

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LINDA C. SWEETING,

Respondent.
_____ /

**Supreme Court Case
No. SC09-1117**

**The Florida Bar File
No. 2007-50,471(17D)**

THE FLORIDA BAR'S INITIAL BRIEF
ON APPEAL FROM A REPORT OF REFEREE

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PRELIMINARY STATEMENT

The Florida Bar is seeking review of a Report of Referee recommending that respondent be found not guilty of all charges, and imposing costs against The Florida Bar. Throughout this Initial Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR ____ (indicating the referenced page number). The four-volume transcript of the final hearing conducted on March 31, April 1, and April 5, 2010 will be designated as TT1, TT2, TT3 or TT4 (indicating transcript volume number), followed by ____ (indicating the referenced page number). [By example, a reference to transcript volume 1 on page 38 will be set forth as TT1, 38.] The Florida Bar's exhibits will be referred to as Bar Ex. ____ (indicating the exhibit number). All such referenced exhibits were received into evidence, unless otherwise noted. The Florida Bar will be referred to "the Bar." Respondent Linda C. Sweeting will be referred to as "respondent."

THE STANDARD OF REVIEW

As to the facts in a Bar disciplinary case, the referee's findings are presumed to be correct unless the appellant demonstrates clear error or a lack of evidentiary support. Absent such evidence, the Court will not reweigh the evidence or substitute its judgment for that of the referee. The Florida Bar v. Rose, 823 So. 2d 727, 729 (Fla. 2002). The Court has more latitude with regard to the recommended discipline, and may disregard a referee's determination if the sanction recommended has no reasonable basis in the case law or in the *Florida Standards for Imposing Lawyer Sanctions*. The Florida Bar v. Mason, 826 So. 2d 985, 987 (Fla. 2002).

STATEMENT OF THE CASE

On October 3, 2006, The Florida Bar received a sworn Florida Bar Inquiry/Complaint from Moreene Getz. Ms. Getz's very brief complaint began with her charge that respondent was guilty of "[m]isappropriation of funds." Thereafter, Ms. Getz explained that respondent had represented Ms. Getz's deceased mother in a lawsuit that Ms. Getz believed had settled after her mother's death.¹ Ms. Getz complained that respondent "took 100% of the settlement," and misrepresented her fee to Ms. Getz's attorneys. Finally, Ms. Getz complained that respondent refused to produce support for her claim to the full settlement amount (asserting privilege), and that she failed to comply with a court order. [Bar Ex. 47.]

On October 24, 2006, The Florida Bar received respondent's 12-page response to each and every charge advanced by Ms. Getz. Her response included 24 pages of exhibits, including copies of letters, copies of a cancelled check, and copies of pleadings from the probate file relating to Ms. Getz's late mother, Harriet Kolinsky. [Bar Ex. 46.] Thereafter, the matter was forwarded to a Florida Bar grievance committee for investigation and the committee set and noticed it for a probable cause hearing. Via its probable cause hearing notice, The Florida Bar put

¹ The Florida Bar's investigation revealed that the subject lawsuit against Pioneer Life Insurance Company was settled in late 2004, just before Harriet Kolinsky's death.

respondent on express notice that it would consider all of the allegations set forth in Ms. Getz's sworn Bar complaint, as well as all of the listed and corresponding potential rule violations. The committee's probable cause hearing notice also listed all of the documents that the committee expected to review. [Bar Ex. 48, accepted into the record for identification only.] The scheduled probable cause hearing was conducted as a live hearing on December 5, 2007. Therefore, in addition to her written responses to Ms. Getz's charges, respondent was given another opportunity to answer the committee's questions and offer evidence in her own defense. The full transcript of this probable cause hearing, at which all noticed conduct and rule violations were discussed and examined, is part of the record, as an attachment to respondent's February 22, 2010 pleading entitled "Pro Se Respondent's Notice of Filing Transcript with Exhibits 1 Through 13 of Proceedings Before the Seventeenth Judicial Circuit Grievance Committee "D" on December 5, 2007, in Support of Pro Se Respondent's Motions for Summary Judgment and Motion for 52.105 Sanctions."²

After completing its deliberations, Seventeenth Judicial Circuit Grievance Committee "D" notified respondent that it had recommended that she be admonished for and found guilty of minor misconduct, pursuant to R. Regulating

² The referee denied each of the motions advanced in this pleading.

