

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR,**  
**Complainant,**

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

**v.**

**LINDA C. SWEETING,**  
**Respondent.**

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

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**PRO SE RESPONDENT'S BRIEF IN RESPONSE TO**  
**THE FLORIDA BAR'S INITIAL BRIEF**  
On Appeal From a Report of Referee

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### **ISSUE I**

**The Referee was correct and acted according to applicable law by limiting his review to the allegations of misconduct and the violations of rules alleged in the four (4) corners of The Florida Bar’s Complaint of Minor Misconduct. The Florida Bar failed to meet its burden of proof, and failed to establish any allegation or charge by CLEAR AND CONVINCING EVIDENCE. The Florida Bar failed to give Respondent reasonable notice of any allegation or charge it tried to “expand” into its Complaint for Minor Misconduct at the Final Hearing; and the Referee correctly excluded these matters from his consideration because, to do otherwise, would violate Respondent’s rights to fundamental fairness and due process under the law.**

### **ISSUE II**

**The Referee, looking within the four (4) corners of The Florida Bar’s Complaint, made factual findings that were clearly supported by the record, which lead him to correctly find that Respondent committed no rule violations. Given the fact that The Florida Bar failed to raise any justiciable issue of either law or fact, the Referee correctly made his finding and recommendation that taxable costs be imposed against The Florida Bar, and Judgment for Costs should be entered in favor of Respondent. Also, given Bar counsel’s clear and unequivocal abuse of process, this case should be remanded to the Referee for determination and recommendation of the amount of sanctions that should be awarded to Respondent pursuant to Section 57.105, Fla. Stat., for which Judgment should also lie. Finally, The Florida Bar has failed to demonstrate clear error or lack of evidentiary support for the findings and recommendations set forth in the Referee’s Report.**

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## **PRELIMINARY STATEMENT**

Respondent serves this her Response Brief in opposition to The Florida Bar, which is seeking a blanket review of the Report of Referee, and which asks for remand and reconsideration of the entire matter. The Florida Bar's Petition for Review dated June 22, 2010, makes the broad request for "*review of the referee's factual findings, disciplinary recommendation, and cost award.*" (See the Bar's Petition for Review, paragraph 4.) The Florida Bar has failed to specify any particular findings of fact or rule violations that it believes the Referee should make, and has failed to cite the *clear and convincing record evidence* in support thereof. The Florida Bar has also entirely failed to demonstrate that the Referee's findings and recommendations are "*erroneous, unlawful, or unjustified*". Rule 3-7(c)(5), R. Regulating Fla. Bar. **Based solely on The Florida Bar's complete failure to demonstrate or cite to any legal or factual basis for review, or to meet its burden in this instance, The Florida Bar's Petition for Review is wholly deficient and should be struck as a matter of law.**

### **Abbreviations Used And Identification of Parties & Non Parties**

**The Florida Bar** is referred to as "TFB" in this Response Brief.

**Respondent**, Pro Se, is referred to as "RPS".

The **Complaint of Minor Misconduct** filed on June 16, 2009, is designated as TFB’s “Complaint of MM \_\_\_\_” (to indicate the referenced page number).

The **Report of Referee** is designated as “RR\_\_\_\_”(to indicate the referenced page number).

The **Transcript of the Final Hearing** that was conducted on March 31, April 1, and April 5, 2010, is designated as TT1, TT2, TT3, or TT4 (to indicate the transcript volume number), followed by “page\_\_\_\_”.

The **deposition of Knyvett Lee** is designated as “Deposition of Lee page \_\_\_\_”. An Exhibit or volume number may also be noted.

The **deposition of Wendy Stein, Esquire**, is designated as “Deposition of Stein page \_\_\_\_”. An Exhibit or volume number may also be noted.

**Florida Bar’s exhibits** are referred to as “Bar Ex. \_\_\_\_”(to indicate the exhibit number).

**Respondent’s exhibits** are referred to as “Resp. Ex. \_\_\_\_” (to indicate the exhibit number).

The **deceased, Harriet Kolinsky**, if not otherwise stated, is referred to as “HK”.

**Moreene Getz**, (also known as Moreene Pioro), the original complainant, daughter of the deceased, HK, and eventually Personal Representative of the Estate

of HK, is referred to as “Getz”. Where Getz is referred to in her capacity as the **Personal Representative of the Estate of HK**, she is referred to as the “PR”.

“**Bar counsel**” refers to Lorraine Christine Hoffmann, The Florida Bar, Attorney Bar No. 612669.

“**Staff counsel**” refers to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Attorney Bar No. 200999.

Witness **Charles Dale, Esquire**, Attorney Bar No. 153740, is referred to as “Dale”. KL, who had acted as HK’s Attorney In Fact for six (6) years prior to HK’s death, hired Dale to petition for her appointment as Curator of the Estate of HK when Getz failed to timely open the Estate of HK as PR.

Witness **Stuart House, Esquire**, Attorney Bar No. 907952, is referred to as “House”. House is a family law attorney. Frederick Charles Bamman, III, Attorney Bar No. 122302, employed House and assigned him the Getz matter to open and manage the administration of the Estate of HK.

Witness **Peter Portley, Esquire**, Attorney Bar No. 112563, is referred to as “Portley”. House referred Getz to Portley after more than a year of mishandling the Estate of HK.

Witness **Alice Reiter Feld, Esquire**, Attorney Bar No. 335940, is referred to as “Feld”. Feld is an elder law attorney who referred HK’s two (2) wrongful denial of insurance matters to RPS.

Witness **Wendy Stein, Esquire**, is referred to as “Stein”. After re-assignment from a partner in her firm, Stein represented and defended National States Insurance Company in the claim that Lee made as Attorney in Fact for HK.

**Kevin Tynan, Esquire**, Attorney Bar No. 710822, is referred to as “Tynan”. RPS retained Tynan to represent her prior to the probable cause hearing that occurred on December 5, 2007. Tynan was negligent and failed to adequately represent Respondent. After RPS brought these inadequacies to light on the eve of the second setting for the Final Hearing, Tynan filed a motion to withdraw and the Referee entered an order thereon. *See Record Index Pleading Tab 38* (see paragraphs 111- 114, 119-129, *with particular reference to number 127*); *Tab 37; and Tab 55* (see paragraphs 31-38).

**Grievance Committee “D”** of the 17<sup>th</sup> Judicial Circuit is at times referred to as “GC”.

**Minor Misconduct** is at times abbreviated as “MM”.

**Subpeona Duces Tecum** is abbreviated as “SDT”.



The case of **Harriet Kolinsky, by and through her Attorney in Fact, Knyvett Lee v. Pioneer Life Insurance Company and George Vince**, Case No. 02-022530 CACE 02 is referred to as the “Pioneer case”.

The case of **Harriet Kolinsky, by and through her Attorney in Fact, Knyvett Lee v. National States Insurance Company et al.**, Case No. 02-022629 CA 25, (then amended as Knyvett Lee, duly appointed Curator of the Estate of Harriet Kolinsky v. National et al., and still later amended as Moreene Getz, as Personal Representative of the Estate of Harriet Kolinsky v. National et al.) is referred to as the “National case”.

The “**Pioneer and National cases**” are referred to as such, or as the “Kolinsky matters”.

Witness **Knyvett Lee** is referred to as “Lee”. “Lee”, “Eldercare”, and “CareSource” may be used interchangeably. HK granted Lee the authority to act as her Attorney In Fact for the period of 1998 through the date of HK’s death on December 11, 2004. Lee petitioned for appointment as Curator of the Estate of HK on April 19, 2005. The court entered an Order appointing Lee as Curator on April 26, 2005. Lee remained the appointed Curator of the Estate of HK until the court entered the Order of discharge almost a year later, on April 18, 2005.

**ElderCare Connection, Inc.** is the social service company with which HK

contracted to oversee her finances and care in 1998. At that time, HK had become estranged from her daughter Getz amidst the mother's accusations that the daughter had committed theft, conversion, and misappropriation of HK's property. At the time HK signed a contract for geriatric care with Lee in 1998, Lee owned and operated a business called "Eldercare Connection, Inc." ElderCare became a not-for-profit company sometime thereafter; and ElderCare was collapsed into the company "CareSource, Inc." "CareSource, Inc. is a not-for-profit social service agency offering direct client services, information and resources for the care and support of the frail elderly, disabled, mentally ill or at-risk population in South Florida." See [www.caresourceconnect.org](http://www.caresourceconnect.org).

**TFB's BURDEN OF PROOF AT THE FINAL HEARING,  
AND THE STANDARD OF REVIEW ON APPEAL**

TFB's burden of proof at the Final Hearing is that of "*clear and convincing evidence*". In fact, TFB *conceded* its heavy burden of proof to the Referee at the Final Hearing. *TTI page 49 lines 19 – 25*.

Rule 3-7.(c)(5), R. Regulating Fla. Bar, provides that: "Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is *erroneous, unlawful, or unjustified*." Emphasis added. This Court must, therefore, *presume* the Referee's findings of fact to be

correct in this case unless TFB demonstrates *clear error* or *a lack of evidentiary support*. This Court should not reweigh the evidence or substitute its judgment for that of the Referee absent *clear error* or *lack of evidentiary support*. The Florida Bar v. Rose, 823 So.2d 727, 729 (Fla. 2002).

With respect to the Referee's award of costs, Rule 3-7.6 (q)(2), Rules Reg. Fla. Bar, states that: "The referee ***shall*** have discretion to award costs and, *absent an abuse of discretion*, the referee's award ***shall*** not be reversed." Emphasis added. When the bar is unsuccessful, Rule 3-7.6 (q)(4), Rules Reg. Fla. Bar, provides that "the referee may assess the respondent's costs against the bar in the event that there was no justiciable issue of either law or fact raised by the bar."

### **STATEMENT OF THE CASE AND FACTS**

RPS has been a member of The Florida Bar in good standing since 1985. RPS is an AV rated attorney by Martindale Hubbell and has no disciplinary record in the State of Florida or in any other state. *TTIII page 497*.

Lee retained RPS to represent her as Attorney In Fact of HK in the claims for wrongful denial of insurance benefits against Pioneer and National, to which Section 627.428, Fla. Stat. applies, on July 2, 2002 (*TTI page 10, Bar Ex. 46 pages 1 & 2, RPS Ex. F2, Deposition of Lee page 52*), and again on August 5, 2002 (*Deposition of Lee Bar Ex. 1 and pages 52 & 53*).

HK was born on April 2, 1925. Her daughter Getz was to care for her mother beginning 1992. *TTIII* page 432. HK executed a Quit Claim Deed of her home in favor of Getz with a life estate to HK on July 29, 1993. *Record Index Tab 78*. HK and Getz became estranged between the end of July 1993 and 1994 when HK retained an attorney and sued Getz in the 17<sup>th</sup> Judicial Circuit Court of Broward County, Florida, for conversion and civil theft of HK's monies and personal property. There is a Final Judgment dated December 12, 1994, recorded in the public records of Broward County, Case No. 94012123 12, that orders Getz to pay her mother \$23,095.00 plus 12% interest, to execute a Quit Claim Deed giving full title of her mother's home back to her, and to return certain jewelry, silver, photographs, and furniture. *Record Index Tab 78*. Getz admits to having knowledge of the Final Judgment and that she never complied with it. *TTIII* pages 473-475. Incredibly, Getz testified that her mother's attorney advised her not to comply with it.

HK bound coverage for home health care with Pioneer on April 5, 1995. *Record Index Tab 50, and Bar Ex. 46*. A Claim of Lien against HK's home was filed against Getz and HK on April 17, 1997. *Record Index Tab 78*. A Lis Pendens and Amended Lis Pendens against HK's home was filed against Getz and HK on May 7, 1997, and July 9, 1997, respectively. *Record Index 78*. Getz denies

any knowledge of the foreclosure proceedings but testifies that her mother had given her irrevocable power of attorney. *TTIII pages 475 & 476*. The foreclosure of HK's home occurred on November 21, 1997. *Record Index Tab 78*.

HK signed a contract with Lee for geriatric care services on March 25, 1998. *Deposition of Lee Vol. II page 105, Bar Ex. 1*. HK signed a General Power of Attorney in favor of Lee on March 27, 1998. *Deposition of Lee Vol. II page 104*. HK signed a Designation of Health Care Surrogate with Lee on September 30, 1998. *Deposition of Lee Vol. II page 105*. After recognizing monthly debits for premiums from HK's bank account, Lee discovers the Pioneer and National policies and begins submitting claims on HK's behalf in January 2001. *Deposition of Lee pages 39-41*. After numerous denials of claims for several reasons even though the premiums continued to be electronically deducted, Lee cancels the Pioneer and National policies in August 2001. *Deposition of Lee page 39*.

In October 2002, RPS served Civil Remedy Notices in the Kolinsky cases. *RPS Ex. B, TTII page 180, TTIV page 515*. RPS filed the National and Pioneer lawsuits on December 2, 2002. *Bar Ex. 46*. RPS wrote Pioneer's attorney on October 22, 2004, with a to Lee, confirming final settlement and specifying the terms and conditions, including confidentiality and the designation of attorney's fees and benefits. *TTII page 188, RPS Ex F16, TTIV page 531*. Pioneer's counsel

also confirmed the terms in writing on that date (*Bar Ex. 46*), and he sent a letter confirming settlement on October 25, 2004. *TTIV page 535*. Lee testifies that she authorized the final settlement and that she was happy with it. *Deposition of Lee page 62*. National issued a settlement draft for certain benefits and interest owed (a partial “**confession of judgment**”) on November 18, 2004. (The draft excluded disputed benefits as well as attorney’s fees and costs.) *Bar Ex. 2, TTIII page 308, Bar Ex. 46, TTIII page 308*. After receiving the Confidential Release and Settlement Agreement for review in November, Lee signs and fully executes the agreement with Pioneer on December 1, 2004. *Record Index Tab 50, Bar Ex. 11, TTIII page 311, Bar Ex. 13, TTIII pages 308, 309 & 314, TTIV pages 535 & 536*. Lee testified that the Pioneer settlement agreement modified the previously executed retainer agreement. *Deposition of Lee Vol. II pages 157 & 158*. National’s partial payments cleared HK’s bank account on December 3, 2004. *Record Index Tab 50*. The Pioneer draft cleared RPS’s trust account on December 10, 2004. *TTIII page 321*.

HK died on December 11, 2004. RPS filed a Suggestion of Death in National on December 17, 2004. Getz retains Bamman to open the Estate in late January or early February 2005. *TTII page 197, TTIII page 445*. March 17, 2005, was the deadline to substitute the Estate as the party plaintiff in National. When

Getz did not open the Estate, Stein files a motion to dismiss the National case for failure to substitute the party plaintiff. In March 2005, after neglecting the case, Bamman assigns the Getz matter to House, a divorce attorney. *TTII page 199*. On April 19, 2005, Judge Rosenberg grants an order allowing RPS ten (10) additional days to substitute the plaintiff in National. *TTI page 110, TTIV page 554*. On April 19, 2005, after retaining Dale, Lee executes the Petition to be appointed curator and oath to open the Estate for substitution in National. *Record Index Tab 50*. The former Judge Larry Seidlin enters the Order appointing Lee as curator. Judge Rosenberg enters the order substituting the curator as plaintiff in National on May 10, 2005. On May 11, 1995, the probate court enters an order appointing Getz as PR. On June 17, 22, and 23, 2005, RPS writes Lee and copies House regarding the modified fee agreements. *Record Index Tab 50, Bar Ex. 46, 22, 23, 25, TTIII page 330, & 333 TTII pages 231-233, Deposition of Lee Vol. II page 176*. RPS writes House and copies Lee on July 26, 2005, regarding the Kolinsky cases. *Record Index Tab 50, RPS Ex. D, Bar Ex. 29*. RPS writes House and copies Lee on August 19, 2005. RPS serves a motion to withdraw as counsel for the curator in National on August 30, 2005; and she writes House, with copy to Lee, asking for a response to letters to him on July 26 and August 19, 2005. *Record Index Tab 50*. Judge Rosenberg grants RPS's motion to withdraw in National on September 22,

2005. November 29, 2005, Judge Rosenberg enters a Rule to Show Cause against House in National. On December 23, 2005, the court enters the order in National substituting the PR for the curator. On January 17, Stein confirms final settlement of the National case with House for the compromised amount of \$10,000.00. *Bar Ex. 34B*. House refers the Getz matter to Portley in March 2006. *RPS Ex. K*. House authorizes the payment of the final National settlement to Portley on April 7, 2006. *Record Index Tab 86*. Final Order of Dismissal with Prejudice is entered in National on May 9, 2006. *Bar Ex. 39B*.

Portley serves a Formal Notice and Petition to Marshal Assets by regular mail dated August 24, 2006. Getz signs, dates, and mails the Florida Bar Inquiry/ Complaint against RPS on September 1, 2006, citing that RPS failed to comply with a court order. *Bar Ex. 45*. Portley's process server effects substitute service of the Formal Notice, the Petition, AND a unilaterally special set hearing on September 19, 2006. *RPS Ex. J*. Portley proceeds to ex parte RPS at the unilaterally special set hearing on his Petition before former Judge Larry Seidlin on September 21, 2006, less than 48 hours after effecting service and RPS's first notice of the hearing. Portley drafts an ex parte order granting his motion, which requires that the order be "delivered" to RPS; and which former Judge Seidlin enters it on September 27, 2006. *Bar Ex. 46*.



### **The Allegations and Charges that TFB Set Forth in the Complaint**

The very limited scope of TFB's allegations of misconduct and charges of rule violations are set forth in the Complaint of MM. *Record Index Tab 1.*

Simply stated, TFB alleged in **Count I of its Complaint of MM** that:

(1) RPS "had no written or signed contingency fee agreement with Lee or Kolinsky; and (2) RPS "accepted and retained a contingency fee for her work on Kolinsky's behalf." *See Record Index Tab 1, page 7.*

In association with these alleged acts of misconduct, TFB alleged the following rule violations: (a) R. Regulating Fla. Bar, Rule 3-4.2; (b) R. Regulating Fla. Bar, Rule 3-4.3; and (c) R. Regulating Fla. Bar, Rule 4-1.5(f)(2).

**NOTE:** *In its case in chief, TFB concedes that RPS did, in fact, have written retainer fee agreements with Lee as Attorney in Fact for HK; and in fact, TFB offered those contracts into evidence at the Final Hearing. However, during the Final Hearing, Bar counsel misrepresented to the Referee that TFB had itself located, or "found, the retainer agreements. However, the undisputed facts are that RPS produced contracts to TFB, not the reverse. Record Index Tab 50.*

TFB alleged in **Count II of its Complaint of MM** that: (1) RPS "failed to obey the court's order"; and (2) RPS "alleged insufficient notice of the September

21, 2006, hearing on Getz’ motion,” when “respondent knew that her statement was false and misleading.” *See Record Index Tab 1, pages 10 & 11.*

In association with these alleged acts of misconduct, TFB alleged the following rule violations: (a) R. Regulating Fla. Bar, Rule 3-4.2; (b) Rule 3-4.3; (c) Rule 4-3.3(a)(1); (d) Rule 4-3.4(c), and (e) Rule 4-8.4(c).

**NOTE:** When TFB filed its Complaint of MM against RPS on September 16, 2009, TFB knew or should have known (had it used the “utmost diligence” required) that many of its allegations and charges were: (1) incorrect at the time plead; (2) incomplete at the time plead; or (3) misleading at the time plead. *Rule 3-7.6(g), R. Regulating Fla. Bar.*

**IN ADDITION,** even if TFB first learned of the falsity of any one or more of its allegations and charges against RPS after filing its Complaint for MM, TFB had ample opportunity to request leave to amend its pleadings as permitted by the Rules months before the Final Hearing took place. *Rule 3-7.6(h)(6), R. Regulating Fla. Bar.* In fact, the Rules require that ***“the complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined”***. Therefore, it was a requirement that TFB seek an order to amend its complaint to include all allegations prior to the Final Hearing. *Rule 3-7.6 (h)(1)(B).* Emphasis added.

This Court need only review RPS's very detailed Motion for Section 57.105 Sanctions against TFB to confirm that RPS pointed out precisely which allegations were completely incorrect, or otherwise unnecessarily misleading, in TFB's Complaint. *Record Index Tab 55*. TFB had ample notice to amend its Complaint to correct and "expand" the allegations and charges not only for the several months prior to the Final Hearing, but it also had three (3) and one half years to investigate this claim (between Getz' Inquiry and Complaint dated September 1, 2006, the filing of the Complaint on June 16, 2009, and the Final Hearing that commenced March 31, 2010, after its third setting).

In an attempt to justify her failure to do so, **Bar counsel concedes** at the Final Hearing that **"The Bar could have in fairness" ... "filed an amended complaint at any time.** Filed a complaint of minor misconduct **then during the discovery phase if we determined it was necessary we could have filed an amended complaint and expanded the charges with the leave of Court. *The rules don't require us to do that.*"** Emphasis added. TTI page 66. *Bar counsel's argument is nothing short of endorsing trial by ambush,* which even in quasi-judicial, disciplinary proceedings *does not meet the requirements of notice, fairness, and due process under the law.*

**The Allegations and Charges that Bar Counsel Tries to "Expand" at the Final Hearing against RPS Without Notice or Due Process**

Outside or beyond the scope of the allegations of misconduct and rule violations that TFB does set forth in its Complaint, TFB (1) nowhere sets forth any other alleged misconduct; (2) nowhere sets forth any other alleged rule violations; (3) does not establish by *clear and convincing* evidence that RPS was “on notice” of any other allegations of misconduct or charges of rule violations; and (4) does not establish or set forth in the record where or how RPS could possibly ever have had a full and fair opportunity to be heard and defend against TFB’s last minute “expanded” allegations and charges during the Final Hearing.

At the Final Hearing, Bar counsel --- for the first time --- attempts to “morph” or “expand” the allegations in Count I of TFB’s Complaint as follows: (1) there was no contingency fee agreement as to the attorneys fees paid, *TTI page 21 lines 2 – 5*; (2) RPS could not take fees without a closing statement, *TTI page 20 lines 8 – 11*; and (3) “the rule requires a signed writing” that reflects the agreement or way fees are paid. *TTI page 25 lines 4 – 7*.

In response, RPS points out that she has “come in here to defend count one that I had no written contingency fee contract when I did. ...”*TTI page 26 lines 6 – 14*. RPS also points out facts about which TFB was very much aware years prior to the Bar filing the complaint, i.e., that Lee “signed a release and settlement

agreement that changed the contract. It actually replaced the contingency fee contract with Pioneer.” *TTI page 26 lines 23 – 25, page 27 lines 1 – 13.*

The Referee even interjects and points out the incoherency of Bar counsel’s arguments and the fact that she is “trying to expand” the allegations “in these proceedings”, *which Bar counsel admits. TTI page 33 lines 22 – 25, page 34 line 1.* When Bar counsel argues that RPS has been given due “notice” of the new allegations and charges she tries to “expand” into and at the time of the Final Hearing, the Court responds:

**The Court:** “And the act that you’ve only specified is that there was no written contract, contingency contract. That’s the only act that you’ve alleged in there. Now how does that put her on notice because she didn’t have a settlement agreement or that she took more money than she was supposed to or anything of that? That’s not what you’ve alleged and that’s all I’m asking you. Where do – *this is about due process and it’s about fundamental fairness.*”

**Hoffmann:** “Yes, sir.”  
*TTI page 36 lines 8 – 17. Emphasis added.*

At the Final Hearing, Bar counsel attempts to establish “notice of the scope of The Bar’s investigation and the focus of The Bar’s investigation and the potential rule violations that The Bar was investigating” by trying to introduce into evidence the GC’s “charging instrument” dated September 25, 2007, as well as asking the Referee to take “judicial notice of the Rules Regulating The Florida Bar

that outline minor misconduct ...”. In response, the following exchange occurs between Bar counsel and the Referee:

**The Court:** “That means you get to shotgun these things without proper notice by saying it’s minor misconduct?”

**Hoffmann:** “I ask Your Honor to take judicial notice -- “

**The Court:** “I asked a very simple question. Does that mean that The Bar has the right to shotgun under minor misconduct any and all things that were involved in the investigation even though that wasn’t what was pled? Is that what you are trying to say?”

**Hoffmann:** “No, Your Honor. What I’m trying to say is that The Bar is limited by its rule under minor misconduct which I’m asking you to take judicial notice of which is the rule on minor misconduct and the Fredericks case ... --“

**The Court:** “What you are doing is trying to get extraneous evidence outside of this courtroom and to move it in by some documents in order to prove up additional Bar violations; is that it?”

**Hoffmann:** “I’m arguing that – “

**The Court:** “I’m not going to allow it, but I’ll make it for identification purposes, okay. *Number 48 is not allowed in. The objection is sustained. ...*” *TTIII* pages 480 & 481. Emphasis added.

The Referee repeatedly states on the record, both prior to and during the Final Hearing, that he intends to limit his review and considerations to those allegations of misconduct and rule violations specifically set forth and contained in TFB’s Complaint. *See Record Index Tab 1. Also see TTI page 40 lines 6 – 12, and TTI page 50 lines 11 – 13.* But Bar counsel persists throughout the Final Hearing in her attempt to “expand” the allegations and rule violations. *TTIV page 494.*

The fact that Bar counsel conducted broad questioning during her eleventh hour depositions of witnesses Lee and Stein “for use at trial”, or that Bar counsel

privately (if not also belatedly) “interviewed” witnesses and believed she had ascertained the basis to assert further allegations against RPS, does not (and did not) place RPS on notice that she would have to defend against any allegation or charge not specifically set forth in the Complaint.

### **Concessions Made by The Florida Bar at the Final Hearing**

At the Final Hearing, **TFB conceded** the following: (1) TFB **recedes from the charge** that there were no written contingency fee agreements. *TTI page 15, lines 6 – 8, and TTI page 16, lines 8 – 9*; (2) TFB **concedes that** in paragraph 42 of Count I of its complaint, **the only charges TFB made against RPS are violations of Rules “3-4.2”. “3-4.3”, and 4-1.5(f)(2).** *TTI page 16 lines 13, 14 & 16*; (3) TFB **concedes** that the only allegations and charges upon which the GC made a finding of probable cause, and the only allegations and charges that TFB placed RPS on notice of are contained in the Complaint. *TTI page 69 line 25, page 70 lines 1 – 4, TTI page 70 lines 5 & 6, TTI page 70 lines 8 & 9, TTI page 70 lines 14 – 17, TTI page 70 lines 22-23, TTI page 70 line 24, TTI page 70 line 25, page 71 line 1, and TTI page 71 lines 2 & 3*; (4) RPS’s entitlement to attorney’s fees and costs for the services she rendered in the National and Pioneer cases; (5) TFB has no complaints with RPS’s handling of the litigation and the settlements. *TTI page 75 line 25, page 76 lines 1 – 8, and TTIV page 524*; (6) TFB **stipulates** that the National

States draft for benefits and interest in the amount of \$8,190.36 cleared HK's bank account. *TTIV* pages 609 & 611; and (7) TFB's **burden of proof**.

**TFB's Lack of "Notice" to RPS of its "Expanded" Allegations at the Final Hearing**

Indeed, **Bar counsel shamefully mischaracterizes the facts and misrepresents** that the GC's letter that notified RPS of the intended scope of its investigation also provided RPS with notice of the Bar's intended scope of prosecution. In fact, the GC and TFB's probable cause findings significantly narrowed the "scope" of this matter to only those allegations and charges set forth in TFB's Complaint of MM. *TTI* page 37 lines 16 – 25, page 38 lines 1 – 4, and *TTI* page 39 lines 15 – 25, page 40 lines 1 – 5. Despite the fact that TFB had ample opportunity to conduct discovery and amend its Complaint prior to the Final Hearing, it failed to do so. TFB's "charges" against RPS should, therefore, be limited to those charges set forth in TFB's Complaint.

**Respondent's Motion for Sanctions Against the Florida Bar Pursuant to Section 57.105, Fla. Stat.**

The Referee made the finding that Section 57.105, Fla. Stat., is inapplicable in Florida Bar disciplinary proceedings based upon Bar counsel's argument that this action is a "quasi-judicial" proceeding. RPS believes the Referee erred. It is clearly contrary to and violates public policy for a lawyer in any proceeding in the



State of Florida, whether in a strictly civil or quasi-judicial proceeding, to be allowed to file and pursue “frivolous” and baseless claims against any party. The Rules Regulating the Florida Bar even specifically set forth such a rule, i.e., Rule 4-3.1, R. Regulating Fla. Bar

There should be no rule if enforcement of the rule is not contemplated, or if the sanction is so nominal as to render the rule meaningless. In this case, RPS paid Tynan considerable compensation to defend and represent her interests in this matter before she was forced to point out his inadequacies on the eve of trial and had to proceed, to her prejudice, in her own defense pro se. In addition, RPS has not only suffered the stress, aggravation, and expense of having to defend this matter before the Referee and at the Final Hearing, but now also on appeal and review before the Florida Supreme Court. **RPS received Getz’ complaint in October of 2006. It is now October of 2010, four (4) years later, and this matter is yet to be resolved!!!** RPS has lost valuable time and income she would otherwise have been able to earn absent having to defend against TFB’s frivolous and erroneous claims and wrongful prosecution.

No lawyer who practices law in this State should be considered “above the law”. In fact, quite the contrary should be true in this case, i.e. Florida Bar counsel, *of all lawyers in this State*, should be held accountable to use the “utmost

diligence” in upholding the law and the standards for pleadings filed in a case. TFB is charged with conducting itself with the “utmost diligence”, not just “due diligence”. Rule 3-7.6(g), R. Regulating Fla. Bar.

RPS, therefore, respectfully asks that the Florida Supreme Court certify and answer the following question as being *one of great public importance*:

**IN A DISCIPLINARY PROCEEDING CONDUCTED BY THE FLORIDA BAR, IS SECTION 57.105, FLA. STAT., APPLICABLE TO PROVIDE THE RESPONDENT WITH RELIEF BY WAY OF AN AWARD OF THE DAMAGES SPECIFIED IN THE STATUTE (TO THE EXTENT SUCH DAMAGES DO NOT DUPLICATE AN AWARD OF TAXABLE COSTS PURSUANT TO THE RULES REGULATING THE FLORIDA BAR), WHERE THERE IS EVIDENCE THAT: (1) BAR COUNSEL MADE MERITLESS CLAIMS AND CONTENTIONS, (2) RESPONDENT PROPERLY NOTICED HER INTENT TO PURSUE SANCTIONS AGAINST BAR COUNSEL PURSUANT TO SECTION 57.105, FLA. STAT., (3) BAR COUNSEL FAILED TO CORRECT OR AMEND ITS COMPLAINT, AND (4) RESPONDENT THEREAFTER TIMELY FILED THE MOTION FOR SANCTIONS?**

**The Referee’s Lawful Finding of Sanctions Against TFB in his Recommendation of a Cost Award in Favor of Respondent**

The Referee had clear and convincing evidence that TFB: (1) failed to amend its pleadings in a timely manner, even though it was given ample notice and time to do so; (2) brought and pursued meritless claims and contentions against RPS despite clear evidence in opposition to what TFB alleged and pursued against RPS; (3) failed to prepare and prosecute the matter with the “utmost diligence”; (4) acted in a manner that is contrary to honesty and justice in the prosecution of

this matter; (5) failed to raise any justiciable issue of either law or fact against RPS; and (6) abused its authority as the “anointed” counsel for TFB. Therefore, at a minimum, the taxable cost award in favor of RPS and against TFB in the amount of \$2,129.90 should stand and judgment should be entered forthwith.

Relative to Bar counsel’s abuse of process, see the Deposition of Knyvett Lee (taken for use at trial), which began on March 17, 2010. *Deposition of Lee Volume I pages 4, 5, and 7*. Lee testified that Bar counsel contacted her in advance of taking her deposition. Bar counsel provided Lee with a copy of the Complaint. They “had a lengthy conversation. Bar counsel explained the Complaint, said that the Bar was investigating” RPS, and Lee testified that Bar counsel assured her “that I had done nothing wrong.” *See Deposition of Lee, page 259*.

Although Bar counsel represented to Lee in the conference call prior to the deposition that she would only cover issues set forth in the Complaint, the scope of her examination deviated far from the allegations of misconduct and rule violations alleged against RPS. In fact, an outside observer would have thought that Bar counsel was, in fact, conducting a criminal fraud or theft investigation involving Lee on behalf of the State of Florida or United States’ Attorney General’s office. Her questioning ultimately made the witness so defensive that Lee almost terminated day one (1) of her deposition, feeling the need to have personal/

corporate counsel with her. When Lee appeared for the second day of her deposition, she did in fact retain and bring personal/ corporate counsel with her.

Bar counsel's questioning ("for use at trial") included the following areas: (1) Care Sources' referral base. *Deposition of Lee Volume I page 8*; (2) How HK was referred to ElderCare/ Care Source. *Deposition of Lee Volume I page 9*; (3) Whether HK was incapacitated at the time HK retained ElderCare's services in 1998. *Deposition of Lee Volume I page 11 & 13*; (4) What HK's medical diagnosis was in June of 1998. *Deposition of Lee Volume I page 12*; (5) What Lee's billing rate was with HK. *Deposition of Lee Volume I page 15*; and (6) whether Lee had billing records for HK. *Deposition of Lee Volume I page 16*.

***At this point in the deposition, Lee asked:***

**Lee:** "I do, but they're at the office. **And I'm not sure what the point of this questioning is.**"  
*See Deposition of Lee Volume I page 16.*

Bar counsel asked for the name of HK's broker. *Deposition of Lee Volume I page 16*, She asked about what history Lee took when HK first met with Lee, including family history, and whether HK had an attorney or a will. *Deposition of Lee Volume I page 18*. Bar counsel questioned Lee about "the value of" HK's "brokerage account" at the time HK contracted for ElderCare's services. *Deposition of Lee Volume I page 19*. She also asked for the amount of HK's

income. *Deposition of Lee Volume I page 20.* Lee confirmed that HK was adamant that KL not contact her daughter; and “the broker confirmed there had been some problems with the daughter”. *Deposition of Lee Volume I page 22.*

Bar counsel asked: “what was ... your ordinary monthly involvement with Miss Kolinsky” ... “What was your interaction with Miss Kolinsky at the outset, from 1998, let’s say, through 2000?” *Deposition of Lee Volume I page 24.* She asked Lee how often she visited HK, for how long, “what other work or time did you spend on” HK’s “behalf?” *Deposition of Lee Volume I page 24.* “How did you receive the bills, do they come directly to your company or did you collect them?”, and where HK’s bank statements were being delivered. *Deposition of Lee Volume I page 25.* She asked why Lee moved HK from the Renaissance to the Avondale assisted living facility. *Deposition of Lee Volume I page 27.* Bar counsel delved into when and why HK started receiving attendant care, and what type and extent of care had HK received. *Deposition of Lee Volume I page 27 – 31.* Bar counsel also questioned Lee about HK’s capacity and whether the filing of the lawsuits was discussed with her. *Deposition of Lee at pages 35 – 37, 48 – 51.*

***By page 33 of the questioning, Lee asks and states:***

**Lee:** “Can I ask the point of this questioning? Because I’m beginning to feel uncomfortable.”

**Hoffmann:** “Well, Miss Lee, these are questions that the Bar needs to ask to prosecute its case that is pending before the referee. ...”

**Lee:** *I'm just a little confused, because the way I understand it and per our conversation, was that this was about the contractual arrangement that was between Linda Sweeting and me acting on Miss Kolinsky's behalf.*

**Hoffmann:** "That's correct. But I need to develop ..."

**Lee:** "So I'm not quite clear about the – when she moved and the kind of care that she required and the – the cost associated with it. **How pertinent that is.**" *Deposition of Lee Volume I pages 33 - 34.* Emphasis added.

*Bar counsel continues with her same line of questioning after stating to the witness: "I understand your concerns and let me see if I can move around them." Deposition of Lee Volume I page 34. When Bar counsel then proceeds with the same line of questioning, Lee finally states:*

**Lee:** "I don't think I'm going to answer that question without proper counsel." *Deposition of Lee Volume I page 35.*

Bar counsel's questioning of this witness over several hours and over two (2) days was repetitive, badgering, misleading, intimidating, harassing, and a complete abuse of process. Bar counsel then tries to lead the witness into agreeing that HK "became legally incapacitated about two years after you were involved in the case, is that accurate?" *Deposition of Lee Volume I page 35.* Lee responds regarding HK's capacity at Volume I page 37, and pages 48 & 49. Bar counsel resorts back to her questioning, and Lee finally responds by stating:

**Lee:** "I'm still unclear as to the – the – the point of this questioning. And so I'm – I'm just going to, um, -- I prefer to answer that with counsel present." *Deposition of Lee at page 51.*

In reviewing the allegations of the Complaint of MM with Lee, the deponent testified that TFB's allegations in paragraph 7, 13, 25, 40, and 47 were false. Lee also testified that she entered into written retainer agreements with RPS; and she testified that she had no knowledge concerning the alleged misconduct in Count II.

With respect to making modifications to the retainer agreements, Lee testified: "We did make adjustments as to how the settlements were going to fly once we had one settlement and we were still negotiating the other..." *Deposition of Lee Volume III page 287.*

Bar counsel also noticed the deposition of Wendy Stein, Esquire, "for use at trial". Again, she took a needlessly broad discovery deposition. Stein was inconvenienced for not just several hours, but over two (2) days in the process. At the conclusion, Stein testified that *she has no knowledge with regard to any allegation asserted in TFB's Complaint of MM against RPS.* See also *Deposition of Stein pages 200-201, 209-210, and 217.* Stein also testified that certain allegations in the Complaint are inaccurate, to wit: paragraph 18 (*Deposition of Stein page 195*), and paragraph 22 (*Deposition of Stein page 196*). TFB's deposition of Stein lasted more than eight (8) hours over two (2) days. Prior to scheduling the deposition, TFB should have been aware of the fact that Stein had absolutely no knowledge as to any allegation in the Complaint.

It is also evident from Bar counsel's direct examination of Stein that, even by the eve of trial for a matter that had been under investigation by TFB since October 2006 *AND* which was on its third trial setting, TFB had never reviewed the entire non-privileged files in the National case that Stein had, or had access to. *Deposition of Stein pages 96-100, 102-104, and 147-149.* In fact, Bar counsel relied upon Stein to produce the documents Stein deemed relevant to TFB's investigation. *See Stein's letter of October 23, 2009, the first page of RPS's Comp. Ex. 1 to the Deposition of Stein, and Deposition of Stein page 97.* Even more astounding is the apparent fact that Bar counsel had never even reviewed the court pleadings in the National case since she appeared unaware of the fact that RPS *had* timely filed a Suggestion of Death.

With regard to the testimony of Feld, it was and remains RPS's position that the Referee erred in allowing any testimony by Feld or evidence of referral fees and contracts. Simply stated, TFB's Complaint for MM does not include any allegation whatsoever concerning Feld. It also does not include any allegations of alleged misconduct or rule violations relative to RPS and Feld, or alleged misconduct or rule violations concerning referral or participation agreements, or alleged misconduct or rule violations about payment of referral or participation fees to Feld. The testimony of Feld bore no relevance whatsoever and was not



material to any of the matters at issue. Again, TFB wasted valuable time and resources in calling this witness to testify at the Final Hearing. including that of the witness, the Referee/ Court, and RPS. *See Record Index Tab 77.*

The Referee also erred in allowing the testimony of Dale at the Final Hearing. RPS's Fourth Pre-Trial Motion / Pro Se Respondent's Motion In Limine and Motion to Exclude Charles Dale, Esquire and any other Witness that TFB Failed to Disclose clearly sets forth, as does the record in this case, that TFB never disclosed Dale as a witness it intended to call at trial within the Court ordered deadline. TFB emailed RPS less than 48 hours prior to the commencement of the Final Hearing on March 31, 2010, (on Monday, March 29, 2010, at 11:25 a.m.) of her intent to call Dale as an additional witness. This is yet another example of TFB's extreme bad faith in the handling of this claim (and utter disregard and disrespect for the Referee's orders and deadlines regarding the Final Hearing). *See Record Index Tab 80.*

### **SUMMARY OF THE ARGUMENT**

Both in its Petition for Review and in its Initial Brief, TFB never specifically sets forth: (1) what specific findings of fact the Referee should have found *by clear and convincing evidence*; (2) what alleged misconduct the Referee should have found RPS guilty of *by clear and convincing evidence*; (3) where such

conduct was alleged, or at least where it was specifically alluded to in TFB's Complaint; (4) the basis for its assertion that RPS should otherwise have had notice of the allegations about which TFB's Complaint is entirely silent; (5) what alleged rule violations the Referee should have found RPS guilty of *by clear and convincing evidence*; (6) where such rule violation was alleged, or at least specifically where it was alluded to, in TFB's Complaint; or (7) the basis for its assertion that RPS should otherwise have had notice of the charges about which TFB's Complaint.

In its CONCLUSION at page 30 of the Initial Brief, TFB baldly asserts (***or boldly misrepresents***) that: “*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,...*”. *Emphasis added.* **Even by the end of TFB’s Initial Brief in this matter, Bar counsel cannot and does not specify the “scope” of its allegations of misconduct and charges of rule violations against the RPS for which it seeks this Court’s review and remand for reconsideration.**

Rule 3-7.6(h)(1)(B), R. Regulating Fla. Bar, sets forth the specifics of what TFB is required to include as “content” of the “complaint”. RPS served a very detailed Notice and Motion for Sanctions pursuant to Section 57.105, Fla. Stat., well in advance of the Final Hearing; and TFB had every opportunity to amend its Complaint and “expand” its allegations against RPS prior to the Final Hearing but failed to do so. *See Record Index Tab 55*. Fundamental fairness and due process requirements of the law require that the RPS be provided with reasonable notice of all allegations and charges to afford her the opportunity to respond and prepare a defense. A finding of an uncharged rule violation based on conduct that is not within the scope of the specific allegations of the complaint is a violation of due process. See **Florida Bar v. Vernell**, 721 So.2d 705 (Fla. 1998).

The Referee made an award of taxable costs in favor of the RPS and against TFB. Clearly, the Referee found that “there was no justiciable issue of either law or fact raised by the bar”. Rule 3-7.6(q)(4), R. Regulating Fla. Bar. His finding is discretionary and should not be disturbed unless there is evidence of “*clear error*”, or that “*a lack of evidentiary support*”. **The Florida Bar v. Rose**, 823 So. 2d 727, 729 (Fla. 2002).

The Referee erred in his determination that Section 57.105, Fla. Stat., sanctions are inapplicable to these proceedings. Unlike the respondents in the

*Chilton* and *Bosse* cases, RPS's request for sanctions is not simply based on a motion for attorney's fees "given the totality of the circumstances". RPS's motion is based on Section 57.105, Fla. Stat. The Rules Regulating the Florida Bar do not supersede Section 57.105, Fla. Stat. Rule 3-7.14, R. Regulating Fla. Bar. provides that the Rules Regulating the Florida Bar supersede certain parts of only three (3) Florida Statutes that are in conflict with the Bar Rules. The Rules specify what taxable costs may be recovered by the prevailing party; but the Rules do not exclude an award of "reasonable attorney's fees, damages and pre-judgment interest". Given Bar counsel's abuse of process in this case, Section 57.105 sanctions should be imposed against TFB and in favor of RPS. Counsel for TFB should be as accountable for the Rules of Conduct as every other attorney in this State, if not more so. Indeed, it is in the public's interests, as well as the interests of every member of TFB, that all attorneys be held equally accountable to comply with the Rules Regulating The Florida Bar.

### **ARGUMENT**

**In Florida Bar v. Vernell**, 721 So. 2d 705 (Fla. 1998), the Florida Supreme Court held that "a finding of an uncharged rule violation based on conduct that is not within the scope of the specific allegations of the complaint is a **violation of due process.**" Emphasis added. See also footnote 1 in **Florida Bar v. Fredericks**,

731 So.2d 1249 (Fla. 1999), which sets forth several distinctions in the case law in this area.

In **Vernell**, the respondent “challenged the referee’s recommendation that he be found guilty of an offense not charged in the complaint.” *Vernell* at 707. The Florida Supreme Court in *Vernell* pointed out that:

“The United States Supreme Court has held that because Bar disciplinary proceedings are quasi-criminal in nature, attorneys must know the charges they face before proceedings commence. See *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), modified on other grounds, 392 U.S. 919, 88 S.Ct. 2257, 20 L.Ed. 2d 1380 (1968).

*The absence of fair notice as to the reach of the procedure deprives the attorney of due process. ...*

*Such matters may only be prosecuted after notice and due process concerns are met ....”.*

The Court in **Vernell** went on to state:

“We recede from any language in prior opinions that may support a contrary result. See, e.g., **Florida Bar v. Stillman**, 401 So.2d 1306 (Fla. 1981).” Emphasis added.

In **Vernell**, the Florida Supreme Court rejected “the referee’s recommendation to find Vernell guilty of violating” a specific rule because the complaint did not charge Vernell with this rule violation. *Vernell* at 707.

However, in **Florida Bar v. Fredericks**, 731 So.2d 1249 (Fla. 1999), the Florida Supreme Court upheld a referee’s recommendation that the respondent be

found guilty of additional rule violations that were not charged in the complaint. The Court in **Fredericks** referred to the case of the **Florida Bar v. Vaughn**, 608 So.2d 18 (Fla. 1992), as precedence for its holding, which case held an attorney guilty of violation of a rule not specifically charged in the complaint *where the complaint alleged the actual conduct which formed the basis of the violation and, therefore, put the attorney on notice.*” *Fredericks* at 1253. Emphasis added.

The Court in **Fredericks** also based its decision upon **Florida Bar v. Nowacki**, 697 So.2d 828, 832 (Fla. 1997), which held that “a referee could find instances of conduct not specifically charged in the complaint *where the conduct was “clearly within the scope of the bar’s accusations” and the attorney was aware of the rules she was alleged to have violated and “the nature and extent of the charges pending against her.”* *Fredericks* at 1253. Emphasis added.

**HOWEVER**, the Court in **Fredericks** made a clear distinction in footnote one (1), *id.* at 1253, which Bar counsel chooses to ignore, and which states:

- 1 **Conversely, we have held that a finding of an uncharged rule violation based on conduct that is not within the scope of the specific allegations of the complaint is a violation of due process.** See *Florida Bar v. Vernell*, 721 So.2d 705 (Fla. 1998). Emphasis added.

In addition, the case of **The Florida Bar v. Batista**, 846 So.2d 479 (Fla. 2003), held that **“a new rule violation cannot be considered without adequate notice. Attorneys must be given reasonable notice of the charges they face before the**

**referee's hearing on those charges.** *See In re Ruffalo*, 390 U.S. 544, 20 L.Ed. 2d 117, 99 S. Ct. 1222 (1968); *see also Florida Bar v. Price*, 478 So. 2d 812 (Fla. 1985), **(rejecting, based on due process concerns, a referee's finding that attorney committed perjury during disciplinary proceedings because the conduct was not charged.)** *Florida Bar v. Vernell*, 721 So.2d 705 (Fla. 1998) **(similar)**; *Florida Bar v. Stillman*, 401 So.2d 1306 (Fla. 1981) **(similar)**. **A rule violation cannot be prosecuted during the same trial unless it is within the allegations of the Bar's complaint.** *See Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999); *Florida Bar v. Vernell*, 721 So.2d at 706." *Id* at 484.

Rule 3-7.6(h)(6), R. Regulating Fla. Bar, allows for amendment of the pleadings in a manner that affords due process. However, TFB never asked the Referee in this case for leave to amend its complaint at any time prior to the Final Hearing. Instead, Bar counsel proceeded with "trial by ambush" tactics and asked the Referee to take Judicial Notice of an entire rule for which TFB had only plead one subsection, and asked the Referee to amend the pleadings to conform to the evidence at the end of the Final Hearing.

RPS even served TFB with Notice of her Intent on February 3, 2010, to serve a Motion for Sanctions pursuant to Section 57.105, Fla. Stat. TFB served its Response to the Notice on February 18, 2010, asserting that only those "costs"

specifically identified in the Rules Regulating The Florida Bar may be assessed in this case, citing Rule 3-7.6(q), R. Regulating Fla. Bar.

Whether or not the sanctions afforded in Section 57.105, Fla. Stat. are applicable to this case, RPS put TFB on notice of the specific deficiencies in its Complaint well in advance of the Final Hearing. In response, TFB neither took action to amend and correct its Complaint during the 21 days afforded by the Statute, nor did it at any time move to amend its Complaint prior to the Final Hearing. Instead, Bar counsel tried to “expand” the allegations against RPS during the Final Hearing.

After the expiration of 21 days, RPS served and filed her Motion for Sanctions Against TFB on March 1, 2010, pursuant to Florida Statute Section 57.105. *See Record Index Tab 55.* RPS specifically enumerates exactly which of numerous allegations in TFB’s Complaint are entirely false; and RPS also provides TFB with the evidence in support thereof. In whole or part, RPS detailed inaccuracies in the following paragraphs in TFB’s Complaint: paragraphs 13, 16, 18, 22, 24, 25, 36, 40, 46, 47, 56, 58, 64, and 65.

The sanctions afforded in Section 57.105, Fla. Stat., are wholly applicable to and should be awarded in this case. *Record Index Tab 55.* The facts of the cases of **The Florida Bar v. Chilton**, 616 So.2d 449 (Fla. 1993) and **The**



**Florida Bar v. Bosse**, 609 So.2d 449 (Fla. 1993), where this Court answered a certified question of whether a respondent can recover attorney’s fees against the Bar “given the totality of the circumstances of the case” are entirely distinguishable.

In the current proceedings, unlike the cases of **Bosse** and **Chilton** where the Referee Reports were completed, RPS moved for relief under the specific Florida statute BEFORE the Final Hearing, BEFORE the Referee’s Report, and BEFORE a “no guilty” plea or consent judgment had been filed. Unlike the respondents in the *Chilton* and *Bosse* cases, RPS’s request for sanctions is not simply based on a motion for attorney’s fees “given the totality of the circumstances”. RPS’s motion is based on a Florida Statute that is nowhere specifically preempted by the Rules Regulating the Florida Bar. Rule 3-7.14, R. Regulating Fla. Bar, provides that *the Rules supersede certain parts of only three (3) Florida Statutes* that are in conflict with the Bar Rules. In addition, *the Rules do not exclude an award of “reasonable attorney’s fees, damages and pre-judgment interest”*. The Rules simply address which costs are taxable in disciplinary proceedings. In *Bosse* and *Chilton*, the question that was certified and answered by this Court was *not* whether TFB could be found subject to the imposition of the sanctions set forth in Section 57.105, Fla. Stat. Clearly, pursuant to RPS’s 57.105 motion for sanctions and to Rule 4-3.1, R.

Regulating Fla. Bar, this Court should remand this matter for the Referee's determination and recommendation of Section 57.105 sanctions in favor of RPS and against TFB. Thereafter, this Court should enter judgment thereon in hopes of deterring TFB from ever again committing such an abuse of process, such a travesty of justice, and such a waste of the courts', third party witnesses', and respondents' time, money, energy, and resources.

Relative to the recommendation for an award of taxable costs by the Referee, the referee's determination is discretionary. **Florida Bar v. Chilton**, 616 So.2d 449, at 451 (Fla. 1993). The Referee in this case clearly made a finding of fact that TFB's case lacked "a justiciable issue of law or fact, ...". Rule 3-7.6(q)(4), R. Regulating Fla. Bar. This Court should not disturb the findings and recommendations of the Referee unless there is evidence of "*clear error*", or that "*a lack of evidentiary support*" exists for the Referee's findings and recommendations. *The Florida Bar v. Rose*, 823 So. 2d 727, 729 (Fla. 2002).

In this case, the exact opposite is true. There is an abundance of evidence to support the Referee's award of "taxable costs" to RPS. The record is replete with evidence that TFB filed and pursued frivolous and meritless claims and contentions against RPS. There is insurmountable evidence that TFB failed to use the "utmost diligence" required in handling this matter. Bar counsel's misrepresentations of

fact and law both during her questioning of witnesses and in her presentation of evidence and arguments to the Referee riddle the transcript. Bar counsel even makes numerous concessions, but then goes back on her word and presents testimony and evidence that are neither relevant nor material to the matters at issue. At times she completely contradicts her own representations to the Referee and concessions made during the Final Hearing. Bar counsel persists in “pushing the envelope”, even after numerous pronouncements by the Referee of his decision to proceed only on and within the four (4) corners of the complaint.

Bar counsel’s attempts to “taint the record” with extraneous materials is both a desperate attempt to conjure bias against RPS and undeserving sympathy for the original complainant, Getz. Throughout these proceedings, the record is clear that Bar counsel’s prosecution of this matter went beyond mere aggressive advocacy in an adversary proceeding. It was careless, dishonest and unprofessional.

Throughout the litigation, beginning most clearly with the Complaint, TFB, by and through Bar counsel and Staff counsel, misrepresented and misstated many facts and allegations against RPS as well as against Lee. For example, the Complaint characterizes RPS and Lee as having a close relationship prior to and at the time that Lee retained the legal services of RPS. As apparent in Lee’s

deposition, nothing could be further from the truth. *See Record Index Tab 85, Deposition of Lee Volume III.*

During the litigation, Bar counsel also shamefully misleads Stein, who is not a probate attorney and who has no expertise in that area, into agreeing that Lee stood to profit from the Estate if she were appointed PR, as opposed to the daughter Getz. *See Record Index Tab 86, Deposition of Stein.* To clarify, on cross-examination RPS questioned Lee, asking: “—if Miss Getz had not stepped up to the plate or someone as personal representative of the estate”, would Lee as curator have inherited the benefits of the estate? Lee responded: “No. The law – that’s absolutely not true.” *See deposition of Lee pages 160 & 161.*

Just as Bar counsel exaggerated and mischaracterized the complainant Getz’ health issues to engender sympathy from the Court, **Bar Counsel also grossly twisted the evidence to prejudice the Court against RPS and has damaged her reputation thereby.** In its Initial Brief, TFB intentionally misrepresented the evidence, mischaracterized the facts, and made libelous statements against RPS in an apparent attempt to “win at any cost”, or as a desperate measure to establish “motive” for allegations and charges it did not even plead in its Complaint. At page 13 of TFB’s Initial Brief, Bar counsel misrepresents RPS’s testimony and evidence by stating: “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.” The evidence in no way adds up to Bar counsel’s inflammatory, libelous, and disparaging statement. Further, Bar counsel conceded at the Final Hearing that the Bar had no complaints about RPS’s handling of the National and Pioneer matters. Therefore, her questioning at the Final Hearing of RPS’s personal life, which clearly by concession did not impact her professional practice or handling of the Kolinsky matters, was irrelevant, immaterial, intrusive, shameful, and cruel. Bar counsel’s insertion of this “noteworthy” testimony as argument before this Supreme Court is nothing short of *malicious*.

RPS’s Pre-Trial Motions in Limine specifically set forth reasons that the testimony of Dale and Feld should have been excluded at trial. In addition, testimony and evidence regarding closing statements and consents to refer agreements should have been excluded at trial. TFB did not disclose Dale as a witness until the eve of trial; and Feld’s testimony was entirely irrelevant and immaterial to the issues alleged and matters charged in TFB’s Complaint. Further, TFB’s Complaint does not mention closing statements or consent to referral agreements in any respect. Introduction of this testimony and evidence violated RPS’s due process rights in her defense at the Final Hearing; and it will most

certainly violate RPS's due process rights should this Court remand this matter for reconsideration by the Referee, as RPS was never afforded the opportunity to prepare a defense or argument on these matters.

After listing only fact witnesses, no "expert" witnesses, and after answering discovery that did not include any expert opinions, TFB still proceeded at trial to introduce "expert" testimony from House, Portley, and Dale (over RPS's objections). In some instances the Referee upheld the objections; but for the most part the Referee allowed the introduction of this evidence and testimony. None of these witnesses were ever properly qualified on the record as experts in the areas about which they were asked to testify. With respect to House's testimony that RPS's attorney's fees billing in the National case appeared "excessive", House has no knowledge, experience or training in the area of first party insurance litigation. In addition, he was never privy to all of RPS's files to make any determination with respect to RPS's billing. The same stands for Portley. Portley was NEVER privy to RPS's files (except for portions that House may have copied from RPS's file in September of 2005 and later provided to Portley). With respect to Dale, he was not only never timely disclosed as a witness for the Bar, he was most certainly never disclosed and never formally qualified as an expert witness.

*The Referee afforded TFB every benefit of the doubt at the Final Hearing of this matter.* Despite repeatedly stating that he would only consider evidence relevant to the allegations that TFB made against RPS in its Complaint of MM, the *Referee allowed TFB broad latitude and admitted evidence that was often not only hearsay, but at times hearsay upon hearsay.* The Referee even listened to TFB try to prove up allegations of misconduct and charges of rule violations that were nowhere alleged or alluded to in the Complaint. Yet, still, TFB failed to prove any misconduct and any rule violation against RPS.

A review of the TFB's witnesses at trial and what they brought to the Final Hearing of this matter would be humorous if this matter were not so serious. Not only did witnesses that Bar counsel called to testify indict, perjure, and contradict themselves at the Final Hearing, but there is also record evidence that the original complainant, Getz, committed perjury when she completed, signed and dated her original Inquiry/ Complaint against the RPS on September 1, 2006. *See Record Index Bar Ex. Tab 45.*

The two (2) witnesses that TFB deposed for use at trial (Stein and Lee), but whose testimony Bar counsel decided and announced on the first day of the Final Hearing that she would NOT be entering as evidence in TFB's case, were deposed for not just hours ... but for days (both within about a month of the third and final

setting of the Final Hearing). Stein had no personal knowledge of any of the allegations of misconduct or rule violations charged in the Complaint. Lee only had knowledge as to allegations pertaining to or contained in Count I of the Complaint, i.e. Lee testified that she did sign contingency fee contracts with RPS.

The other witnesses called to testify in TFB's case at the Final Hearing also made quite the team. Their testimony in this matter was a litany of self-indictments, or they were witnesses making obvious attempts to shield themselves from liability. There was testimony as to: (1) a lawyer not doing his job after accepting a retainer to proceed in a case (Bamman); (2) a lawyer (Bamman) failing to return phone calls (from Lee and ElderCare) concerning his representation; (3) a lawyer (Bamman) delegating a case to an employee or associate (House) who had no background, knowledge, training, or experience in how to proceed in a probate case; (4) a lawyer (House) with no background, knowledge, training, or experience in how to proceed in a probate matter attempting to do so all the while knowing that he was "over his head"; (5) a lawyer (House) who evidenced a consistent pattern of failing to return phone calls or respond to correspondence from several persons, including RPS, Lee or ElderCare, and Dale. (In fact, this lawyer also failed to comply and appear at a hearing on Judge Rosenberg's Rule to Show Cause against him in the National case; he could not get a release signed and a



settlement finalized for Getz over a two (2) or three (3) month period; AND he failed to deposit or to refer to Portley for deposit the draft made payable to the Estate from the curatorship by Dale); (6) a lawyer (House) who misrepresents his communications and interactions with RPS when even his client testifies that he copied a large quantity of documents from RPS's files and falsely asserts that RPS was uncooperative in this matter (when all the evidence and testimony from Portley, Dale, Getz, and RPS points to the fact that *House* was the unresponsive and uncooperative one); (7) a lawyer (House) who completely prejudiced his client by failing to properly and timely carry out the duties of and administer the Estate on behalf of the PR and who allowed the curatorship to proceed over his client Getz' objection; (8) a lawyer (House) who contradicts his client's testimony at the Final Hearing stating that RPS did not provide him access to files contained in two (2) boxes she carried to his offices for review; (9) a lawyer (Feld) who admits to being a poor record keeper and whose only record file of her referral in two (2) cases are the deposits of two (2) referral fee drafts and a computer memorandum documenting a conversation with Lee more than two (2) years after the Retainers and Consents to Referral were signed; (10) a lawyer (Feld) who does not participate in the two (2) cases that she referred when specifically asked to do so, when the request for assistance was within her training and experience to handle,

and when there was a dire time deadline for getting the work done; (11) a lawyer (Portley) who unilaterally schedules a special set hearing without coordinating with RPS and fails to comply with the Local Rules and the requirement of certification on his notice of hearing relative to his communications with RPS, i.e. that he attempted to resolve the matter or narrow the issues prior to noticing the matter for hearing; (12) a lawyer (Portley) who fails to timely serve a Formal Notice and Petition by process server on RPS and who proceeds to ex parte RPS for a hearing that he unilaterally set, that he failed to provide sufficient notice for (less than 48 hours), and that did not meet the requirements of the law in allowing RPS to respond with written defenses 20 days after he had the Petition served and prior to the hearing pursuant to Rule 5.040(a), Florida Probate Rules; (13) a lawyer (Portley) who falsely represents that RPS ignored him and that she did not communicate or was uncooperative in this matter; (14) a lawyer (Portley) who contradicts his client's testimony that he did not participate in the engineering of the subject bar complaint against RPS; (15) a lawyer (Portley) who serves and charges his client to file and attend a motion which was not appropriate in the circumstances and for which he does not follow through, but instead advises his client to utilize the Florida Bar grievance mechanism against RPS as a coercive measure in a matter where, if jurisdiction exists, it lies with the courts; (16) a

lawyer (Portley) who drafts and submits an ex parte order to the court for entry that requires “delivery” of the probate court order to RPS, but who fails to ever deliver the order pursuant to the requirements for “delivery” found at Rule 5.041(b), Florida Probate Rules; (17) a lawyer (Tynan) who fails completely in his representation of RPS, despite receiving payment of attorney’s fees for services, who fails to communicate with or otherwise make himself available to RPS even when his own office calls to coordinate and schedule the conferences, who fails to timely prepare and serve the Answer to the Complaint as well as discovery responses, who fails to timely prepare and serve motions necessary to narrow or clarify the issues, who completely fails to prepare the matter for trial, and who withdraws and abandons RPS’s representation on the eve of the second setting of the Final Hearing; (18) Bar counsel whose lack of diligence, misguided prosecution, and routine disregard for or manipulation of the facts and law has damaged both RPS’s reputation and ability to practice in this community; (19) *an original complainant who accused various parties, including RPS, of misappropriating her mother’s assets, even though she herself was sued by her mother and has a pending judgment recorded against her in the Broward County public records for misappropriating her mother’s assets, i.e., for the return of substantial property and monies. RPS Ex. E*; (20) an original complainant (Getz)

who was estranged from her mother for about ten (10) years prior to HK's death, and who allowed her mother's home to be foreclosed on by failing to respond to Lis Pendens notices from the mortgagor; and (21) **an original complainant (Getz) who perjured herself when she represented preparing, signing, and serving her Florida Bar Inquiry/ Complaint against RPS on September 1, 2006**, and who complained that RPS had failed to comply with an order where the matter was not even heard until September 21, 2006, and the Order was not entered until September 26, 2006.

### **CONCLUSION**

In conclusion, this Honorable Court should:

1. Deny TFB's Request for Review;
2. Dismiss TFB's Initial Brief and the relief requested therein;
3. Enter Judgment for taxable costs as recommended by the Referee in favor of RPS and against TFB;
4. Certify and answer the question stated above on page 22 as one of great public importance;
5. Remand this matter to the Referee for determination and report of the amount of sanctions that should be imposed against TFB/ Bar counsel and in

favor of RPS pursuant to Section 57.105, Florida Statutes, as a deterrent to Bar counsel for her frivolous and malicious prosecution of this case; and

6. Enter Judgment in favor of RPS for 57.105 Sanctions against TFB/ Bar counsel in the amount determined and recommended by the Referee.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original of the foregoing Pro Se Respondent's Response 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 US. Mail to Lorraine Christine Hoffmann, Bar counsel, The Florida Bar, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323, and to Kenneth Lawrence Marvin, Staff counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, on this 27<sup>th</sup> day of October, 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.



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Respectfully submitted,



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