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.
_____/

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Appellant, **TIMOTHY A. PATRICK**, shall be referred to as "Patrick". The transcript shall be referred to as "T", followed by the applicable page number. The record shall be referred to as "R" followed by the applicable tab number.

STATEMENT OF THE CASE

The Florida Bar, hereinafter "The Bar," filed its Complaint in this matter on November 4, 2009. R.1. The Bar alleged that the Respondent, Timothy A. Patrick, hereinafter "Patrick" had promised to pay the opposing party's attorneys' fees and costs if his client lost a case, and Patrick later reneged on this promise. R.1. The Bar also alleged that Patrick's payment of a portion of the client's appellate attorneys' fees constituted improper financial assistance to the client, in violation of Rule 4-1.8(e).

This case proceeded to a final evidentiary hearing on the merits before the referee on March 25, 2010. R.14; T.1-T.255

On April 27, 2010, the Honorable Jack Helinger issued his Report of Referee, holding that Patrick had improperly promised to pay any judgment for attorney's fees imposed against his client in the event that the litigation proved to be unsuccessful. The Referee also found that, Patrick had "improperly continued the litigation by agreeing to pay and then paying a portion of the [appellate] attorney's fee in violation of Rule 3-4.3 and Rule 4-1.8(e)." R.18.

A sanction hearing was held on May 4, 2010. R.20. On May 5, 2010, the referee issued his "Report of Referee Discipline Hearing" wherein he ruled that Patrick should be suspended from the practice of law for a period of one year, that

Patrick must successfully complete an ethics course and must pass the ethics portion of the Florida Bar examination. R.20.

Patrick filed his Motion for Rehearing on May 7, 2010. R.21.

On May 13, 2010, the Referee granted the Motion for Rehearing to the extent of modifying one finding of fact but in all other respects, the Motion for Rehearing was denied. R.22.

Patrick served his Respondent's Petition for Review on June 24, 2010.

STATEMENT OF FACTS

Craig A. Newman, D.C. a Tampa chiropractic physician, filed a complaint against Patrick with the Florida Bar in April of 2009. T.16.

Newman treated Michael Riley, and his wife, Reem Riley for injuries that they sustained in an automobile accident. T.17-18. Newman billed their insurance company, Progressive, for an initial examination and Progressive reduced his bill from $275 to $245 for each patient.[1] T18. Newman disliked the fact that Progressive had cut his bill and referred this matter to his attorney, Jeff Coleman. T.18.

Newman had previously filed approximately 10 PIP cases before he contacted Coleman's office. T.11.

Prior to retaining Jeff Coleman, he had referred PIP cases to attorneys Woody Isom and Jim Miles. T.18-19. In the past, Newman would send the attorney the information and the attorney would write a PIP demand letter directed to the insurance company. The insurance company would then turn around and mail Newman a check for the amount of the PIP demand, $20 to $50 or more, and the attorney would get his fee. T.19. The Michael Riley and Reem Riley cases involved a $24 claim in each case. T.19-20.

[1] Newman asserted that he was entitled to 80% of the $30 reduction or $24 for each patient.

Jeff Coleman had handled prior PIP claims for Newman and now worked in the offices of Timothy A. Patrick, P.A., Attorney at Law. T.18. T.167. The PIP claims were all small cases because the insurance companies cut his bill just a little bit. T.40. Nationwide typically cut Newman's charges by $25. T.41. After reviewing the PIP demand letter the insurer would settle. Newman also knew of the GEICO class action where the providers who had filed PIP suits had been paid. T.41.

On January 2, 2003, Newman signed a Legal Services Fee Contract with Patrick's firm. Respondent's Exhibit No. 1. T.44. This contract provided that the insurance company would be solely responsible for the attorney's fee if Newman prevailed:

> 1. This is the type of case where, if the client prevails, the insurance company will be required to pay the client's reasonable attorney's fees. It is therefore understood that, if the client prevails, the law firm will seek compensation of his attorney's fees solely from the insurance company.
>
> 2. If the client does not prevail, or if a lawsuit is dismissed by the court, a law firm will not be entitled to seek compensation for attorney's fees from the client…

However, the contract also provided that if the insurance company should prevail, the client, in this case Newman, would be responsible for the insurance companies' fees:

> 3. The client further understands that if the insurance company prevails then the client, and the client alone, may be responsible for the insurance companies' attorney's fees and costs. Respondent's Exhibit No. 1

The contract also contained an integration clause. Respondent's Exhibit No. 1.

Jeff Coleman left Patrick's office. T.103. He decided to take the bodily injury cases with him but not the PIP cases. T.20; T.103. After Jeff Coleman left his firm, Patrick communicated with Newman for the first time in his letter of June 3, 2003. Respondent's Exhibit No. 2B. This letter was prophetic:

> …Progressive typically does not settle these cases. As such, please understand that you may well have to go the distance in this case as Progressive vigorously defends these cases. Progressive will also probably file an Offer of Judgment or Proposal of Settlement at some point which will substantially increase the risk of this case. Said Offer or Proposal could potentially subject you to Progressive's attorney's fees and costs, which could be sizeable. I am willing to pursue this case, but I just want you to understand the fight that may lie ahead.

