
IN THE SUPREME COURT OF FLORIDA

Case No. SC20-1685
The Florida Bar File No. 2018-10,741 (13B)

THE FLORIDA BAR,

Complainant,

v.

BRIAN P. RUSH,

Respondent.

THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

I. NATURE OF THE CASE

Respondent Brian P. Rush seeks review of a Report of Referee recommending that he be found guilty of professional misconduct in violation of several Rules Regulating The Florida Bar (“RRTFB”) and receive a three-year suspension. Specifically, Mr. Rush challenges the Referee’s findings of guilt. Because the Referee’s fact findings and recommendations of guilt are supported by competent, substantial evidence, and the recommended discipline is supported by Florida’s Standards for Imposing Lawyer Sanctions (the “Standards”) and this Court’s case law, Complainant The Florida Bar (“TFB”) asks that the Court approve the Referee’s recommended sanction.

II. THE UNDERLYING EMINENT DOMAIN ACTION

A. Background on Attorney Fees in Eminent Domain Cases

This disciplinary matter stems from Mr. Rush’s representation of two companies in an eminent domain action initiated by the Florida Department of Transportation (“FDOT”). Because much of the case concerns the statutory fees to which Mr. Rush contends he was entitled, we briefly outline those statutes.

Subject to exceptions inapplicable here, “the court, in eminent domain proceedings, shall award attorney’s fees based solely on the benefits achieved for the client.” § 73.092(1), Fla. Stat. The benefit is generally represented by the monetary difference between the condemning authority’s written offer and the amount of the final judgment or settlement. *See id.* § 73.092(1)(a); *see also Dep’t of Transp. v. RFT P’ship*, 906 So. 2d 1161, 1166 (Fla. 2d DCA 2005). But the statute also “recognizes that benefits can be achieved that are not payable in dollars,” *RFT P’ship*, 906 So. 2d at 1166, and in those circumstances, the court is entitled to award fees based on any nonmonetary benefits, “to the extent such nonmonetary benefits are specifically identified by the court and can, within a reasonable degree of certainty, be quantified.” § 73.092(1)(b), Fla. Stat.

Once the amount of “benefits obtained” is determined, the statute provides a straightforward formula for calculation of attorneys’ fees:

1. Thirty-three percent of any benefit up to \$250,000; plus
2. Twenty-five percent of any portion of the benefit between \$250,000 and \$1 million; plus
3. Twenty percent of any portion of the benefit exceeding \$1 million.

Id. § 73.092(1)(c).

B. Events Preceding the Eminent Domain Action

The eminent domain action concerned land owned by North Park Isles, PTC, LLC and managed by JT North Park, LLC (collectively, “North Park”). (*See* Tr. 271:20-273:10.)¹ For much of the relevant time period, three individuals—Todd Taylor and brothers Jack and Bob Suarez—owned and managed North Park. (*Id.* 271:20-272:3; Resp. Exs. 38, 39.)

In July 2013, North Park’s property was slated to be sold to Plant City Acquisitions, LLC, a company owned by Devon Rushnell. (*See* Resp. Ex. 178 at 1; *see also* Resp. Exs. 179, 180; Tr. 273:15-22, 805:22-806:1.) At some point the parties learned that FDOT intended to take a portion of the North Park property as part of a road-widening project. (*See* TFB Ex. 26A; TFB Ex. 29 ¶ 30.) Between 2013 and early 2014, Mr. Taylor, as a managing member of North

¹ Citations to “ROR” are to the Report of Referee dated February 7, 2022 (Tab 205 in the Index of Record (“Index”)). Citations to “Tr.” are to the transcripts of the final hearing on guilt that occurred on September 22, 23, 24, 27, 28, 29, and October 4, 2021. Citations to “TFB Ex.” are to TFB’s exhibits entered at the hearing on guilt. Citations to “Resp. Ex.” are to Mr. Rush’s exhibits entered at the final hearing. Other references are to the record, including to the appropriate “Tab” number in the Index.

Park, and Mr. Rushnell, as the purchaser of the property, convinced FDOT to relocate a planned drainage pond to be constructed on the portion of the North Park property that was the subject of the anticipated taking. (Tr. 274:1-12, 776:5-777:5.) With the drainage pond relocated, the property allowed access to the 400-acre residential development proposed for the property. (*Id.* 274:1-10, 777:2-5; *see also id.* 424:16-20, 426:4-9.)

In 2014, Mr. Taylor reached out to his longtime friend and past counsel, Mr. Rush, to represent North Park in the anticipated eminent domain action. (*Id.* 274:13-275:14.) Licensed to practice law in Florida since 1982, Mr. Rush is an experienced eminent domain litigator. (*Id.* 25:10-26:13.)

Mr. Taylor asked that Mr. Rush draft a representation agreement. (*See id.* 277:1-279:17.) On September 25, 2014, Mr. Taylor signed the agreement on behalf of North Park. (TFB Ex. 7.) Although Mr. Taylor had consulted with the other two managing members about retaining Mr. Rush, he did not show them the representation agreement before executing it. (Tr. 276:5-8, 278:5-7.)

The representation agreement provided, in relevant part:

ATTORNEYS FEES

As set forth in this Agreement, Attorney's fees and costs for this representation *will be limited to the amount paid* to Attorney by the condemning authority or the State of Florida or the Department of Transportation or their agents (the "government" or the "condemning authority") through a settlement or the amount awarded by the Court if Attorneys cannot reach a settlement of their claim for fees. These fees are usually determined based on time expended, difficulties encountered, expertise required and results achieved, and may include enhancements or increases in the fee where appropriate.

(TFB Ex. 7 at 1 (emphasis in original).)