Fla. Bar 3-7.4(m). Respondent timely rejected the grievance committee's finding and The Florida Bar served the mandatory complaint of minor misconduct required by R. Regulating Fla. Barr 3-7.4(n), on June 17, 2009. A referee was appointed, and respondent served an untimely answer and affirmative defenses, through counsel, on July 29, 2009. Respondent's counsel filed a successful motion to withdraw (citing "communication difficulties" with respondent), on December 31, 2009. Respondent proceeded thereafter *in pro se*.

Vigorous discovery ensued, and both parties propounded and responded to a number of discovery requests. In February and March of 2010, respondent filed two unsuccessful motions for summary judgment, and an unsuccessful "Pro se Respondent's Motion for Sanctions Against The Florida Bar Pursuant to Florida Statute Section 57.105." Also in March 2010, respondent filed eight unsuccessful motions in limine, seeking to limit the Bar's ability to use, at trial, the witnesses, testimony and other evidence discovered and/or developed through discovery.

Pursuant to timely notice, this case was called to trial on March 31, April 1 and April 5, 2010. The parties filed deposition designations and requests for costs shortly thereafter, and the referee served his Index of the Record, and Report of Referee on April 29, 2010. The Florida Bar served a timely Petition for Review,

seeking this Court's review of the referee's factual findings, disciplinary recommendation, and cost award, on June 22, 1010.

STATEMENT OF THE FACTS

Moreene Getz is a retired teacher with multiple sclerosis. [TT3, 425.] She is sight impaired [TT3, 427.] and has experienced a multitude of serious medical problems and a major surgery during the pendency of this matter. [TT3, 435; TT4, 443-444.]. In October 2006, she filed a sworn complaint with The Florida Bar, alleging that respondent had “misappropriated funds” derived from a lawsuit that respondent had filed on behalf of Ms. Getz’s mother. Ms. Getz also claimed that respondent had kept all of the settlement proceeds for herself (providing no funds to the estate), and that she had misrepresented the amount of her actual fees to Ms. Getz’s attorney. Ms. Getz also alleged that respondent refused to justify her claim to “100%” of her mother’s settlement proceeds, and that she had failed to comply with a court order entered against her. [Bar Ex. 45, 47; TT3, 427-428.]

Moreene Getz’s mother was Harriet Kolinsky. [Bar Ex. 46.] In 1992, Ms. Getz moved to the South Florida area to care for her ailing mother. Mrs. Kolinsky had cancer and was showing indications of developing dementia. She had begun to experience hallucinations and engage in “odd behaviors.” Ultimately, she was diagnosed with Parkinson’s disease and paranoid dementia. [TT2, 222; TT3, 433-434.] During her decline, Mrs. Kolinsky began to imagine that her daughter (and others) took small personal and household items from her.

She imagined that family members and neighbors were engaging in conduct intended to vex and annoy her. [TT3, 432-433.] As a result, Mrs. Kolinsky became estranged from her daughter, and no longer wanted her to be involved in her affairs. [TT4, 476.] Nonetheless, Ms. Getz remained the named personal representative in her mother's will [Bar Ex. 40A], retained her mother's power of attorney [TT3, 437; TT4, 458 and 476;], and continued to keep track of her mother. She knew when Mrs. Kolinsky moved from her home into Renaissance, an assisted living facility. However, due to a long-term and pernicious family dispute, Ms. Getz was not told when Mrs. Kolinsky was moved from Renaissance to another assisted living facility [TT3, 434-435, 437.] In early 2003, Harriet Kolinsky had a stroke, was confined to a wheelchair, and was rendered speech impaired. [TT3, 300, 302.] She died on December 11, 2004. [TT4, 443; Bar Ex. 40A.]

Ms. Getz learned of her mother's death after her funeral, when she was given the address and told she could go to the now-disclosed assisted living facility to collect her mother's things. Ms. Getz was also given the telephone number for a geriatric management company, ElderCare. Ms. Getz went to the assisted living facility, and to ElderCare. At ElderCare, she was given to understand that she needed to speak with the company's owner, Knyvett Lee, who was not available.

Ms. Getz placed several phone calls to Ms. Lee. When Ms. Lee returned Ms. Getz's call, she revealed to Ms. Getz that Mrs. Kolinsky (through Ms. Lee) had advanced two successful lawsuits. One had settled for \$35,000. Ms. Lee asked Ms. Getz to waive her rights as designated personal representative of Mrs. Kolinsky's estate. Ms. Getz refused, and hired an attorney to represent her in the probate of her mother's estate. [TT3, 436-438.]

In March of 1998, Mrs. Kolinsky had hired Lee Management Services/The ElderCare Connection, Inc., to provide geriatric care management services for her. The contract for services was signed by Mrs. Kolinsky and Knyvett Lee, for ElderCare Connection, Inc. [Bar Ex. 1.] At that time, Mrs. Kolinsky was estranged from Ms. Getz, and living at the Renaissance. Two days after she signed the ElderCare contract, Mrs. Kolinsky signed a general power of attorney in favor of Knyvett Lee. This document named Ms. Lee as Mrs. Kolinsky's "Attorney-in-Fact," and "Agent." In June of 2000, Ms. Lee signed a new assisted living facility contract for care, on Mrs. Kolinsky's behalf, and moved her to the Avondale Manors Retirement Home. [Bar Ex. 2.]

Prior to July 2002, Ms. Lee noticed that insurance premiums were being auto-deducted from Mrs. Kolinsky's bank account each month, and paid to Pioneer

Insurance Company and National States Insurance Company. As she believed that Mrs. Kolinsky was not receiving any benefit from these policies — while their monthly premiums were reducing her ever diminishing funds, Ms. Lee took it upon herself to cancel both policies. [TT3, 294-295.] In July of 2002, Ms. Lee (on behalf of Mrs. Kolinsky) hired respondent to try to reinstate these same insurance policies, and to recover whatever insurance benefits were owed to Mrs. Kolinsky by both Pioneer Life and National States Insurance companies. [TT3, 283.]

Ms. Lee and respondent entered into and signed a standard, written contingency fee agreement for each of the two cases. Both agreements are dated August 5, 2002 and both were received into evidence, along with signed statements of client rights. [Bar Ex. 5 (National States Insurance) and Bar Ex. 6 (Pioneer Life Insurance Company)]. These written, signed contingency fee agreements were never modified in any writing signed by respondent and Ms. Lee. [TT3, 299; 306-307; 310; 313; 329-330; 534; 536; 547; 552; 555; 559; 564; 565; 577 and 617.]

Respondent filed suit in both cases. She settled the Pioneer case in the fall of 2004 for \$35,000. Despite her written contingency fee agreement with Mrs. Kolinsky (through Ms. Lee), respondent caused or allowed the release to be drafted apportioning \$10,000 in benefits to Mrs. Kolinsky, and \$25,000 in attorney's fees for herself. Respondent sent this release to Ms. Lee for signature on

November 8, 2004, with a cover letter that provided no explanation regarding respondent's unilateral modification of the original standard contingency fee agreement. Ms. Lee signed the release on December 1, 2004. [Bar Ex. 11; TT3, 306-307.] Respondent deposited the Pioneer settlement check into her attorney trust account at Mellon United National Bank on December 10, 2004. [Bar Ex. 14.] Mrs. Kolinsky died the next day.

Before she learned of Mrs. Kolinsky's death, respondent prepared a closing statement for the Pioneer settlement, and mailed it to Ms. Lee with a cover letter dated December 13, 2004. In the closing statement and in the cover letter, respondent listed her legal fee as the agreed-upon 40% contingency fee. [Bar Composite Ex. 15.] Ms. Lee was unable to sign the prepared closing statement, because Mrs. Kolinsky was dead and her power of attorney had expired as well.

Respondent held the Pioneer settlement proceeds in her trust account, intact, until April 18, 2005. On that date, she paid herself \$10,500 via her trust account check number 1070. Thereafter, she made additional disbursements to herself and to the referring lawyer (Alice Reiter Feld) in a series of five additional out-of-sequence checks, until she had paid out the full amount of the Pioneer settlement as fees and costs to herself and Ms. Reiter Feld. Between April 18, 2005 and July 5, 2005, respondent took \$29,225.84. She paid Ms. Reiter Feld \$5,774.16. [Bar Ex.

24.] Even though the memo lines of some of the checks in Bar exhibit 24 reference the National States case, respondent conceded at trial that she prepared no release and settlement agreement in the National case because it was settled after she withdrew from the case in September 2005. [TT3, 268 and 310.] The full attorney fee award in that case (\$10,000) was paid to the Harriet Kolinsky estate, through Ms. Getz's probate attorney Peter Portley, in April 2006 [TT3, 340-342; Bar Ex. 37]. Respondent conceded that she never obtained a signed closing statement from any party to the Kolinsky case, before or after she distributed the entire \$35,000 Pioneer settlement to herself and her referring lawyer. Not from Ms. Lee under Mrs. Kolinsky's power of attorney, not from Ms. Lee as short-term curator of the Kolinsky estate,³ and not the personal representative — Moreene Getz. [TT4, 489; 535; 536; 546; 556; 560; 564; 565; and 577.] Ms. Lee testified, at a March 23, 2010 deposition, that she herself does not know — even now — whether the estate of Harriet Kolinsky ever got any of the \$35,000 that respondent obtained in settlement of Mrs. Kolinsky's lawsuit against Pioneer. *See* deposition of Knyvett

³ Charles Dale, who served as counsel to Ms. Lee in her role as curator (from about April 19 through the issuance of the letters of administration to Moreene Getz, as personal representative, on May 11, 2005), testified that he *never* knew that the estate had a \$35,000 settlement award from Pioneer. As he saw this award as a clear asset of the estate, he testified that had he known of it, "it would have been an asset in the possession of Ms. Lee and she's a fiduciary obligated to report to the Court by her accountings and petition what assets she had possession of." [TT1, 115; Composite Bar Ex. 35 and 40.]

Lee, Volume III, page 325, in evidence as Item 97 on Referee's Index of Record. It is noteworthy that respondent admitted, at trial, that she was going through a contentious divorce from her former law partner during this same time period and that, as a result, she suffered severe professional, business and financial losses. [TT3, 264-270.]

Once Moreene Getz became personal representative of her mother's estate, and learned of the Pioneer settlement, she hired counsel to assist her in probating her mother's estate and locating the estate's assets — including the Pioneer settlement proceeds. For a very brief time, she was represented by Fred Bamman — who was succeeded in April 2005 by his former law partner, Stuart House. [TT2, 196-198.] Mr. House's initial work on the case revealed what he considered to be "hard evidence of situations that had arisen where assets were, substantial assets were distributed . . . assets which I believe should have been the estate's had gone to Ms. Sweeting." [TT2, 199-200.] Mr. House also testified that he became aware that the recovery of the Pioneer settlement "was in the trust account of Linda Sweeting and we learned I want to say later in the summer that that \$35,000 was being - - checks were being written." [TT2, 201-202.] In order to find out about the Pioneer settlement proceeds, and why no portion came to the estate, Mr. House scheduled a meeting with respondent, who was uncooperative. When he asked to

see her fee agreement regarding Mrs. Kolinsky's case against Pioneer, respondent refused to show it to him, asserting "attorney-client privilege on behalf of Knyvett Lee." [TT2, 202.] Respondent testified, at trial, that her client throughout the Pioneer and National cases, was Harriet Kolinsky — and not Knyvett Lee. [TT3, 285.] Mr. House referred Ms. Getz's case to a more experienced successor counsel, Peter Portley, in March 2006. [TT3, 335.]

Immediately upon his retention, Mr. Portley examined the curatorship distribution statement and noted that it did not include (as he thought it should have) the Pioneer settlement. Accordingly, he "focused on two things, where is the thirty-five thousand which I learned was the settlement of the Pioneer and what is going on with the National States and how do we gain whatever benefits we can from that litigation and close that down as well." [TT3, 340.] Mr. Portley quickly completed the wrap-up of the National States case himself, and realized a \$10,000 attorney's fee award for the estate. [Bar Ex. 37.] Respondent made no claim against this settlement award because, she told Mr. Portley, she had already taken this fee for herself, out of the Pioneer settlement total. Mr. Portley deposited the \$10,000 National settlement into the estate's checking account. [TT3, 343.]

Moving on to the Pioneer settlement issues, Mr. Portley asked respondent for copies of her employment contracts in the Kolinsky cases. Respondent refused,

again asserting attorney-client privilege as to her “client” Knyvett Lee. [TT3, 344-345.] Mr. Portley made additional attempts to communicate with respondent but found her uncooperative. In order to resolve the issue, he served a petition to marshal the Kolinsky estate assets, on August 24, 2006. He set his petition for hearing on September 21, 2006.

Mr. Portley testified that he served respondent with all necessary copies via United States mail (which was not returned) and via personal service which was not delivered (due to a presumed process server error) until September 19, 2006. [TT3 349-353.] Mr. Portley also testified that respondent did not appear at the hearing, but the judge called her from the courtroom. It was Mr. Portley’s recollection that respondent told the judge that she did not appear due to insufficient notice. [TT3, 353-356.] At trial, respondent testified that neither the judge nor Mr. Portley called her on the day of the hearing. She stated that if she had been reached by telephone, she would have argued Mr. Portley’s motion telephonically. [TT4, 599-600.] She also testified that when she received the hearing notice, she telephoned Mr. Portley’s office and spoke with a woman who told her that the hearing “would be re-set, she would get back to me with dates and times, and she would coordinate with me on the next round and that it would be on a date after October 9, after the date that my response was due.” [TT4, 597.]

However, at the grievance committee probable cause hearing, on December 5, 2007 respondent testified differently. She stated, under oath, that Mr. Portley called her on the date of hearing, “from the courthouse.” Further, respondent testified that the woman with whom she spoke, in Mr. Portley’s office, only said that she would “relay [her] message” to Mr. Portley. From that, respondent testified, she drew “the distinct impression that they would work it out with me.” *See* Grievance Committee Probable Cause hearing transcript, page 56, in the record as an attachment to respondent’s February 22, 2010 summary judgment motion.

After the September 21, 2006 hearing, the probate judge entered an Order Granting Petition to Marshall Estate Assets in the Kolinsky estate. [Bar Ex. 42.] Respondent wrote a letter to the probate judge, and filed some responsive pleadings, including a motion to vacate — which she never set for hearing. [Bar Ex. 41, 42; TT4, 601.] Respondent conceded that she no longer had the Pioneer settlement proceeds in her trust account, and that she *could not* comply with the court’s order to deposit the Kolinsky estate assets into Mr. Portley trust account, as the probate court had ordered her to do. [TT4, 625-626.] Respondent testified that she believed Mr. Portley’s actions, on behalf of Ms. Getz and the Kolinsky estate, were intended to harass and “strong arm” her. [TT4, 625-626.] She never obeyed the probate judge’s order, never set her motion to vacate for hearing, and never

appealed it. [TT4, 624.] Moreene Getz could not afford additional attorneys' fees to chase respondent for the funds that were due to her mother's estate, so she did not move to enforce the order. As a result, the estate was administratively closed without discharge of the personal representative (subject to reopening) on November 2, 2007. [Bar Ex. 44.] Respondent has kept the proceeds of the Pioneer settlement for herself, and Moreene Getz has filed a complaint with The Florida Bar, seeking relief. Respondent testified, at the close of trial, that she views the situation as a "stalemate." [TT4, 624.]

SUMMARY OF ARGUMENT

From the time that Moreene Getz filed her sworn Florida Bar complaint against respondent in October 2006, and continuing through the date on which The Florida Bar filed its Petition for Review on June 22, 2010, respondent has been on *express* notice of the scope of the Bar’s investigation. From the outset, Ms. Getz alleged that respondent took settlement funds belonging to her mother’s estate, and failed to account for such funds — to her and to her lawyers. From the first, Ms. Getz complained that respondent failed to cooperate with her as personal representative, that she misrepresented the truth, that she failed to follow a court order, and that she “misappropriated” monies belonging to her mother’s estate. These broad charges were the subject of The Florida Bar’s investigative inquiries from the outset, and they were expressly delineated in the probable cause hearing notice that The Florida Bar served upon respondent in advance of her probable cause hearing.⁴ As the probable cause hearing transcript demonstrates, all of these charges were the subject of the grievance committee’s questioning of respondent, under oath — and respondent had a full and fair opportunity to respond to and defend against them.

⁴ This comprehensive hearing notice is included in the record for identification only as Bar exhibit 48. The referee disallowed its admission into evidence. [TT4, 481.].

Based on what the grievance committee knew at the time of its deliberations (based in large part on respondent's testimony and production of subpoenaed documents), the committee found respondent guilty of *some* of the rule violations noticed, and recommended that she be admonished for minor misconduct under R. Regulating Fla. Bar 3-7.4(m). Respondent timely rejected that recommendation and the Bar filed the mandatory complaint of minor misconduct, on the grievance committee's rule violations only, pursuant to the mandate of R. Regulating Fla. Bar 3-7.4(n).

After the Bar filed its complaint of minor misconduct, it undertook discovery and learned that respondent had failed to timely produce all requested and relevant records to the grievance committee at the probable cause hearing. The Bar also came to believe that respondent had failed to be completely candid and forthcoming in her responses to the committee's questions about specific allegations in Getz's complaint. As the Bar propounded discovery, issued trial subpoenas and set witnesses for deposition in advance of trial, respondent grew to understand and indeed, began to complain, about the broadening but clearly delineated scope of the Bar's investigation. This is demonstrated by respondent's initial "Notice of Intent to File Motion for Sanctions Pursuant to Statute 57.105 in 21 days," her successive and renewed motions for 57.105 sanctions, and her eight

motions in limine — all seeking to limit what she knew would be The Florida Bar’s trial evidence. Given the tone and tenor of respondent’s own pleadings, there can be no doubt that she both knew and fully understood the focus and range of the Bar’s investigation and prosecution, well in advance of trial. Accordingly, there can be no doubt that she also had a full and fair opportunity to prepare and respond at trial.

Notwithstanding this clear notice and opportunity for response and defense, the referee misapprehended both his function as trier of fact,⁵ and his obligation under applicable case law, to allow The Florida Bar to present (and required him to consider), evidence beyond the strictly confines four corners of The Florida Bar’s complaint. At trial, the referee stated that he understood his role to be that of a fact gatherer, and not a trier of fact. [TT4, 488-489.] That the referee was misguided in this belief is well established by the language of this Court’s designation and appointment Order of July 1, 2009, as well as by the requirements of R. Regulating Fla. Bar 3-7.6(m). Further, even *within* the strictly construed four corners of The Florida Bar’s complaint, respondent made factual findings that are not supported by competent record evidence, and failed to make findings that are so supported.

⁵ Midway through trial, respondent advanced a motion for a directed verdict. In responding, the referee commented that he was “not the trier of fact.” Instead, the referee saw his role as fact gatherer, in order to make recommendations to the Court. [TT4, 488-489.]

Accordingly, because the referee's findings of fact and recommendations as to sanction and cost awards are based on incomplete evidence evaluated from a position *other than* trier of fact, this case should be remanded for reconsideration of all of the evidence presented at trial, under the applicable case law and from the standpoint of trier of fact.

ARGUMENT

ISSUE I

THE REFEREE ERRED AND ACTED CONTRARY TO APPLICABLE CASE LAW BY ELECTING TO LIMIT HIS REVIEW OF THE FLORIDA BAR'S TRIAL EVIDENCE TO THE FOUR CORNERS OF THE FLORIDA BAR'S COMPLAINT OF MINOR MISCONDUCT. BY THIS ELECTION, THE REFEREE CHOSE TO DISREGARD CLEAR AND CONVINCING RECORD EVIDENCE OF MISCONDUCT ABOUT WHICH RESPONDENT HAD RECEIVED NOTICE AND TO WHICH SHE WAS GIVEN AN OPPORTUNITY TO RESPOND — BOTH BEFORE AND AT TRIAL.

In the second and third pages of his Report of Referee and throughout the trial, the referee noted as follows:

At the commencement of and during the Final Hearing, this Referee expressed his intent to review this matter within the confines of the Complaint filed by The Florida Bar against Respondent, i.e, that his interpretation and understanding of the case law would only allow trial of matters for which Respondent was given notice in the Complaint through either the allegations of misconduct or the rule violations plead in the Complaint, or both. This Referee held that to do otherwise will violate Respondent's due process rights to proper and timely notice of the charges against which she is defending in the Final Hearing.

In reliance on this determination, the referee completely ignored clear and convincing evidence, presented by the Bar and defended by respondent at trial, that respondent took legal fees far in excess of her written contingency fee agreements with her client, that she took these fees without her client's written consent, that

she disbursed such fees to herself and her referring lawyer with no closing statement of any kind, that she took for herself (and her referring lawyer) the *whole* of her client's settlement proceeds (in the Pioneer case without documented authority of any kind), and that she intentionally misstated the truth about this conduct to the now-deceased client's personal representative, to the personal representative's lawyers, and to The Florida Bar.

In urging the referee to admit and consider this evidence, The Florida Bar argued the authority of The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999) and The Florida Bar v. Committee, 916 So. 2d 741 (Fla. 2005). [TT1, 63-71; TT4, 478-481.] In response, respondent discussed her clear knowledge of, and opposition to all Bar charges that exceeded the strict boundaries of The Florida Bar's complaint. [TT1, 90-94.] The referee allowed the Bar's evidence in, and allowed respondent to respond to it, but made it clear throughout the proceedings that he regarded the Bar's trial posture to be a means by which to "shotgun these things without proper notice by saying its minor misconduct," [TT1, 50, 53, 67, 58 and TT4, 480] and that he would not consider such evidence — whether he regarded his role to be the gatherer or the trier of fact. [TT4, 488.] The referee was not dissuaded from this position even after The Florida Bar moved to conform the pleadings to the evidence, pursuant to Fla.R.Civ.P. 1.190(b).

The referee misapprehended both his role as the trier of fact and his duty under applicable case law to consider all reasonably noticed evidence of respondent's misconduct, regardless of whether it was specifically pled in The Florida Bar's complaint of minor misconduct. This duty is clearly set forth in the case law. In The Florida Bar v. Head, 27 So. 3d 1, 7 (Fla. 2010), this Court rejected a respondent's argument that he was entitled to summary judgment because The Florida Bar's complaint "did not have 'structure' and did not link the alleged facts with the rules allegedly violated." In so doing, the Court quoted from The Florida Bar v. Tipler, 8 So. 3d 1109, 118 (Fla. 2009), and stated that "[d]ue process is satisfied in Bar disciplinary proceedings where the attorney is served with notice of the Bar's charges and is afforded an opportunity in the disciplinary hearing to be heard and defend himself." In the case at Bar, respondent had clear and repeated notice of the misconduct at issue, as well as a full and fair opportunity at the grievance committee hearing, and again at the trial, to be heard and to defend herself.

In The Florida Bar v. Batista, 846 So. 2d 479 (Fla. 2003), upon which respondent relied at trial, the Court determined that an uncharged rule violation that occurs *during* the trial cannot be prosecuted at the same trial. This is inapplicable to the instant case. The Florida Bar has not sought to amend or expand

its charges against respondent for anything she did during the trial of the instant case. The Florida Bar v. Karten, 829 So. 2d 883 (Fla. 2002) is also instructive. In that case, a respondent alleged that The Florida Bar alleged violations that were not raised in its complaint. In rejecting this argument, the Court construed the language of the subject complaint as having given respondent sufficient notice of all allegations at issue.

At trial in the instant case, The Florida Bar argued The Florida Bar v. Fredericks, 731 So. 2d 1249, 1253 (Fla. 1999) on a number of occasions because it clearly establishes this Court's determination that "an attorney may be found guilty of violating a rule not specifically charged in The Florida Bar's complaint where the complaint alleged the actual conduct which formed the basis of the violation and, therefore, put the attorney on notice." The Frederick opinion also referenced The Florida Bar v. Nowacki, 697 So. 2d 828, 832 (Fla. 1997), which held that "specific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations of the complaint." The Court stated this same principle, more expansively, in The Florida Bar v. Solomon, 711 So. 2d 1141, 1145-1146 (Fla. 1998). Drawing from The Florida Bar v. Stillman, 401 So. 2d 1306, 1307 (Fla. 1981) and Nowacki, *supra*, this Court stated

that “the referee’s report may include evidence of unethical conduct ‘not squarely within the scope of the Bar’s accusations’ when it is relevant to the question of respondent’s fitness to practice law and thus relevant to the discipline to be imposed.” In the instant case, trial evidence of an attorney’s inappropriate or unauthorized taking of an estate client’s funds, and her refusal to obey a probate court’s direction to marshal such estate funds, are clearly relevant to that lawyer’s fitness to practice law.

ISSUE II

EVEN WITHIN FOUR CORNERS OF THE FLORIDA BAR’S COMPLAINT OF MINOR MISCONDUCT, THE REFEREE MADE FACTUAL FINDINGS WHICH ARE NOT SUPPORTED BY THE RECORD, AND FAILED TO MAKE FACTUAL FINDINGS (REGARDING RULE VIOLATIONS) THAT ARE SUPPORTED BY THE RECORD. ACCORDINGLY, THE REFEREE’S RECOMMENDATION REGARDING (NO) SANCTION AND COSTS IS ALSO ERRONEOUS.

Even within the sharp confines of The Florida Bar’s complaint, the referee made factual findings, as a gatherer instead of a finder of the facts [TT4, 488] which are not supported in the record. In paragraph 8 of his Report, the referee stated that The Florida Bar “conceded at the Final Hearing that Respondent did in fact have written retainer agreements with her client.” This finding is contrary to the weight of the record evidence, which established, clearly and convincingly, that respondent never reduced the amended fee agreement (that she claims to have

reached with her client) to a writing — at any time. Further, respondent herself admitted, throughout the trial, that she never reduced her fee agreement with her client (either the original or the amended agreement) to a closing statement signed by both parties — before she took for herself the lion's share of her client's settlement proceeds. Accordingly, paragraph 9 of the Referee's findings, as set forth in his Report (finding no misconduct relating to written fee agreements), is also without record support.

The referee's findings as to Count II of The Florida Bar's complaint are similarly flawed. All of the referee's findings relating to the September 21, 2006 hearing on the personal representative's motion to marshal the estate assets are based on, and articulated from the standpoint of the referee's mistaken belief that his function was to gather facts for the Court, instead of to weigh and determine them as the finder of fact. In listing the facts relating to Count II, the referee seems to set forth the claims and assertions advanced by respondent, at trial. The referee neither explains nor determines which facts (where they have been directly contradicted by other witnesses, such as the estate's attorney, Peter Portley) he has found to be the more or less credible, persuasive, or compelling — or why.

Similarly, the referee failed to consider and make factual findings (regarding rule violations) that are both within the strict confines of The Florida Bar's

complaint of minor misconduct and supported by clear and convincing record evidence. Specifically, The Florida Bar pled a violation of R. Regulating Fla. Bar 4-1.5(f)(2), and proved that respondent failed to reduce to a writing the actual and “amended” fee “agreement” by which she took and justified her legal fees. Further, The Florida Bar also proved that respondent failed to furnish a signed copy of this “amended agreement,” — which is clearly a “subsequent notice of consent” under the plain language of that same rule — to her client. Even given this proof, the referee failed to find respondent guilty of R. Regulating Fla. Bar 4-1.5(f)(2), as pled in The Florida Bar’s complaint. The Florida Bar also proved that respondent violated R. Regulating Fla. Bar 3-4.4(c) [knowingly disobeying an obligation under the rules of tribunal], and 4-8.4(c) [conduct involving deceit, dishonesty or misrepresentation.].

With regard to R. Regulating Fla. Bar 3-4.4(c), respondent conceded that she did not obey the probate judge’s order to marshal the assets of the Kolinsky estate. She testified as to why she thought the estate lawyer Peter Portley was wrong in seeking the order, and why the judge was wrong in issuing it. But she also conceded that the order was not vacated, and she did not appeal it. She viewed the situation as a “stalemate” and found no discomfort in her election to disregard an order of a court. Were the referee’s finding of no discipline on this rule violation to

stand, it would be tantamount to a license to disobey all court orders with which attorneys take issue, or with which they disagree. That respondent clearly violated this rule, and should be punished for doing so, also established her guilt of the other rule violation at issue herein: 4-8.4(c). Respondent was less than fully truthful in her communications to the probate court as to why she did not, or could not, marshal the assets of the Kolinsky estate. Similarly, she was dishonest in her false representations to Ms. Getz's probate lawyers, Messrs. House and Portley, about both the amount of her fees in the Pioneer and National cases, and the attorney-client privilege she asserted on behalf of her client's agent, Knyvett Lee. By making this false claim of attorney-client privilege, respondent sought to protect herself and the legal fees which she had taken without written amended fee agreement, or authorization of any kind. In making this claim, respondent knew her assertions to be false and misleading. Ms. Lee was never respondent's client, and respondent had no duty to protect her in any way. To the contrary, both respondent and Ms. Lee had duties to the deceased Mrs. Kolinsky: respondent was her lawyer, and Ms. Lee became her fiduciary. Both of them failed her. Respondent is responsible for that failure, and should be sanctioned for her misconduct under the applicable Bar rules, including R. Regulating Fla. Bar 4-8.4(c).

CONCLUSION

The Report of Referee in this case is flawed. It reflects the referee's determination to disregard all record evidence which is not related to specific charges set forth in four corners or specific confines of The Florida Bar's complaint of minor misconduct. The referee reached this erroneous determination despite the weight of the evidence in the record before him, the argument of The Florida Bar, and the body of applicable case law, as established by this Court. Further, even within the four corners of the Bar's complaint of minor misconduct, the referee made factual findings which are not supported by the record, and he also failed to make findings which are supported by the record.

Given that respondent was on notice of the scope of The Florida Bar's charges against her, and that The Florida Bar presented such evidence at trial (where respondent had a full and fair opportunity to be heard and defend against them), this case should be remanded for reconsideration of all misconduct and rule violations reasonably noticed by The Florida Bar's charges against respondent, and for the referee's reconsidered recommendations as to rule violations, sanctions, and costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Florida Bar's Initial Brief regarding Supreme Court Case No. SC09-1117, The Florida Bar File No. 2007-50,471(17D) was e-filed and furnished by regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1927 and true and correct copies have been mailed by regular U.S. mail to Linda C. Sweeting, respondent, 3445 NE 30th Avenue, Pompano Beach, FL 33064-8528, and to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, on this _____ day of August, 2010.

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

LORRAINE CHRISTINE HOFFMANN
Bar Counsel

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