Newman said he did not recall this letter, but it "probably crossed my desk." T.49. The PIP suit for Reem Riley and Michael Riley was filed in 2003, and as Patrick predicted, Progressive vigorously defended. There was extensive discovery. Dr. Newman answered interrogatories, was deposed on two occasions, participated in two mediations and one non-binding arbitration. Respondent's Exhibit Nos. 3, 7 & 8. T.20; T.174.

As Patrick had predicted, Progressive filed proposals of settlement in the Reem Riley and Michael Riley cases. The proposal of settlement in the Reem Riley case was for $100.00 and the proposal in the Michael Riley case was for $1.00. Bar Exhibits Nos. 3 and 4. T.50. On February 12, 2004, Patrick sent Newman a certified letter in each case enclosing the proposal of settlement and explaining that if he accepted the offer the case was over. If he rejected the offer he must obtain a judgment, including attorney's fees and costs, of at least 75% of Progressive's proposal of settlement or he would be responsible for Progressive's attorney's fees and costs. Newman rejected the proposals of settlement in writing on February 20, 2004. T.50. Bar Exhibit Nos. 3 and 4. Patrick did not offer to indemnify Newman when he rejected the proposals for settlement. T.51.

Approximately two months later, on April 19, 2004, Newman and Patrick attended the second mediation. The Mediator was retired Circuit Court Judge F. Dennis Alvarez. Respondent's Exhibit No. 8. T.22.

At the time of this mediation, Newman had two $24 claims against Progressive. T.81-82. Progressive offered to pay $2,500 to settle the case at mediation. T23; T82. Patrick indicated he had approximately 60 hours in the case and he charged $250 per hour. T.24; T.25. Judge Alvarez responded that Progressive was not going to come close to that. T.184. Judge Alvarez then

advised Newman that it was his decision whether or not to accept the settlement offer. T.183.

Judge Alvarez then left and Newman discussed the matter with Patrick. At this point, the testimony diverged. Newman testified that he wanted to accept the $2,500 to settle the $48 dollar claim but Patrick urged him to continue the case. T.23; T.25. At that time, Newman was under the impression that he would owe Patrick 60 hours work at $250 per hour plus his associate's time and his costs if he settled the case. T.82-83. He did not realize until later when he reviewed the contract that if he did not win he would not owe Patrick any fees, "I didn't do my due diligence to sign that." T.83.

Newman testified that when he said he wanted to settle the case Patrick promised that if they lost the case, Patrick would pay his attorney's fees. T.83-84.

Patrick testified that the issue of Patrick paying Newman's attorney's fees never came up. T.113. He never told Newman that if the case was lost he would pay all of the attorneys' fees assessed against Newman. T.186. He had never made such a proposal to any client. T.186. Progressive's settlement offer was turned down. T.27.

The Referee resolved the testimonial dispute in favor of the Florida Bar. R.18., pages 5-6 at subparagraphs a.a. and b.b.

The PIP case proceeding to a trial that lasted two and one half days. T.194. At the conclusion of the trial the court ruled in Newman's favor as to the Reem Riley case and awarded $24 plus his attorney's fees. Respondent's Exhibit No. 11. The court ruled against Newman in the Michael Riley case and held that Michael Riley had exhausted his benefits during the proceeding. Respondent's Exhibit No. 12. After two further days of hearing, the trial court awarded Newman $120,772.50 in attorney's fees and over $9,000 in expert witness fees and costs in the Reem Riley case. The trial court awarded Progressive $9,000.00 in attorney's fees and $1,200 in costs in the Michael Riley case. Respondent's Exhibit No. 15

In Paragraph 7 of the order, the Honorable Michelle Sisco provided:

> Plaintiff shall pay the foregoing amount to counsel for the Defendant within twenty (20) days of the date of entry of this Order, or if the parties agree in writing the Defendant may simply deduct $10,200 from the total amount owed to the Plaintiff for attorney's fees and costs.

Respondent's Exhibit No. 15, p. 5.

The parties agreed that Progressive's fees and costs would be offset from Newman's fees and costs. T.194.

After entry of this order, Progressive perfected its appeal of the Reem Riley case to the circuit court. Patrick recommended to Newman that he retain an Orlando attorney, Rand Saltsgaver, as appellant counsel. T.112. Newman retained

Mr. Saltsgaver on or about February 14, 2005. Bar Exhibit No. 4; Respondent's Exhibit No. 14. Newman entered into a pure contingency contract with Saltsgaver:

> I understand that this is a contingent fee contract and if no recovery is made, I will not be obligated to pay attorney's fees. Also, if there is no recovery, I will not be obligated to reimburse the attorneys for any costs incurred for representing me in these appeals. Bar Exhibit No. 4

The contract did provide that if there was a recovery and the court awarded fees, Newman would be obligated to pay the statutory attorney's fees to counsel and would reimburse the attorneys for any costs they had incurred to the extent the court awarded those costs. Bar Exhibit No. 4. T.55-56.