The agreement also contained the following clause:

TERMINATION OF REPRESENTATION

Client shall at all times have the right to terminate Attorney's services upon written notice to that effect, *but Client would then be obligated to pay to Attorney the reasonable value of his services*. Likewise, Attorney shall at all times have the right to terminate his services upon written notice to that effect, in the event that Attorney determine[s] in his reasonable discretion that it would be unethical or impractical or unreasonable or unprofitable to continue his service to Client.

(*Id.* at 3 (emphasis added).)

Mr. Taylor did not question these provisions, signing the agreement as he had done with all prior agreements he made with Mr. Rush. (Tr. 289:3-293:25.)

The representation agreement authorized Mr. Rush to retain experts on behalf of North Park, specifically engineer Reginald “Reggie” Mesimer and appraiser Richard Harris. (TFB Ex. 7 at 2.) Mr. Rush also hired John Greer, an inactive Class B contractor and developer, to conduct an analysis regarding the effect of the taking of the North Park property. (Resp. Exs. 16 & 62 at 1.)

In August 2016, Mr. Rushnell’s company assigned its interest in the purchase contract for the North Park property to North Park Isles Development, LLC, a company owned by Jeffrey Hills, for \$10,000,000. (Tr. 806:2-5; Resp. Exs. 178-82.) Notwithstanding the assignment, Mr. Rushnell remained involved because of his long history with the project. (Tr. 779:6-20.)

C. The Eminent Domain Litigation

On May 19, 2017, FDOT finally initiated the eminent domain action for the taking of the relevant portion of the North Park property. The trial court entered an order of taking on October 24, 2017. (TFB Ex. 26A.) After the entry of that order, the only issue that remained was compensating North Park for the property taken. (Tr. 440:1-8.)

1. The Change in Objective in March 2018

At first there was no urgency to resolve the eminent domain action. The planned purchaser of the property, Mr. Hills, was not in a position to close the sale. (Tr. 658:19-659:15.) But in spring 2018, Mr. Hills' financing was approved, and North Park's litigation objectives changed. (See *id.* 659:16-24.) Although financing was secured, the bank would not fund the closing until the eminent domain case was concluded. (TFB Ex. 29 ¶ 48.) Consequently, North Park's primary goal became expediting resolution of the eminent domain action to accomplish closing. (Tr. 661:11-662:20, 669:9-10; see also TFB Ex. 29 ¶ 49.)

Despite Mr. Taylor's and Mr. Rushnell's earlier success in negotiating relocation of the drainage pond, the pond's placement remained an issue. The ultimate purchaser, Mr. Hills, asked to move the pond a second time, which North Park tried to accommodate through negotiations with FDOT. (Tr. 794:13-795:3, 796:20-25.) But FDOT would not consider moving the pond until certain regulatory permits were obtained, and FDOT believed Mr. Rushnell was responsible for obtaining them, although it was actually the responsibility of Mr. Hills' company. (Resp. Ex. 279 at 2; see Resp.

Ex. 178 at 2.) In the end, the permits were never obtained and FDOT would not agree to move the pond again. (See Tr. 408:10-409:6.)

On March 6, 2018, Mr. Taylor forwarded Mr. Rush an email in which Mr. Rushnell stated:

FDOT is stopping the pond changes unless the lawsuit is resolved. This is a major problem.

FDOT needs to be put on notice that without the pond changes and changes to the Sam Allen roadway plans the entry boulevard to the subdivision will not work, thus disabling the entire project.

FDOT currently has a bus stop at the entry with a major drainage headway in conflict with the entry road.

(Resp. Ex. 232.) This was consistent with Mr. Rush's belief that relocation of the pond was still critical to resolving the eminent domain action. (See Tr. 1104:25-1106:11.) But the second relocation of the pond was what Mr. Hills wanted, not North Park. (*Id.* 284:2-4, 794:13-795:9; *see also id.* 61:21-62:13.)

Importantly, had FDOT agreed to move the pond or undertake other efforts to modify the plans attached to the order of taking, these actions could have resulted in a nonmonetary benefit which would serve as a basis for Mr. Rush's recovery of additional attorney's fees.

(See TFB Ex. 26E, Exhibit “A” at 4-15; TFB Ex. 26I at 10-11, 20); see also § 73.092(1)(b), Fla. Stat.

On March 21, 2018, the members of North Park met with Mr. Rush to discuss the pending eminent domain action and the sale of the property. During that meeting, managing member Jack Suarez advised Mr. Rush that North Park’s objective was to quickly settle the eminent domain action so that the sale could close. (Tr. 283:6-11, 662:7-20.) The members and Mr. Rush also resolved to schedule an informal settlement conference with FDOT. (See *id.* 718:14-19; Resp. Ex. 234.) That informal settlement conference was set for April 4, 2018.

2. The April 4, 2018 Informal Settlement Conference

The day before the informal settlement conference, Mr. Rush sent two letters to FDOT’s counsel, Aloyma Sanchez. One letter included John Greer’s preliminary expert report stating his opinion as to the midpoint damages amount, which he opined was \$8.3 million based on the property taken and a claimed loss of access. (Tr. 1161:16-25; Resp. Ex. 241.) According to Mr. Rushnell, this letter

did not accurately reflect North Park's view of the claimed damages. (Tr. 815:21-816:21.)

On April 4, 2018, North Park's managing members, Mr. Rush, two of Mr. Rush's retained experts, and Mr. Rushnell met with several representatives from FDOT at the informal settlement conference. (*Id.* 69:9-70:21.) The parties discussed the potential relocation of the pond as well as the governmental permits needed to allow a new pond location. (*Id.* 71:6-19, 450:17-451:15, 781:15-782:17.) According to Mr. Rush, Kevin Lee, an FDOT project manager, and Mr. Rushnell had a heated exchange about the failure to obtain permits in order to move the pond a second time. (*Id.* 72:9-13.)

