dissimilar conduct. For example, Respondent relies on *Florida Bar v. Varner*, 780 So.2d 1 (Fla. 2001). In *Varner*, the attorney reached an agreement to settle a pending matter for which he mistakenly believed a lawsuit had already been filed. The terms of the settlement agreement called for the attorney to provide a notice of voluntary dismissal to the other side. When he realized that suit had not yet been filed, the attorney nevertheless created a notice of voluntary dismissal with a fictitious case number and provided it to opposing counsel. *Id* at 2. The Court in *Varner* imposed a 90-day suspension for that misconduct which involved no significant harm to the client or the opposing party. By contrast, Respondent's misconduct caused substantial harm to his client. By rejecting the settlement offer at mediation, Dr. Newman was subjected to approximately $200,000 in judgments against him for pursuing claims worth $48; Dr. Newman eventually settled the judgments for less than their face value. ROR-

Sanctions, p.3. Given the substantial difference in harm caused by the misconduct, *Varner* is not appropriate guidance for imposing a sanction in this proceeding. Rather, the case law cited above, particularly *Rotstein*, provides a reasonable basis to support the Referee's recommended sanction.

CONCLUSION

This Court should accept that recommendation and suspend Respondent for one year, with the additional requirement of completing an ethics course and passing the ethics portion of the Florida bar examination.

This Court should also approve the Referee's recommended findings of fact and conclusions of guilt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this ANSWER BRIEF OF THE FLORIDA BAR has been provided by overnight delivery to The Honorable Thomas D. Hall, Clerk of the Supreme Court of

Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy by email and regular U.S. mail to **Respondent's Counsel**, David A. Maney, 606 East Madison Street, P.O. Box 172009, Tampa, Florida 33672-2009; and by regular U.S. mail to **Kenneth Lawrence Marvin, Staff Counsel**, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, this _____ day of August, 2010.

_____
Troy Matthew Lovell
Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE
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Undersigned counsel does hereby certify that this answer brief complies with the font standards by the Florida Rules of Appellate Procedure for computer-generated briefs.

_____
Troy Matthew Lovell
Bar Counsel