On appeal, the circuit court reversed the award in favor of Reem Riley and affirmed the award against Michael Riley and awarded Progressive its attorney's fees and costs. T.30. Rand Saltsgaver sent Newman a copy of the opinion. T.30-31. Soon thereafter, Newman called Patrick and in an "irate" telephone call told Patrick that he had agreed to pay Progressive's fees. T.114-115; T.31-32.

Patrick heatedly denied any such agreement. T. 32. T.115. Patrick responded that he did not know what Newman was talking about. T.32. Newman then hung up. T.32.

Rand Saltsgaver made it clear that he did not want to proceed further in the case. T116. Patrick then contacted a board certified appellate attorney, David Caldevilla, to see if he was interested in handling the case. T.33. Caldevilla met Patrick for lunch and told him that he would handle the case but only on an hourly

basis because it was very difficult to reverse an appellate decision. T.131. He normally charged $450 per hour, but decided to bill the case at $450 per hour and only require the client to pay $225 per hour, with the provision that he would recover the entire $450 per hour if he prevailed on appeal. T.132,134.

After he returned to his office, Caldevilla thought better of his arrangement and decided he would charge Newman $225 per hour, one half of his normal hourly rate, with a contingency fee kicker of an additional $225 per hour if he prevailed on appeal. T135.

Patrick called Newman and recommended David Caldevilla as appellate counsel. He related Caldevilla's fee arrangement of charging $450 per hour but only requiring the client to pay $225 per hour. T.134.

In a later conversation, Newman stated that he could not afford to pay the entire fee and asked if Patrick would pay half. T.117. Patrick agreed as he already had advanced $9,000 in costs. T.117.

Newman contacted Caldevilla the following day asking how much he charged. Caldevilla responded that he normally charged $450 per hour but would charge $225 per hour in this case. Newman laughed and said that was different than what Patrick had told him. Caldevilla responded that he had changed his mind on how he would bill the case. T.71; T.135. He would bill a straight $225 per hour for his time with a contingency fee kicker of an additional $225 per hour

if he prevailed on appeal. T155. Caldevilla recommended that Newman file a motion for rehearing of the circuit court decision. Caldevilla testified that Newman authorized Caldevilla to do so. T.135.

On March 30, 2007, Caldevilla sent Craig Newman and Patrick his fee agreement. It was Caldevilla's practice to send fee agreements and monthly billing statements to referring counsel. T.127; T.137. Caldevilla never had an agreement with Patrick whereby Patrick would pay his fee. T.141.

Newman received the letter but he did not sign it. T.63. He did not advise Caldevilla that he was not going to sign the fee letter nor did he advise Caldevilla that he was not authorized to represent him on the motion for rehearing. T.66-67.

An oral argument was held on the motion for rehearing filed by Caldevilla on May 8, 2007. Newman was present at the oral argument. Respondent's Exhibit No. 20, June 12, 2007 statement. T.144-145. Newman did not advise Caldevilla that he was not authorized to represent him and that Newman had no intention of paying him. T.145. The motion for rehearing was denied on July 9, 2007. Respondent's Exhibit No. 22. On July 18, 2007, Caldevilla sent Newman a letter advising him that the rehearing had been denied. The first paragraph of this letter provided:

> As you may recall, you retained me a few months ago to assist Tim Patrick with the above-entitled reference circuit court appeals. Among other things, I filed a motion for

> rehearing, responded to Progressive's cross-motion for rehearing and attended a hearing on those motions.

Caldevilla outlined Newman's options:

> (1) do nothing, or (2) seek further appellate review in the Florida Second District Court of Appeal.
>
> Respondent's Exhibit No. 22, page 1.

If Newman did nothing he would be responsible for Progressive's attorney's fees and costs in the trial court and in the circuit court appeal. Caldevilla recommended that Newman seek further appellate court review and stated that he thought the circuit court decision was seriously flawed and that he had a good chance of winning. Respondent's Exhibit No. 22

Caldevilla then cautioned:

> At the same time, however, if you lose the appeal, you could be held liable for additional attorney's fees and costs incurred in that appeal.

Caldevilla then stated:

> If you want me to handle the new appeal, I will apply the same hourly rates, terms and conditions that we currently have in place on the existing appeals…
>
> Respondent's Exhibit No. 22, pp. 1-2.

Shortly thereafter, in a conference call between Newman, Patrick and Caldevilla, Newman authorized Caldevilla to seek appellate review in the second district. T.150. Respondent's Exhibit No. 20, August 14, 2007 statement.

Newman did not mention the fact that he had not retained Caldevilla, that Newman was not responsible for Caldevilla's attorney's fees, and that Caldevilla should look to Patrick for payment of those fees. T.66-67.

On August 15, 2007, Newman filed a Petition for Writ of Certiorari in the Second District. On August 29, 2007, the Second District entered an order directing Progressive to file a response. Respondent's Exhibit No. 24. Patrick then filed a motion for stay pending the outcome of the Petition for Writ of Certiorari in the trial court on September 4, 2007. Respondent's Exhibit No. 25. The hearing on this motion was scheduled for October 29, 2007. Respondent's Exhibit No. 25.

Caldevilla called Newman before the appellate disposition and pressed him to pay his bill. T.139. Newman responded that he had not signed Caldevilla's Fee Agreement. T.139. In a later phone call, Caldevilla advised Newman that he had never had a client who had hired him and then refused to sign a fee agreement after Newman had attended hearings with him and after Caldevilla had worked on the case. T.141; T.143. Newman responded that the bill was Patrick's responsibility. T.143.

The Referee resolved this dispute in favor of the Bar and found that Patrick had retained Caldevilla. R.18, page 5 at subparagraph v.

At about this time, Scott Dutton, counsel for Progressive, contacted Newman directly and stated that pursuant to Progressive's judgment against Newman, he was going to levy upon his office equipment. T.35.

Newman then retained Michael Addison, Esquire to represent him. T.35.

On December 12, 2007, Addison filed a separate motion for stay pending review on behalf of Newman. Respondent's Exhibit No. 26.

At approximately this time, Patrick moved to withdraw from the case. Bar Exhibit No. 10.

The circuit court entered an order granting the stay pending review on December 19, 2007. Respondent's Exhibit No. 28.

The Second District denied Newman's Petition for Writ of Certiorari. T35.

Newman ultimately compromised Progressive's claim for fees and costs. T.35-39.

SUMMARY OF THE ARGUMENT

The standard of review of a Referee's finding of fact is whether the Referee's findings are supported by substantial, competent evidence. However, where the Respondent has fully and completely denied the asserted wrongful act, the evidence must be clear and convincing and that degree of evidence does not flow from the testimony of one witness, unless such witness is corroborated to some extent either by facts or circumstances. *The Florida Bar v. Rayman,* 238 So.2d 594,597 (Fla. 1970).

The Bar's case, relies upon the essentially uncorroborated testimony of the complainant, Craig Newman, D.C. Newman testified that during mediation, at a time when only he and Patrick were present, Patrick verbally promised to indemnify Newman for the insurer's attorneys' fees and costs if Newman's PIP case was lost. There are no writings or other witnesses to corroborate this testimony.

The documentary evidence is to the contrary. The fee agreement executed by Newman specifically provided that if the insurance company prevailed, the client would be responsible for the insurance company's attorneys' fees and costs. Respondent's Exhibit No. 1. Further, in his June 3, 2003 letter, Patrick specifically advised Newman that the insurer, Progressive, would file a Proposal of Settlement

which could potentially subject Newman to Progressive's attorneys' fees and costs, "which could be sizeable." Respondent's Exhibit No. 2B.

The Bar's contention, which was adopted by the Referee, was that *three years later* when Patrick agreed to advance a portion of Newman's appellate attorneys' fees this act constituted the necessary corroboration of the alleged verbal agreement whereby Patrick was to indemnify Newman for the *opposing* party's fees and costs. T.18, page 6 at subparagraph c.c.

Where Newman's testimony was evasive and contradicted by documented evidence there was insufficient competent evidence in the record to support the Referee's finding of guilt on this issue.

The issue of whether Patrick provided improper financial assistance to his client by agreeing to advance a portion of his appellate attorneys' fees is a pure question of law which may be reviewed by this Court de novo. It is undisputed that Patrick agreed to pay a portion of Newman's appellate attorneys' fees for which he was to be reimbursed if the appeal was successful.

The comment to Rule 4-1.8(e), of the Rules of Professional Conduct provides that there is no prohibition on a lawyer advancing a client's court costs and litigation expenses. Appellate attorneys' fees are a "litigation expense" and should be permissible. The proper standard should be whether the monies

advanced on behalf of the client were for purposes related to the conduct of the litigation. *The Florida Bar v. Dawson*, 318 So.2d 385(Fla. 1975).

If this court should find, as a matter of law, that Patrick's advancing a portion of the client's attorneys' fees is a legitimate litigation expense, the discipline imposed should be revisited as the Referee considered this misconduct in imposing discipline.

The imposition of the one year suspension was excessive punishment even if this court should uphold the Referee's findings of guilt. This court should consider the punishment imposed on other attorneys for similar misconduct. *The Florida Bar v. Breed*, 378 So.2d 783, 785 (Fla. 1979). On several prior occasions this court has found that a 90 day suspension was appropriate punishment for violations that were similar to or even more egregious than those in the present case.

ARGUMENT I

THE REFEREE'S FINDING OF GUILT ON THE ISSUE OF WHETHER PATRICK AGREED TO INDEMNIFY HIS CLIENT FOR THE OPPOSING PARTY'S FEES AND COSTS WAS NOT SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE

This Court's standard of review for evaluating a Referee's finding of fact and recommendation as to guilt is whether the Referee's Findings of Fact are supported by substantial, competent evidence in the record. *The Florida Bar v. Shoureas,* 892 So.2d 1002, 1005(Fla. 2004).

However, where, as here, the Respondent has fully and completely denied the asserted wrongful act, the evidence must be clear and convincing and that degree of evidence does not flow from the testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances. *The Florida Bar v. Rayman,* 238 So.2d 594, 597 (Fla. 1970).

The Bar's case relied upon the essentially uncorroborated testimony of the complainant, Craig Newman, D.C. Newman testified that during mediation, at a time when only he and Patrick were present, that Patrick verbally promised to indemnify Newman for the insurer's attorney's fees and costs if Newman's PIP case was lost.

Newman had no contemporaneous notes of this conversation nor is there any witness that could corroborate his testimony.

The documentary evidence does not support Newman's testimony. On January 2, 2003, Newman signed a Legal Services Fee Contract with Patrick's firm. Respondent's Exhibit No. 1. This Contract provided that if the insurance company would prevail, Newman would be responsible for the insurance companies' fees:

> 3. The client further understands that if the insurance company prevails and the client, and the client alone, may be responsible for the insurance company's attorney's fees and costs.
>
> Respondent's Exhibit No. 1.

On June 3, 2003, Patrick wrote Newman a prophetic letter which provided irrelevant part:

> …Progressive typically does not settle these cases. As such, please understand that you may well have to go the distance in this case as Progressive vigorously defends these cases. Progressive will also public file an Offer of Judgment or a Proposal of Settlement at some point, which will substantially increase the risk of this case. Said offer or proposal *could potentially subject you to Progressive's attorney's fees and costs, which could be sizable*. I am willing to pursue this case but I just wanted you to understand the fight that may lie ahead.
>
> Emphasis supplied.

Newman stated he did not recall this letter, but "it probably crossed my desk." T.49.

This case was intensively litigated and Newman was required to prepare Answers to Interrogatories, was deposed on November 11, 2003, and participated in a Court Ordered Mediation on December 2, 2003. Respondent's Exhibit Nos. 3, 6, and 7.

As Patrick had predicted, Progressive filed Proposals for Settlement in the Reem Riley and Michael Riley cases. The Proposal for Settlement in the Reem Riley case was $100 and the Proposal for Settlement in the Michael Riley case was for $1. Bar Exhibit's No. 3 & 4. On February 12, 2004 Patrick sent Newman a certified letter in each case enclosing the Proposals of Settlement explaining that if he accepted the offer the case was over. If he rejected the offer he must obtain a judgment, including attorney's fees and costs, of at least 75% of Progressive's Proposal of Settlement or he would be responsible for Progressive's attorney's fees and costs. Newman rejected the Proposals of Settlement in writing on February 20, 2004. T.50. Bar Exhibit Nos. 3 & 4.

The Referee was greatly influenced by the fact that the entire benefit that Newman could gain in this case was a payment of $48 and the establishment to the insurance company that he would pursue claims and that these claims were valid. R.18, pages 2-3 at subparagraph e. As the Referee stated in his report:

> At Mediation the insurance company offered $2,500 to settle the claim. By this offer, Newman would have been paid in full ($48) and would have established a precedent of prosecuting types of claims and the insurance company paying these types of claims. *Newman could not have gained or benefited anymore than the offer made at Mediation.*
>
> Emphasis supplied.
>
> R.18, Page 3 at subparagraph i.

This analysis ignores the fact that the time of the Proposals of Settlement, Newman could have obtained the same results. The Proposals of Settlement totaled $101. Newman could have accepted the Proposals of Settlement, received the full amount of his claim, $48, and established that he would prosecute these types of claims. At the time of the Proposals of Settlement in February, 2004, Newman had prepared Answers to Interrogatories in August, 2003, had been deposed for more than an hour on November 11, 2003 and had participated in the December 2, 2003 Court Ordered Mediation Conference. Respondent's Exhibit No. 3, 7 and 8.

In other words, Newman had already spent a significant amount of time on this case in exchange for a maximum recovery of $48. In February, 2004, two months prior to the second mediation, Progressive offered him a total of $101 to settle the case. If the maximum benefit that Newman could receive was $48, why

didn't he accept the offer? It is undisputed that the Proposals of Settlement were made more than two months before the second mediation conference where Patrick allegedly offered to indemnify Newman.

Newman's testimony regarding his relationship with the appellate counsel, David Caldevilla, was evasive, self-serving and contradicted by the documentary evidence.

Caldevilla's March 30, 2007 letter to Newman set forth his fee agreement. Respondent's Exhibit No. 17. The initial paragraph of this letter fee agreement provided:

> We appreciate the opportunity to represent Craig A. Newman, D.C. in the above-referenced appeals. We agree to the appellate representation on the terms described in this letter agreement. Please acknowledge the acceptance of the terms by signing and dating this letter where indicated below and returning to me.

Newman never signed the letter. David Caldevilla's normal practice was to have referring counsel, as well as the client, sign the fee agreement. T.137. Patrick signed the fee agreement on April 2, 2007. Respondent's Exhibit No. 17.

Newman never advised Caldevilla that he was not going to sign the Fee Agreement. Caldevilla immediately commenced work on the Motion for Rehearing, and later prepared a Petition for Writ of Certiorari and each month sent Craig Newman a billing statement. Respondent's Exhibit No. 20. From May 2007

to February 2008, Newman received monthly statements, observed the work that Caldevilla was performing with regard to the Motion for Rehearing and the Petition and never advised Caldevilla that he was not going to be responsible for the bill. T.63-67.

Newman testified that he had a verbal agreement with Patrick whereby he then testified that Patrick was responsible for the entire fee:

> [Counsel for Respondent] Can you show us where in here it says that Mr. Patrick is going to be liable for any of the fees that were being charged to represent your interest in this proceeding?
>
> Answer: [Craig Newman, D.C.] This goes back to the conversation that Mr. Patrick and I had, which originally started when I spoke to Mr. Patrick after he told me about David Caldevilla. He said we are going to hire Mr. Caldevilla to do the work, the appellate work. I said how much does it cost? He said, 'he charges $450 an hour to do this work. I will pay half of the $225 and you pay the other half.[2]' T.70.

Newman then called David Caldevilla and asked him what he would charge. Caldevilla said that his normal fee was $450 an hour but he was going to charge $225 an hour in this case. Newman responded that Patrick had told him the fee was going to be $450 an hour and Newman was going to pay $225 an hour and Patrick was going to pay $225. T. 71. Newman felt that Patrick was trying to have

[2] This conversation occurred *after* the heated conversation where Patrick adamantly denied that he had agreed to indemnify Newman for the insurance fees and costs and before Caldevilla was retained. T.115

him pay the entire appellate attorney's fee and that this "side deal" with Patrick was that Patrick would pay David Caldevilla's fee. T.67.

Newman never advised Caldevilla that Newman was not going to be responsible for paying his bill and he was relying upon a supposed verbal agreement with Patrick whereby Patrick would pay the bill:

> Question [by Respondent's Counsel]: You had never seen any such agreement?
>
> Answer [by Craig A. Newman, D.C.]: No I didn't, except when I just read this document, because what he told me, Mr. Caldevilla, that is, is that if the case --- if we won, he was going to charge his initial $450.
>
> Question: Yes?
>
> Answer: And if we didn't win, it was $225 that was going to be paid each time.
>
> Question: So with all of this knowledge, you didn't write one single letter to Mr. Caldevilla challenging his understanding of the fee. Now set forth in the letter which we have marked as Exhibit No. 17?
>
> Answer: I didn't have to. The $225 that Mr. Patrick agreed to pay was paying the bill that Mr. Caldevilla was sending. So I figured, look. I am not going to – if I win, this case wins, I am not getting $160, $190,000.
>
> Question: Just so I understand this, you are relying on this oral agreement that you have with Mr. Patrick that he was going to pay the $225 an hour that was being charged by

> Mr. Caldevilla in his letter of March 30, 2007; and therefore you didn't bother to tell Mr. Caldevilla about this side deal that you had with Mr. Patrick or respond to any of the statements for services that he was sending to you. Did I get that right?
>
> Answer: I guess it could be right. T.71-73.

On July 18, 2007, David Caldevilla again wrote to Craig Newman to advise him that the Motion for Rehearing had been denied. This letter provided in relevant part:

> Dear Dr. Newman:
>
> As you may recall, you retained me a few months ago to assist Tim Patrick with the above-referenced Circuit Court Appeals. Among other things, I filed a Motion for Rehearing, responded to Progressive's Cross-Motion for Rehearing and attended a hearing on those Motions.
>
> Unfortunately, I have some bad news. It appears that the Circuit Court is not willing to grant a rehearing. Under the circumstances, your options are (1) do nothing; or (2) seek further appellate review in the Florida Second District Court of Appeal.
>
> I recommend that you seek further appellate review. If you seek further appellate review, you will have the opportunity to reverse the Circuit Court's decision and reinstate Judge Sisco's judgment that was in your favor. Although, I cannot guarantee that you will win, it is my opinion that the Circuit Court's decision is seriously flawed, so I believe

> that you have a good chance of winning. At the same time, however, if you lose the appeal, you could be held liable for additional attorneys' fees and costs incurred by Progressive in that Appeal.
>
> If you want me to handle the new Appeal, I will apply the same hourly rates, terms and conditions that we currently have in place on the existing Appeals. Respondent's Exhibit No 22

Newman read this letter but did not reply. Mr. Caldevilla represented him on the Petition for Writ of Certiorari to the Second District Court of Appeal, but Newman denied that he owed Caldevilla any monies. So, for the second time, Newman has taken the position that a verbal agreement absolves him entirely of liability for attorneys' fees and costs:

> Question: [Counsel for Respondent] Let me put it to you another way, if you don't understand it's quite alright. You probably already have answered this, but I will ask it one more time. Can you show me one written document that contravenes the terms of your initial contract of representation with Mr. Patrick, contravenes the terms of your agreement, if any, with Mr. Caldevilla or contravenes the terms of the agreement that you had with Mr. Caldevilla, whatever his name was. Can you show me one writing?
>
> Answer: [Craig Newman, D.C.] You will have to make it real simple. I am not an attorney.

> Question: Show me a contract that you signed with anybody that changed the terms of the contracts you admittedly signed.
>
> Answer: There is no written contract. That's what we asked about at the mediation hearing. I asked him to put it in writing when he said he would do this. He said he couldn't do that. T.81-82

There is an alternative explanation for why Newman turned down Progressive's offer at mediation to settle the case for $2,500. Newman was under the erroneous impression that if he had settled for $2,500 he would owe Patrick for 60 hours of work at $250 an hour plus his associates' time and his costs and fees. T.80-83.

Newman did not realize until after he read the paperwork that if he did not win he did not owe Patrick any fees. "I did not do my due diligence to sign that." T.83.

In summary, the Referee's Finding of Fact that Patrick verbally agreed to indemnify Craig Newman, D.C. for the insurer's attorneys' fees and costs in the event the case was lost was not supported by competent substantial evidence. Newman's testimony was evasive and contradicted by the documentary evidence. This testimony by a single, uncorroborated witness is insufficient to establish by clear and convincing evidence that Patrick promised to indemnify Newman.

The finding of guilt by the Referee should be reversed.

ARGUMENT II

THE REFEREE ERRED IN DETERMINING THAT TIM PATRICK'S PAYMENT OF A PORTION OF THE CLIENT'S APPELLATE ATTORNEY'S FEES CONSTITUTED IMPROPER FINANCIAL ASSISTANCE TO THE CLIENT

It is undisputed that Patrick paid a portion of the attorneys' fees and costs incurred by appellate counsel, David Caldevilla. The client told Patrick that he could not afford to pay Caldevilla's appellate fees and asked Patrick to pay one half. Patrick agreed as he had already advanced more than $9,000 of fees and costs in the case. Patrick testified that he expected to be reimbursed by Caldevilla for the attorney's fees and costs advanced if the client prevailed on appeal. T.21-T.22.

Where there are no genuine issues of material fact and the only disagreement is whether the undisputed facts constitute unethical conduct, the referee's findings present a question of law that the Court reviews de novo. *The Florida Bar v. Pape*, 918 So.2d, 240, 243(Fla. 2005); *The Florida Bar v. Hines*, 2010 WL 2301711 at *3(Fla. 2010).

Rule 4-1.8(e) of the Rules of Professional Conduct provides that a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that:

> (1) a lawyer may advance court costs and expenses of litigation, the payment of which may be contingent on the outcome of the matter;

The comment to this rule provides:

> Lawyers may not subsidize lawsuits… brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in litigation. These dangers do not warrant a prohibition on a lawyer advancing a client's court costs and *litigation expenses*, including expenses of medical examination and the reasonable costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees that help ensure access to the courts.
>
> Emphasis supplied.

The term "litigation expenses" is sufficiently general to encompass paying portions of the appellate attorney's fees in this case. If Patrick had an associate in his office prepare the appeal that would be perfectly permissible; if he hired an attorney to provide an expert opinion as to the attorneys' fees in this case, that would also be permissible. It would be incongruous to say that paying a portion of Caldevilla's fee was not a "litigation expense" and the Bar's assertion that this is improper financial assistance to a client should be rejected.

Respondent suggests that the proper standard is whether the monies advanced on behalf of the client were for purposes related to the conduct of the litigation. See *The Florida Bar v. Dawson,* 318 So.2d 385 (Fla. 1975). In *Dawson,* the referee found:

> 1. That respondent made repeatedly made monetary advancements to his clients for purposes unrelated to the

> conduct of their litigation, and if the client's case was lost no effort was made to recover the advancements. Respondent's secretary testified to a 'Friday payroll' for a significant number of clients.

See also *State v. Dawson*, 111 So.2d 427, 430(Fla. 1959) (Attorney disciplined for advancing to clients the sum for funeral expenses and for medical and automobile repair bills.)

In this case, the Newman was not "on the payroll." No monies were paid to the client for any purposes. The monies in question were advanced by Patrick for appellate attorney's fees and costs directly related to the litigation.

Under the circumstances of this case, where Patrick advanced a portion of the appellate attorney's fees with the understanding that he would be reimbursed if the client prevailed on appeal, such advancement is a permissible litigation expense and the referee's finding that Patrick had violated Rules 3-4.3(general misconduct) and Rule 4-1.8(e) (improper assistance to client) should be reversed.

ARGUMENT III

THE REFEREES RECOMMENDATION OF A ONE YEAR SUSPENSION WAS EXCESSIVE

The Referee in this case imposed a sanction of a one year suspension. Additionally, Patrick was required to successfully complete an ethics course and pass the ethics section of the Florida Bar Examination.

In reviewing a Referee's recommended discipline, the 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. *The Florida Bar v. Shankman*, 2010 WL2680248 (Fla. 2010); *The Florida Bar v. Ticktin*, 14 So.3d 928, 939(Fla. 2009).

This Court has recognized that each case must be assessed individually in determining the punishment. This Court should consider the punishment imposed on other attorneys for similar misconduct. *The Florida Bar v. Breed*, 378 So.2d 783,785 (Fla.1979).

Although this Court is reluctant to second guess the Referee's recommended discipline, it should have a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Shankman, supra at* *6.

On several prior occasions this Court has found that a 90 day suspension was appropriate punishment for violations for that were similar to or even more egregious than those than the present case.

In *The Florida Bar v. Corbin*, 701 So.2d 334, 337(Fla. 1997), the Respondent was found guilty of making a knowingly false statement to a tribunal and to deliberately misleading the Bar in his initial response. The Referee found that the Respondent had a dishonest motive to advance the cause of his client at the expense of an unrepresented party and there were three private reprimands for past conduct. The Referee recommended the six month suspension but this court found that the Referee's recommended discipline was in conflict with the existing case law and that a 90 day suspension was appropriate on this record. *Corbin, supra at page 337*.

In *The Florida Bar v. Morse*, 587 So.2d 1120(Fla. 1991), the Respondent was co-counsel in a personal injury case. A $2,500 settlement offer from the tortfeasor's insurance company was rejected. Suit was never filed and the statute of limitations ran.

The Respondent participated in a scheme to pay the client $2,500 in funds from his law firm and to lead the client to believe that the check was the recovery for his personal injury claim. The Respondent never informed the client of the true outcome of his personal injury case or the fact that the firm had committed

possible malpractice by letting the statute of limitations run, nor did he advise the client to seek other legal counsel as the conflict of interest had arisen. This Court rejected the recommendation of the referee and imposed a 90 day suspension.

In another case involving misrepresentation, the Respondent mistakenly advised the client's insurer that he had filed suit against the insurer on the client's behalf. The insurer then settled the case for $415 in attorney's fees and costs. The insurer forwarded its $415 check along with a letter requesting that the Respondent furnish the insurer with a notice of voluntary dismissal. When Respondent found that a lawsuit had never been filed, instead of advising the insurer of his mistake, he prepared a Notice of Voluntary Dismissal, filled in a fictitious file number, signed it and mailed it to the insurer. The other Respondent was found guilty of engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Referee recommended the sanction of a 30 day suspension while the Florida Bar requested a 91 day suspension. This Court found a 91 day suspension was not supported in the case law there was no finding of fraud and the Court determined that a 90 day suspension was appropriate. *The Florida Bar v. Varner,* 780 So.2d 1, 5-6 (Fla. 2006).

The relevant case law with regard to making a misrepresentation to a client requires no more than a 90 day suspension.

Additionally, if this Court should find, as a matter of law, that Patrick's advancing a portion of the client's appellate attorney's fees is a legitimate litigation expense and not providing improper financial assistance to the client, the discipline imposed should be revisited as the referee considered this misconduct in imposing discipline and in rejecting the argument that the prior offenses committed by Patrick were remote in time:

> The original acts of the Respondent's violations herein occurred in approximately 2004. Respondent's wrongful acts had ceased at that time, there would be a valid argument for the applicability of this mitigating factor. The record herein supports that the Respondent's wrongful actions herein continues [sic] at least through May, 2007, August, 2007 and September, 2007. See Florida Bar's Exhibit List, Exhibits 5,6 and 7. These are checks paid by Respondent's law office to the Law Office of Second Appellate Attorney David Caldevilla. R.20, page 5(m).

In summary, the recommendation of a one year suspension in this case is out of line with the existing case law and this recommendation should be rejected and the punishment imposed should not exceed a 90 day suspension.

CONCLUSION

The Referee's adjudication of guilt on the ground that the Respondent agreed to indemnify his client for the opposing party's attorneys' fees and costs should be reversed for lack of substantial, competent evidence.

The Referee's adjudication of guilt on ground that Respondent provided improper financial assistance to his client should be reversed as a matter of law.

If the Court should uphold either adjudication of guilt, the sanction of a one year suspension should be rejected by this court and punishment should not exceed a 90 day suspension.

MANEY, DAMSKER, JONES
& KUHLMAN, P.A.

/s/ Lee S. Damsker

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Respondent's Initial Brief* has been furnished by facsimile and Federal Express Mail to Troy M. Lovell, Esquire, The Florida Bar, 4200 George J. Bean Pkwy, Ste 2580, Tampa, FL 33607 and to Kenneth L. Marvin, Esquire, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 on this 28th day of July, 2010.

/s/ Lee S. Damsker
_____
Lee S. Damsker, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this *Respondent's Initial Brief* complies with the font (Times New Roman 14-point) requirements of the F.R.A.P. Rule 9.100(1).

/s/ Lee S. Damsker

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Lee S. Damsker, Esquire