After that meeting, FDOT reiterated that it would not consider relocating the pond unless and until the necessary permits were obtained. (*See* TFB Ex. 20, Attachment (Apr. 20, 2018 Letter to Taylor and Rushnell).) As an effort to resolve some of the remaining issues, including the requested second relocation of the pond, Mr. Taylor directed Mr. Rush to draft a proposed memorandum of understanding for FDOT's consideration. (*See* Tr. 369:3-15, 373:7-14.) Mr. Taylor executed a second representation agreement with Mr. Rush limited to drafting the requested memorandum. (*See id.*

284:22-285:8; TFB Ex. 11 at 1.) Attorney Michael Rocha from the Petitt Worrell law firm reviewed the memorandum as real estate counsel on behalf of North Park. (See Tr. 213:5-8.)

FDOT, through Ms. Sanchez, refused to enter into the memorandum of understanding, taking the position that FDOT did not enter such memoranda with non-governmental entities. (*Id.* 451:25-452:9, 950:1-9, 1020:4-10.)

3. The April 12, 2018 Client Meeting

On April 12, 2018, North Park's managing members and Mr. Rushnell met with Mr. Rush to discuss the case. (See Tr. 664:24-665:5; TFB Ex. 12.) Jack Suarez prepared an agenda for the meeting, which stated in relevant part:

Where we need to get to:

1. Close the Sale with Jeff Hills by April 25th.
2. Get our "Just Compensation" for the taking of our Real Estate.

While these are equals in importance, the closing is first among equals and the just compensation is subordinate to achieving the targeted 4/25 closing date.

(TFB Ex. 12; Tr. 664:24-669:10.)

Consistent with the agenda, Jack Suarez emphasized that Mr. Rush's instructions were to "get this closed" and "get a deal with the FDOT." (Tr. 669:17-23, 671:1-3.) Even Mr. Rush agreed that the number one priority was closing the sale with Mr. Hills, and that North Park "was willing to walk away ultimately with no additional compensation." (*Id.* 83:23-84:7.) But Mr. Rush pushed back that his attorney's fees had to be taken care of as part of any settlement. (*Id.* 671:3-4.) When Mr. Suarez asked for a current estimate of Mr. Rush's fees, Mr. Rush answered that he was unsure but that the number was somewhere between \$300,000 and \$1 million. (*Id.* 86:20-87:8, 670:24-671:8.) Mr. Rush suggested that he would seek these fees from North Park rather than from the condemning authority, FDOT, under certain circumstances. (*See id.* 671:20-672:2, 748:13-749:25; *see also id.* 84:11-85:21.) Notably, when the eminent domain litigation eventually settled at mediation after Mr. Rush had withdrawn as counsel, the attorney fee award was around \$110,000. (*Id.* 642:13-20.)

Mr. Suarez testified there was "an underlying threat" that based on Mr. Rush's representation agreement, North Park "would owe him fees regardless," despite Mr. Suarez's prior understanding that "the

State pays everything.” (*Id.* 671:20-672:9; *see also id.* 748:17-749:25.) Mr. Suarez said that he was hesitant to terminate Mr. Rush because of the fees associated with the representation agreement and Mr. Rush’s claim that North Park would be in violation of the agreement. (*Id.* 689:18-690:8.)

4. *The Retention of Richard Petitt*

Following the April 12th meeting, Mr. Rush’s actions began to reflect a growing preoccupation with protecting his claim for fees, including fees premised on the achievement of a nonmonetary benefit for North Park through obtaining the second relocation of the pond and other engineering changes. Becoming concerned with Mr. Rush’s conduct, North Park retained additional counsel—Richard Petitt, from the same law firm as real estate counsel Mr. Rocha—in an effort to expedite resolution of the case. (Tr. 286:2-8, 672:16-673:1.)

On April 17, 2018, Mr. Petitt notified Mr. Rush by email that his firm had been retained by North Park as “co-counsel in the eminent domain case” and requested a meeting to discuss the case. (Resp. Ex. 268.) The pair met on April 19. At that meeting, Mr. Petitt relayed to Mr. Rush that the client “wanted to get the case settled ASAP” and

“didn’t care about the money.” (Tr. 413:9-12.) The client had hired Mr. Petitt to “bring the case to a conclusion”; Mr. Petitt would be paid by the hour for his work, while Mr. Rush “could have whatever fee was generated as a result of the settlement.” (*Id.* 413:13-18.)

Mr. Rush acknowledged by letter later that same day that they had agreed that Mr. Petitt would contact Ms. Sanchez at FDOT to discuss the case, and that Mr. Rush would cooperate with Mr. Petitt and North Park. (*See* Resp. Ex. 275.)

On April 26, 2018, Mr. Rush sent Mr. Petitt a letter purportedly in furtherance of their continued representation of North Park, although Mr. Rush emphasized that he did “*not* agree that [Mr. Petitt] was his ‘co-counsel’ in this lawsuit,” in part due to Mr. Rush’s personal assessment of Mr. Petitt’s prior eminent domain experience. (Resp. Ex. 280 at 2 (emphasis in original).) Mr. Rush reiterated his view that North Park and Mr. Petitt had agreed to “fully preserve [his] firm’s claim for attorney’s fees, expert fees and costs in regard to any benefit or nonmonetary benefit achieved in this case.” (*Id.* at 2.)

5. Mr. Rush’s Filings in March, April, and May 2018 Before Mr. Petitt’s Notice of Appearance

In March, April, and May 2018, as well as until the time he was

formally discharged from the case in July 2018, Mr. Rush made a number of filings asserting that FDOT was required to make modifications to the plan of taking. The modifications Mr. Rush sought in his filings would have resulted in nonmonetary benefits for North Park that would correspondingly increase Mr. Rush's attorney's fees. Many if not all of these filings were unauthorized and contradicted the expressed desires of Mr. Rush's clients, North Park.

On March 21, 2018, before leaving his office to meet with the members of North Park to discuss the pending eminent domain action and the sale of the property, Mr. Rush drafted and filed a motion for partial summary judgment. (Tr. 1126:8-1128:14.) That motion largely concerned a claim that FDOT had breached a promise to work with North Park to obtain all necessary permits related to a second relocation of the pond, as well as claims that the taking would result in a loss of access to the property and marketing vistas. (TFB Ex. 26B, Attachment, Motion to Schedule Mediation in April or May of 2018, "Exhibit 'A'" "Defendants' North Park Isles PTC, LLC, Todd Taylor, and JT North Park, LLC's Motion for Partial Summary Judgment Against Petitioner, Florida Department of Transportation.")

While not included in the record, at some point prior to May 3, 2018, Mr. Rush filed another motion for partial summary judgment, “[r]egarding Petitioner, Florida Department of Transportation’s Blocking of Access to Residential Development and Defendants’ Loss of Marketing Window, Model Home Marketing Area and Resulting Loss of Use of Land.” (See TFB Ex. 13.)

On April 18, 2018, Mr. Rush learned that Mr. Taylor and Robert Suarez had resigned as managing members of North Park, leaving Jack Suarez as the sole managing member. (Tr. 286:14-287:4; Resp. Ex. 274.) That same day, Mr. Rush made several filings with the court. Mr. Rush filed a “Notice of Filing Previously Served Motions” (TFB Ex. 26B) which attached an April 12, 2018 “Motion to Schedule Mediation in April or May of 2018 and Motion for Attorneys’ Fees, Expert Witness Fees and Costs” (TFB Ex. 26D) and March 21, 2018 “Notice of Attorney’s Fee Agreement Requiring FDOT and State of Florida to Pay Full and Just Compensation, Including Fees and Costs.” (TFB Ex. 26C.) The motion to schedule mediation in particular devoted three paragraphs on scheduling mediation and more than two pages regarding Mr. Rush’s claimed basis for the recovery of attorney’s fees against FDOT, including the claim that Mr.

Rush was entitled to fees for achieving nonmonetary benefits. (TFB Ex. 26D at 2-4.)

On May 3, 2018, in a letter also signed by Jack Suarez, Mr. Petitt instructed Mr. Rush to withdraw the two pending motions for partial summary judgment, stating that the motions were “legally deficient and contain[ed] material misstatements of fact” and had “an adverse effect upon the Clients’ relationship with the Plaintiff [FDOT] and the ability of the Clients to settle the above-referenced case.” (TFB Ex. 13; Tr. 384:8-24.)

Mr. Rush withdrew the motions the following day. The notice of withdrawal contained a lengthy “Purpose of This Withdrawal of Motions for Partial Summary Judgment” which claimed that the motions were withdrawn “as an accommodation” to FDOT because FDOT “has asserted that these motions for summary judgment are burdensome, legally complicated and are having an adverse effect on the FDOT’s relationship with Defendants and Defendants’ counsel of record.” (Resp. Ex. 284 at 6.) Mr. Rush threw in yet another discussion of his entitlement to fees, contending that FDOT had also asserted that the withdrawal “would facilitate settlement negotiations with Defendants’ counsel of record which would likely resolve various

disputes, including the amount of any nonmonetary benefits, the amount of attorney's fees to be paid to Defendants' counsel on such nonmonetary benefits, and the payment of expert witness fees and costs in this case." (*Id.*) Mr. Rush withdrew the motions "without prejudice to any Motion to Recover Attorney's Fees, expert fee[s] and costs." (*Id.* at 5).

On May 4, 2018, Mr. Rush sent a letter to Ms. Sanchez of FDOT, enclosing copies of the notice of withdrawal of the motions for partial summary judgment and the motion for attorney's fees, expert witness fees, and costs, among other things. (TFB Ex. 14.) The same day, Mr. Rush also filed a lengthy motion for attorney's fees, expert witness fees, and costs, that again reiterated his position that he was entitled to fees for nonmonetary benefits. (TFB Ex. 26E.)

Upon receiving the notice of withdrawal of the two motions for partial summary judgment, FDOT counsel Ms. Sanchez emailed Mr. Rush to deny that FDOT had requested the withdrawal. (Tr. 454:1-7; *see also* TFB Ex. 284 at 4.)

On May 9, 2018, Mr. Rush responded by letter and claimed that Mr. Pettitt had represented to him that FDOT had demanded withdrawal of the motions. (Resp. Ex. 284 at 1.) Mr. Rush further

asserted that Mr. Petitt was “acting independently” of Mr. Rush and was “not [Mr. Rush’s] co-counsel.” (*Id.* at 2 (emphasis omitted).) Mr. Rush said that Mr. Petitt blamed Ms. Sanchez and FDOT “for allegedly causing the withdrawal of the above Motions, and thereby inducing [North Park] to potentially breach their contract of full cooperation with me and my firm.” (*Id.* (emphasis omitted).) Mr. Rush again claimed that North Park was contractually required to support any motion for his fees, including by helping to “establish certain facts including the factual basis for any claimed non-monetary benefits.” (*Id.*) Mr. Rush warned that anyone inducing interference with his fee agreement would commit tortious interference. (*Id.*)

At the same time, Mr. Rush wrote to Mr. Petitt, questioning Mr. Petitt’s “credibility” with FDOT and suggesting that, by requesting the withdrawal of the motions, Mr. Petitt and North Park had interfered with his fee contract, particularly fees associated with nonmonetary benefits. (TFB Ex. 15 at 1-2.)

6. Mr. Rush’s May 4, 2018 Settlement Offer

In the same May 4, 2018 letter by which Mr. Rush notified Ms. Sanchez of the motion withdrawal, Mr. Rush made a settlement offer

in which: (1) North Park would “give up all of their claims for monetary damages”—which he estimated, based on his expert John Greer’s report, amounted to \$2.84 million—and in return, FDOT would confer a “substantial nonmonetary benefit on the Defendants with a midpoint value of approximately \$8.3 million”; (2) FDOT would move the drainage pond as requested; and (3) FDOT would pay North Park’s attorney’s fees based on the \$8.3 million nonmonetary benefit. (TFB Ex. 14 at 2-3 (emphasis omitted).) Mr. Rush also emphasized that he was counsel for North Park and that only he, and not Mr. Petitt, could sign a stipulated final judgment in this case. (*Id.* at 3.)

Mr. Rush admitted that he did not share a copy of the May 4, 2018 settlement offer with his clients or Mr. Petitt before sending it. (Tr. 90:14-91:4.) While Mr. Rush later said he sent “another version” of the letter to Mr. Petitt on May 7, 2018, that letter did not mention the extension of any settlement offer to FDOT. (*Id.* 91:4-7; *see* TFB Ex. 15.) Ultimately, North Park did not learn of this settlement offer until it was produced in later litigation. (Tr. 241:7-244:5.) Mr. Suarez testified that he never authorized Mr. Rush to waive North Park’s rights to any monetary compensation. (*Id.* 679:10-14.) Similarly, Mr. Rush testified that he was not told by his clients the

terms of any settlement, but he understood that the clients were not focusing on compensation. (*Id.* 1139:10-25.)

7. The May 24, 2018 Hearing and Termination of Mr. Rush's Representation

On May 18, 2018, Mr. Petitt filed his notice of appearance on behalf of North Park in the eminent domain action. The same day, Mr. Petitt advised Mr. Rush by letter of North Park's concerns with the representation agreement. (TFB Ex. 16.) Among other things, Mr. Petitt stated that the agreement "violate[d] the Rules Regulating the Florida Bar" in that it contained an "illegal termination provision that purports to require the Clients to pay you a fee if they terminate the attorney-client relationship, even if the contingency is not fulfilled." (*Id.* at 1.) On behalf of North Park, Mr. Petitt demanded that Mr. Rush agree to rescind and cancel the prior agreement and execute a new proposed agreement by May 22, 2018. (*Id.*) The new agreement would require Mr. Rush to communicate to his clients only through Mr. Petitt, and not communicate with FDOT or file any pleadings in the eminent domain action without the clients' approval. (*Id.* at 2.) The letter also acknowledged that the clients intended to pursue settlement through Mr. Petitt, but that neither the clients nor

Mr. Petitt would stand in the way of Mr. Rush's claim for fees against FDOT. (*Id.*)

Although Mr. Petitt referenced the RRTFB, Mr. Petitt did not threaten a complaint with TFB against Mr. Rush, notwithstanding Mr. Rush's assertion to the contrary. (*Compare* TFB Ex. 16, *with* Initial Br. at 10.) Mr. Petitt indicated that if Mr. Rush did not agree to rescind the prior representation agreement and enter into the new one, North Park would "pursue their legal remedies." (TFB Ex. 16 at 2.)

Despite the clients' intent for Mr. Rush to abstain from filing any further pleadings on their behalf without prior approval, Mr. Rush filed the same day a notice of lien against FDOT and motion to adjudicate lien and recover attorney's fees (TFB Ex. 26H) and a motion for partial summary judgment on attorney's fees and expert fees premised on the achievement of nonmonetary benefits (TFB Ex. 26I).

It appears that neither of these filings had been discussed with or authorized by North Park or Mr. Petitt. Indeed, by this point, Mr. Rush believed he had been "constructively terminated" by the clients given Mr. Petitt's letter. (Tr. 142:12-20.) Neither filing was designed

to advance the client's cause, but to instead protect Mr. Rush's right to fees. (*Id.* 135:7-139:22, 140:6-141:4.) The motion for partial summary judgment was similar to the motions for partial summary judgment that North Park had just asked Mr. Rush to withdraw on May 3. (*Compare* TFB Ex. 26B, Attachment "Exhibit 'A,'" *with* TFB Ex. 26I.) Mr. Rush's latest motion sought an attorney's fee of more than \$1,400,000, based upon nonmonetary benefits North Park says it was not seeking. (TFB Ex. 26I at 20.)

Mr. Rush rejected North Park's offer to rescind his existing representation agreement and enter into a new one, suggesting that North Park and Mr. Petitt may have violated the agreement and requesting that they enter binding arbitration to settle their respective rights under it. (TFB Ex. 17.) On May 21, 2018, Mr. Petitt responded on behalf of North Park, denying interference. (TFB Ex. 18.) He also suggested that the parties meet to discuss the matter prior to an anticipated May 24 hearing before the trial court in the eminent domain action, but the meeting never occurred. (*Id.* at 2; Tr. 391:14-392:5.)

The hearing proceeded on May 24, 2018, before circuit court Judge Cheryl K. Thomas. At issue were the motion to schedule

mediation filed by Mr. Rush (TFB Ex. 26D) and a motion by Mr. Pettitt to disburse the good-faith deposit FDOT had placed in the court register after commencing the eminent domain action, which was unopposed and designed to further North Park's objectives to resolve the case. (See TFB Ex. 23, Attachment, May 24, 2018 H'rg Tr. 10:21-24.)

Before the pending motions could be addressed, Mr. Rush announced to the court that "[t]here's a debate about who represents the property owner." (*Id.* 4:7-9.) Mr. Rush asserted that Judge Thomas would need to decide who represented North Park and accused Mr. Pettitt of carrying on secret negotiations with FDOT. (*Id.* 5:3-6:1.) According to Mr. Rush, only one lawyer could represent North Park, and if North Park wanted Mr. Pettitt to serve as its counsel, it would need to discharge Mr. Rush. (*Id.* 5:18-22.) When Judge Thomas inquired, North Park's sole remaining member Jack Suarez admitted he was confused about what to do because of the terms of the representation agreement with Mr. Rush, making him concerned that if he terminated Mr. Rush, North Park would be on the hook for "millions of dollars of legal fees." (*Id.* 9:2-13; *see also* Tr. 689:18-25.) On behalf of FDOT, Ms. Sanchez confirmed on the

record that there was no secret settlement between North Park and FDOT. (TFB Ex. 23, Attachment, H'rg Tr. 10:9-11.)

Mr. Petitt offered to obtain just an order on the unopposed motion to disburse funds to North Park. (*Id.* 10:21-24.) Judge Thomas agreed to enter the order if both attorneys would sign it on behalf of North Park. (*Id.* 10:25.) Mr. Rush refused, opposing any involvement by Mr. Petitt in the case. (*See id.* 11:1-12.) At that point Judge Thomas terminated the hearing, refusing to consider any motions until the parties “figure[d] this out.” (*Id.* 11:18-19.)

Meanwhile, North Park continued to pursue informal settlement with FDOT. On June 25, 2018, Mr. Petitt made a settlement offer on behalf of North Park to FDOT. (TFB Ex. 19.) The settlement proposal would, in relevant part, ensure Mr. Rush’s fees would be paid by FDOT pursuant to Florida law and as determined by the court, stating expressly that “*[t]his offer does not include, affect, or waive, in any respect, Brian Rush’s claim for attorneys’ fees and costs, which must be heard by the court at an appropriate hearing if we are able to settle the case.*” (*Id.*, Attachment at 1 (emphasis in original).)

Ms. Sanchez rejected the offer, citing Mr. Rush's allegations at the May 24, 2018 hearing that there was a dispute as to who represented North Park. (TFB Ex. 20 at 1.)

Subsequently, Mr. Petitt asked Mr. Rush to send an identical settlement offer to FDOT. In a June 28, 2018 letter also signed by Mr. Suarez, Mr. Petitt provided the exact language of the settlement proposal North Park wanted Mr. Rush to send to FDOT, which was virtually identical to the one Mr. Petitt sent on June 25. (*Compare* TFB Ex. 21, Ex. B, *with* TFB Ex. 20, Attachment.) Mr. Petitt's letter instructed that Mr. Rush was "not permitted to deviate from the precise language contained in the settlement proposal." (TFB Ex. 21 at 2.) The letter also acknowledged North Park's agreement that Mr. Rush should apply for payment of his fees and costs from FDOT, but stated that such application

must not, in any way, delay or hinder the settlement negotiations, entry into a settlement agreement, or entry into a stipulated final judgment. You are not permitted or authorized by the Clients to make claims or demands for fees and costs during the settlement negotiation process, in advance of the entry of a stipulated final judgment.

(*Id.* at 3.)

Mr. Rush responded by sending a letter to Ms. Sanchez on June 29, 2018, that purported to include the settlement offer from North Park. But the settlement offer in Mr. Rush's letter contained a number of additions to the client-approved offer. First, Mr. Rush calculated his anticipated attorney's fees from the monetary benefit, and stated that the amount of those fees "will need to be entered into a Stipulated Final Judgment, to be signed by you and me." (TFB Ex. 22, Attachment at 1.) Mr. Rush also replaced the simple paragraph in the settlement proposal provided by North Park, which stated that "FDOT will pay the attorneys' fees and costs claimed by my firm, as established by the court at an appropriate hearing after entry of the stipulated final judgment" (TFB Ex. 21, Ex. B at 2), with his own paragraph, which stated, among other things:

The above proposed settlement will likely result in a substantial nonmonetary benefit as defined in Section 73.092, Florida Statutes. The FDOT agrees that FDOT is responsible for paying all attorneys' fees, expert fees, and costs in this case and especially relating to the claimed nonmonetary benefit, as determined by the Court

(TFB Ex. 22, Attachment at 2; *see also* Tr. 461:8-19.) Ms. Sanchez ultimately declined Mr. Rush's settlement offer given the confusion

over who represented North Park and referred to the transcript of the May 24, 2018 hearing before Judge Thomas. (TFB Ex. 23.)

On July 3, 2018, North Park terminated Mr. Rush's representation. (Resp. Ex. 303.)

A week later, Mr. Rush filed an amended motion seeking to withdraw from the case which again repeated the assertion that, by virtue of the termination provision of the engagement agreement, North Park may be liable for Mr. Rush's attorney's fees. (TFB Ex. 26L.)

On July 11, 2018, the trial court heard Mr. Rush's motion and a day later granted his request to withdraw. (TFB Ex. 26M.) The court's order stipulated that Mr. Rush would remain on the service list and receive copies of all documents filed. (*Id.*) It also stipulated that any final judgment in the case would contain a provision stating that the court retained jurisdiction to hear motions for attorney's fees, expert fees, and costs. (*Id.*)

8. Incident after the July 18, 2018 Hearing

Although Mr. Rush was discharged from representing North Park, he remained in the case as counsel for Mr. Taylor, who was also individually named as a defendant. Mr. Rush filed a motion to

withdraw from that representation, which culminated in a hearing on July 18, 2018, before Judge Thomas. (Resp. Ex. 389.)

According to Ms. Sanchez, she had been threatened by Mr. Rush before, so she decided to bring a witness with her to the court hearings on July 11 and July 18. (Tr. 466:3-13.) That witness was Phillip Hobby, an independent contractor for FDOT. (*See id.* 465:14-24.)

Outside the courtroom after the July 18th hearing, with Mr. Hobby present, Mr. Rush threatened to sue Ms. Sanchez for tortious interference and accused her of being part of a scheme to deprive him of his fees for the nonmonetary benefits. (*Id.* 466:22-467:16; *see also id.* 100:3-10.) According to Ms. Sanchez, Mr. Rush also threatened to file a complaint with TFB against her. (*Id.* 467:17-21.) Mr. Rush denied threatening a complaint. (*Id.* 100:22-24.)

Mr. Rush later testified that he was angry because Ms. Sanchez “disparaged” one of his experts, Mr. Harris, at the July 11th hearing. (*Id.* 101:3-102:5.) However, at that hearing, Ms. Sanchez did not identify any expert by name, but stated only that she had recently received the bills for two of Mr. Rush’s experts and was “quite astounded” that “the appraisal alone” was more than Ms. Sanchez

made in a year, before expressly agreeing that FDOT would comply with statute in paying any attorney and expert fees. (Resp. Ex. 388 at 15:8-16:03.)

After the July 18 altercation with Mr. Rush, Ms. Sanchez reported the incident to her supervisor and followed up with an email to Mr. Petitt, recounting what happened. (Tr. 469:11-25; TFB Ex. 24.) By that point, Ms. Sanchez and her client, FDOT, had decided against continuing informal settlement discussions, preferring either a formal mediation or trial “where there’s a third party that can see what is going on.” (Tr. 471:9-20.)

9. Mr. Rush’s Lawsuit Against North Park

One month following his termination as North Park’s counsel, Mr. Rush sued his former clients in Hillsborough County circuit court, seeking binding arbitration regarding his claim for fees and alleging that he had significantly increased or enhanced the value of North Park’s real property. He asserted more than 10 claims against his former clients, including for conspiracy and violation of RICO. (See Tr. 407:7-13; TFB Ex. 29 at 2-7.)

As part of that suit, Mr. Rush filed and recorded two lis pendens encumbering the North Park property subject to the eminent domain

action. (See TFB Ex. 27.) But Mr. Rush had no recorded interest in the subject property. (Tr. 244:16-245:19, 404:18-405:16.) The trial court granted North Park's motion and dissolved both lis pendens. (TFB Ex. 28; Tr. 405:3-16.)

The matter proceeded to binding arbitration before retired Circuit Court and Third District Court of Appeal Judge Melvia B. Green as arbitrator. (See TFB Ex. 29.) After hearing testimony and receiving evidence, Judge Green denied each of Mr. Rush's claims. Although the parties had not agreed to a "reasoned award," Judge Green issued a detailed 32-page award, finding in relevant part that Mr. Rush largely acted out of his own self-interest in pursuing the claim for nonmonetary benefits (and thus corresponding attorney's fees) and actively sought to challenge his client's efforts to expeditiously resolve the eminent domain case. (TFB Ex. 29; *see also* Tr. 247:9-23.)

Mr. Rush and North Park ultimately settled their dispute. (Tr. 165:20-167:7, 249:13-25; Resp. Exs. 150, 170-173.)

10. The Settlement of the Eminent Domain Action

Meanwhile, after formal mediation in November 2018, North

Park and FDOT reached a settlement in the eminent domain action. The settlement did not require the relocation of the drainage pond. (Tr. 408:10-409:6.) The parties entered into a stipulated final judgment in January 2019 in which North Park was paid the monetary value of the property taken, the experts' fees were paid, and the court retained jurisdiction over the matter of attorney's fees. (TFB Ex. 26Q, Exhibit "B.")

Mr. Rush contested North Park's subsequent request for attorney's fees and continued to press his claim for fees premised on the recovery of nonmonetary benefits, calling the stipulated final judgment a "sham." (TFB Exs. 26Q, 26R.) Mr. Rush asserted that North Park and FDOT

may or have entered into a "sham" settlement agreement and a "sham" or fraudulent stipulated final judgment, wherein they have misrepresented certain facts in an effort to damage, reduce, preclude or otherwise interfere with the Attorneys' previously filed motions for attorneys' fees, expert fees and costs, in order to frustrate or preclude the Attorneys or North Park's recovery of attorneys' fees and costs from FDOT, including the payment to Attorneys of attorneys' fees for monetary benefits and nonmonetary benefits

(TFB Ex. 26Q at 7 (emphases omitted).)

Ultimately, Judge Thomas entered an order denying Mr. Rush's motion to strike the judgment, upholding the stipulated final judgment, and striking Mr. Rush's allegations of fraud. (TFB Ex. 26S at 1-2.)

III. DISCIPLINARY PROCEEDINGS

On November 17, 2020, TFB filed a formal complaint initiating these disciplinary proceedings against Mr. Rush, asserting that his conduct violated Rules 4-1.2, 4-1.4, 4-1.5, 4-1.7, 4-3.1, 4-3.4, and 4-8.4 of the RRTFB. (See Tab 1, TFB Complaint.) The matter was initially assigned to the Honorable Linda R. Allan, but due to scheduling issues, Judge Allen withdrew and was replaced by the Honorable William Douglas Baird as Referee on April 15, 2021. (Tabs 3, 4, 53.)

A. The Final Hearing

The Referee conducted a final evidentiary hearing on guilt over eight days, on September 22, 23, 24, 27, 28, 29, and 30, and October 4, 2021. The Referee took testimony from 13 witnesses, including Mr. Rush, Todd Taylor, Richard Petitt, Aloyma Sanchez, Phillip Hobby, Jack Suarez, Devon Rushnell, Reginald Mesimer, Kevin Lee, and Michael Rocha. (ROR at 2.)

FDOT contractor Phillip Hobby testified on the third day of the hearing, on September 24, 2021. (See Tr. 535:7-9.) During his testimony, an issue arose concerning a memorandum that Mr. Hobby prepared following the altercation between Mr. Rush and Ms. Sanchez after the July 18, 2018 court hearing. (See TFB Ex. 25.) Mr. Rush suggested that the memorandum's metadata reflected a later creation date than what Mr. Hobby claimed; although Mr. Hobby testified that he created the memorandum on July 19, 2018, Mr. Rush contended metadata showed the memorandum was created on August 16, 2018. (Tr. 545:10-546:1, 549:7-21.) Mr. Hobby acknowledged that there might have been two versions of the memorandum, but that they were "very similar." (*Id.* 550:11-551:4.) Mr. Rush argued that Mr. Hobby could not authenticate the memorandum that TFB sought to admit as an exhibit, and that the version of the memorandum shared at Mr. Hobby's deposition and submitted as an exhibit at the final hearing was not previously produced to Mr. Rush. (*Id.* 552:17-553:10.) After the Referee agreed to accept the version of the memorandum submitted as a TFB exhibit, Mr. Rush pushed for FDOT to produce the document in its native format, which the Referee agreed to order. (*Id.* 554:2-570:15.)

Later, on September 29, 2021, the Referee inquired of Mr. Rush's counsel whether they had received the requested metadata, and if they had chosen to call anyone to testify further about the memorandum issue. (*Id.* 1030:9-23.) Mr. Rush's counsel indicated that they had "chosen to leave it where it stands" and they were "comfortable proceeding without getting into the metadata of that any further." (*Id.* 1030:15-23.)

On the last day of the hearing, October 4, 2021, Mr. Rush's counsel raised additional concerns about the Hobby memorandum, arguing that it included additions not contained in the purported original version of the memorandum, including the allegation that Mr. Rush threatened Ms. Sanchez with a TFB complaint. (*Id.* 1247:12-1252:6.) In response, TFB argued that it did not matter for purposes of the charges, but noted that Mr. Rush had subpoenas issued to two FDOT representatives serving as records custodians to address the issue, but chose not to serve them. (*Id.* 1254:24-1255:6.)

The Referee offered that Mr. Rush could recall Mr. Hobby, although he did not view Mr. Rush's case as prejudiced since both "versions" of the memorandum were part of the record. (*Id.* 1257:15-1258:15, 1259:9-13, 1260:7-14; see TFB Ex. 25; Resp. Ex. 437.)

Ultimately, at the end of the hearing, Mr. Rush declined to recall Mr. Hobby. (Tr. 1309:10-15.)

After the evidentiary hearing, the Referee issued preliminary findings of fact and conclusions of law on December 27, 2021, finding Mr. Rush guilty of the misconduct charged. (Tab 197.) A sanction hearing was held on January 5, 2022, although it was not transcribed. (See ROR at 3.)

B. The Final Report of Referee

On February 7, 2022, the Referee issued his report, recommending that Mr. Rush be found guilty of all RRTFB violations charged and suspended from the practice of law for three years. The Referee found that Mr. Rush “conducted his representation in a manner that promoted his financial self-interest, namely his desire for a greater attorney’s fee than he would otherwise receive, over his obligation to serve the interests and objectives of his client” and that he “relied upon the uncertainties and ambiguities created by his [representation] contract to threaten and intimidate his client and others in order to pursue his objective of greater attorney’s fees.” (ROR at 5-6.) The Referee further noted that Mr. Rush had modified the representation agreement to state that “this agreement shall be

construed equally in regard to each party.” (*Id.* at 15; see TFB Ex. 7.) This modification “appeared designed to deprive the Client of the long-recognized rule of construction that allows ambiguous terms to be construed against the drafter, in this case the Respondent.” (ROR at 15.)

After tracing the complicated factual background, the Referee outlined the facts supporting Mr. Rush’s guilt on each of the RRTFB violations charged by TFB. With respect to Rule 4-1.2 (Objectives and Scope of Representation), the Referee found by clear and convincing evidence that Mr. Rush had failed to comply with North Park’s desire to use Mr. Petitt as co-counsel and for Mr. Rush to cooperate with Mr. Petitt, made a settlement offer to FDOT in furtherance of Mr. Rush’s own interests, deliberately refused his clients’ demand that he send a client-approved settlement offer to FDOT and altered the offer that was sent, and generally “conducted himself in a way that worked directly against [his clients’] objectives.” (ROR at 56-57.)

With respect to Rule 4-1.4 (Communication), the Referee found by clear and convincing evidence that Mr. Rush failed to reasonably consult with his clients and to explain the matter as reasonably

necessary to permit the clients to make informed decisions regarding the representation, pointing to the various unauthorized actions Mr. Rush undertook that foreclosed an earlier settlement of the case. (ROR at 58-59.)

The Referee also found that Mr. Rush's representation agreement violated Rule 4-1.5 (Fees and Costs for Legal Services). Calling the agreement "ambiguous, confusing and clearly one-sided," the Referee said that Mr. Rush had used the agreement to threaten North Park with significant liability in order to pressure North Park to continue the litigation and pursue Mr. Rush's own theory supporting the recovery of nonmonetary benefits and corresponding attorney's fees. (ROR at 59-60.)

The Referee also found that Mr. Rush violated Rule 4-1.7 (Conflict of Interest; Current Clients), because he made numerous filings in pursuit of his own objectives rather than those of his clients. (ROR at 60-61.)

With respect to Rule 4-3.1 (Meritorious Claims and Contentions), the Referee found that Mr. Rush's filing of two lis pendens to encumber North Park's property and Mr. Rush's

unauthorized motions for summary judgment were unsupported by the law and facts. (ROR at 61-62.)

The Referee also recommended finding Mr. Rush guilty of violating Rule 4-3.4 (Fairness to Opposing Party and Counsel), because he unjustifiably threatened to file a complaint with TFB and a lawsuit against Ms. Sanchez. (ROR at 62-63.)

In addition, the Referee found by clear and convincing evidence that Mr. Rush violated Rule 4-8.4(d) (Misconduct) by engaging in conduct prejudicial to the administration of justice, including attempting to sabotage the clients' mediated settlement, lodging numerous claims including fraud and RICO claims against his clients, acting to delay the eminent domain proceedings, and acting unprofessionally toward Ms. Sanchez. (ROR at 63.)

Turning to the recommended discipline, the Referee found several aggravating factors:

- Dishonest or selfish motive, Standard 3.2(b)(2);
- Multiple offenses, