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 AMENDED REPLY BRIEF

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OTHER AUTHORITIES:

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.

The Answer Brief of the Florida Bar shall be referred to as "TFB Brief" followed by the applicable page number.

REPLY TO STANDARD OF REVIEW

The Bar contends that the Referee's finding that Patrick's payment of a portion of his client's appellate attorney's fees led to an improper continuation of litigation was a factual determination and should be affirmed if supported by competent, substantial evidence. TFB Brief, page 2.

Patrick has argued, and continues to argue, that the Referee's finding is based upon undisputed facts and can be reviewed *de novo* by this Court. In the summary of his findings, the Referee held:

> …the Respondent improperly continued the litigation by agreeing to pay and then paying a portion of the attorney's fee of David Caldevilla who handled part of the appeal of the cases. *This conduct which is uncontroverted, violated Rule 3-4.3(e) (general misconduct), and Rule 4-1.8(e) (improper assistance to client).*
>
> R.18, page 7.
>
> Emphasis added.

The Referee ruled, as a matter of law, that Patrick's advance of a portion of the appellate attorney's fees in this case, in and of itself, was sufficient to establish that Patrick improperly continued the litigation. R.18, page 7.

The Referee's finding relied upon "uncontroverted" evidence and may be reviewed *de novo* by this Court.

SUMMARY OF THE ARGUMENT

Even if this court were to accept the standard that a single witness' testimony could meet the burden of clear and convincing evidence unless the testimony is evasive, inconclusive and inconsistent, the record does not establish that Newman's testimony met this standard.

The Bar has argued that Newman's testimony that Patrick had verbally agreed to indemnify him from the opposing party's attorney's fees and costs was credible because it was detailed and consistent. Newman's testimony regarding other portions of the attorney/client relationship with Patrick, including the retention of David Caldevilla, was inconsistent and incredible. Where the complainant's testimony is not supported by any documentation and relies solely upon his damaged credibility, the finding of fact that Patrick verbally promised to indemnify Newman was not supported by substantial, competent evidence.

The Referee's finding that Patrick's advance of a portion of Newman's appellate attorney's fees violated Rule 4-1.8(e) and served to continue the litigation is not supported by substantial, competent evidence. Indeed, when the Bar put this issue squarely to Newman at trial, he did not testify that Patrick's advance of a portion of Caldevilla's appellate attorney's fees was even a *factor* in his decision to continue the litigation. T.34-35. Newman sought an independent opinion from an

attorney with the Florida Chiropractic Association before deciding to continue with litigation. After receiving that opinion, he decided to go forward with that appeal. T.34-35.

Patrick's advance of a portion of Newman's appellate attorney's fees was a permissible litigation expense. No monies were advanced to the client. *See comment, R. Regulating Fla. Bar* 4-1.8(e).

Finally, the Referee's recommendation of one year suspension far exceeds the punishment imposed on other attorneys for similar misconduct. The Bar compares Patrick's conduct with the attorney's conduct in *The Florida Bar v. Rotstein*, 835 So.2d 241 (Fla. 2002). The misconduct in *Rotstein* was far more egregious than the conduct herein and involved several intentional misrepresentations to the grievance committee during the disciplinary process. To the same effect is this Court's ruling in *The Florida Bar v. D'Ambrosio,* 946 So.2d 977 (Fla. 2006), where this Court held that a one year suspension was an appropriate sanction when the attorney's misconduct involved three different clients, the attorney violated the rules by failing to furnish a copy of his suspension order to his clients, the courts, and some counsel, and the attorney failed to provide an affidavit to the Bar listing all persons and entities who were furnished a copy of the order. *D'Ambrosio, supra*, at page 981.

The sanction in this case should not exceed a ninety day suspension.

ARGUMENT

REPLY TO ISSUE NO. 1

WHETHER THE REFEREE'S FINDING REGARDING RESPONDENT'S PROMISE TO INDEMNIFY WAS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE

The Florida Bar contends that a single witness' testimony can meet the burden of clear and convincing evidence unless the testimony is evasive, inconclusive and inconsistent. TFB Brief page 5. The Referee's finding that Patrick verbally agreed to indemnify Newman rests upon Newman's uncorroborated testimony three years after the fact. Newman, who has been head of the ethics and grievance committee of the Hillsborough County Chiropractic Society for the past fifteen years, testified that he entered into an unethical agreement with Patrick, yet he has no documentation to support his testimony. T.17; T.97.

Newman's testimony was contradicted on several relevant points. Newman's dealings with appellate counsel, David Caldevilla, evidence his duplicitous and opportunistic conduct.

Newman had prevailed in the Reem Riley case at the trial court level. Respondent's Exhibit No. 11. The trial court ruled against Newman in the Michael Riley case and awarded the insurer its attorneys' fees.

The circuit court reversed the award in favor of Reem Riley and affirmed the award against Michael Riley and awarded Progressive its attorneys' fees and costs. T.30. Soon thereafter, Newman called Patrick and in an "irate" telephone call told Patrick that he had agreed to pay Progressive fees. T.114-115; T.31-32. Patrick heatedly denied any such agreement. T.32. T.115.

The original appellate counsel, Rand Saltsgaver, did not want to proceed further in the case. T.116. Patrick then contacted David Caldevilla to see if he was interested in handling the appeal. T.33. Caldevilla and Patrick met on March 29, 2007. Respondent's Exhibit No. 17, May 10, 2007 billing.

After this meeting Newman asked Patrick what Caldevilla would charge. Patrick responded that Caldevilla normally charged $450 an hour. T.70. Newman testified that Patrick offered to pay one-half and Newman would pay the other half of Caldevilla's fee. T.70.

The following morning, March 30, 2007, Newman called Caldevilla directly and asked Caldevilla what he would charge for handling the case. T.71; Respondent's Exhibit No. 20, May 19, 2007 billing. Caldevilla responded that his normal fee was $450 an hour but he was going to charge $225 an hour in this case. T.71.

Newman then responded that Patrick had told him the previous day that Caldevilla was going to charge $450 an hour and Newman was going to pay $225

an hour and Patrick the remaining $225 an hour. T.71. To Newman it looked like Patrick and Caldevilla had an agreement to cheat him as the fee was $225 an hour, rather than $450 an hour. T.71. At the very inception of Caldevilla's representation, Newman believed that Patrick and Caldevilla were trying to cheat him and he decided not to sign the fee agreement. T.63; T.71. Newman later contended that he had not retained Caldevilla and was not responsible for his fee. T.63;T.70. He testified that Caldevilla's fee was Patrick's responsibility. T.70. If that were the case, why did Newman telephone Caldevilla in the first place? If Caldevilla's fee was solely Patrick's responsibility, why should Newman care if he charged $225 per hour, $450 per hour, or even $1,000 per hour?

On March 30, 2007, Newman felt that Patrick and Caldevilla arranged to cheat him with regard to the fee agreement. T.71. He never advised Caldevilla that he did not intend to pay him. T.66; T.68. He never advised Caldevilla that Caldevilla was not authorized to represent him. T.66-67

In fact, on May 8, 2007, Caldevilla, Patrick and Newman met prior to the oral argument on Newman's motion for rehearing. Newman met with two attorneys he alleged had an arrangement to cheat him, one of whom had previously reneged on an alleged verbal agreement to indemnify him. Respondent's Exhibit No. 20, June 12, 2007 billing. Newman attended the oral argument made by

Caldevilla, an attorney who he later contended did not represent him. T.63; T.144; Respondent's Exhibit No. 20, June 12, 2007 billing. T.71.

Caldevilla's fee agreement was incorporated in Caldevilla's letter to Newman. The first sentence of this letter confirmed that Caldevilla represented Newman in Appeal No. 05-1690 and 05-3335. Respondent's Exhibit No. 17.

Caldevilla mailed seven monthly statements to Newman at Newman's office address. T.65; Respondent's Exhibit No. 20. Although he received these monthly statements, Newman never called Caldevilla and advised him there had been a mistake and that Caldevilla did not represent him. T.66-67.

Why didn't Newman discharge Patrick and Caldevilla if he felt they had arranged to cheat him on the appellate attorney's fee? Why deal with an attorney that he felt was trying to cheat him from the very inception of the relationship? Why attend an oral argument with an attorney that you contend does not represent you?

The answer is that Newman was going to avail himself of the legal services provided by Caldevilla for as long as he could, without paying him.

For the same reason, Newman did not discharge Patrick when Patrick denied the existence of the alleged verbal indemnification agreement. As long as Patrick would provide professional services on a contingency fee basis, this was acceptable to Newman.

The Referee's Finding of Fact regarding the existence of the verbal indemnity agreement was not supported by competent, substantial evidence and should be reversed.

REPLY TO ISSUE NO. 2

WHETHER THE REFEREE CORRECTLY FOUND THAT RESPONDENT'S PAYMENT OF A PORTION OF CALDEVILLA'S APPELLATE ATTORNEY'S FEES VIOLATED RULE 4-1.8(e)

The Florida Bar has now conceded that the payment of appellate attorney's fees would not violate Rule 4-1.8(e) "as a matter of law in all circumstances." TFB Brief page 10. However, the Bar contends Patrick's payment for appellate attorneys fees "under circumstances and terms under which they were paid was an improper inducement." *Id.*

It was undisputed that Patrick advanced a portion of Newman's appellate attorney's fees. The Referee found that this payment caused Newman to improperly continue the litigation. R.18, pg 7.

This finding of fact is not supported by competent, substantial evidence.

There was no proof that but for Patrick's advance of a portion of the appellate attorney's fees, Newman would have terminated the litigation.

The Bar put this issue squarely to Newman at trial:

> Q. [By bar counsel] Would you have proceeded with the Petition for Writ of Certiorari if you were responsible for the entire $450 an hour fee of Mr. Caldevilla?

> A. [by Craig A. Newman, D.C.] I didn't know what I was going to do at that point, quite honestly. I just got told that I owe over $200,000, and I wasn't even sure what I was going to do at that point and how I was going to proceed. I was trying to find – the next thing was to find some other lawyers. I called the counselor for the Florida Chiropractic Association and ask (sic) for his opinion, what I should do?
>
> Q. And what did you end up doing?
>
> A. We wound up going ahead. We wound up going ahead and using David Caldevilla.
>
> T.34-35

Newman sought an independent opinion from an attorney with the Florida Chiropractic Association. T.34. After receiving that opinion he decided to go forward with the appeal. T.35. When asked directly, Newman declined to state that Patrick's agreement to advance a portion of appellate attorneys' fees was even a *factor* in continuing the litigation. T.34-35.

So, the client who has allegedly been "induced" to continue the litigation testified that he sought an independent opinion before making the decision to do so. He did not testify that Patrick's agreement to pay a portion of the appellate attorney's fees "induced" him to continue the litigation. T.34-35. The Referee held that the payment of the portion of the appellate attorney's fees, in and of itself, "improperly continued the litigation." R.16, page 7.

The arguments advanced by the Bar on page 11 of its brief have no merit and did not form the basis of the Referee's decision.

In summary, the Referee's finding that Patrick's advance of a portion of the appellate attorney's fees continued the litigation was not supported by substantial, competent evidence.

As a matter of policy, the Bar's position that Patrick's advance of a portion of the appellate attorney's fees was an improper inducement to continue the litigation proves too much. In every contingent fee case the attorney advances his professional services and he usually advances costs. The argument that a contingent fee agreement engenders litigation has not found favor with this Court. This Court rejected the philosophy that claims should be limited because of economic considerations and noted that the poor and less fortunate in our society enjoy access through our courts, in part, because of the existence of the contingent fee. *In the matter of The Florida Bar*, 349 So.2d 630, 633 (Fla. 1977).

The underlying case involved two $24 PIP claims. PIP coverage is designed to "provide swift and virtually automatic payment so that the injured insured may get on with life without undue financial interruption." *Ivy v. Allstate Insurance Co.*, 774 So.2d 679,684 (Fla. 2000). To further this goal, the legislature enacted penalty provisions intended to promote the prompt resolution of PIP claims by imposing several penalties on insurers who pay late. When an insurer files an

action for payment of PIP benefits and prevails, the insured is entitled to attorneys' fees. *USAA Casualty Insurance Co. v. Shelton*, 932 So.2d, 605 607 (Fla. 2d DCA 2006). By their very nature, PIP claims often involve relatively small amounts of money and large amounts of attorneys' fees. *See: State Farm Fire & Casualty Co. v. Palma*, 555 So.2d 836 (Fla. 1990), wherein the court upheld an award of $253,500 attorneys' fees in the contest over a $600 charge for a thermographic examination.

There was neither testimony nor evidence to support the Referee's conclusion that Patrick advanced a portion of the appellate attorneys' fees in this case to extend the litigation.

Patrick advanced no monies to the client; no guarantees of loans were made to "subsidize" the litigation. *See: comment, R. Regulating Fla. Bar* 4-1.8(e). Patrick merely advanced a portion of the attorneys' fees with the understanding that he would be reimbursed if the client prevailed on appeal. This 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.

REPLY TO ISSUE NO. 3

WHETHER THE REFEREE'S RECOMMENDED SANCTION WAS APPROPRIATE

The Bar contends that the ruling in *The Florida Bar v. Rotstein*, 835 So.2d, 241 (Fla. 2002) and "the similar prior misconduct" support the Referee's recommended sanction of a one year suspension. TFB Brief pages. 16-17.

The Respondent's conduct in *Rotstein* was far more egregious than the Referee's findings in this case. In *Rotstein*, not only did the attorney twice file motions to enforce settlement agreements contrary to his client's wishes, he created a backdated letter to conceal his allowing a statute of limitations to lapse, and he also made several material misrepresentations to the grievance committee.

In *The Florida Bar v. D'Ambrosio*, 946 So.2d 977 (Fla. 2006), this Court ordered a one year suspension where the attorney "demonstrated a complete disrespect for the disciplinary process by failing to comply with the disciplinary rules." *D'Ambrosio, supra*, at page 981. D'Ambrosio had previously been suspended by the Court for ninety days. *D'Ambrosio, supra*, at page 979. He failed to furnish a copy of his suspension order to his clients, the courts, and some opposing counsel. He also failed to provide the Bar with an affidavit listing all persons and entities who were furnished copies of the suspension order. *D'Ambrosio, supra,* at page 981. The attorney did not advise a client, Dennis, of his suspension but, instead, informed his client that he could not continue to represent him due to a heart or pacemaker problem, not because of his suspension. *D'Ambrosio, supra,* at page 981.

D'Ambrosio failed to return telephone calls to a different client, Bachert, falsely represented to that client that he had filed a corporate bankruptcy petition, and ultimately failed to file the petition that he was paid to file. *Id.*

Additionally, the attorney failed to enter into a written contingency fee agreement with yet another client. *Id.*

Rotstein and *D'Ambrosio* both involved cases where the attorney had a prior disciplinary record. *Rotstein, supra,* at page 243; *D'Ambrosio, supra,* at page 982.

In reviewing the proposed sanction, this Court should consider the punishment imposed on other attorneys for similar misconduct. *Florida Bar v. Breed,* 378 So.2d 783, 785 (Fla. 1979). The misconduct which merited one year suspensions in *Rotstein* and *D'Ambrosio* was far more severe than the conduct in this case. The conduct at issue in this case is more in line with the cases cited by the respondent such as *The Florida Bar v. Varner*, 780 So.2d 1 (Fla. 2006).

The sanction in this case should not exceed a ninety 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 the ground that Respondent provided improper financial assistance to his client should also be reversed as a matter of law and for lack of substantial, competent evidence.

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this *Respondent's Amended Reply Brief* has been provided by US Mail to The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; and by email and regular US Mail to the Complainant's Counsel, Troy M. Lovell, 4200 George J. Bean Parkway, Ste 2580, Tampa, FL 33607-1496; and US mail to Kenneth Lawrence Marvin, Staff Counsel, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, this ____ day of September, 2010.

_____
Lee S. Damsker, Esquire

CERTIFICATE OF COMPLIANCE

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

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Lee S. Damsker, Esquire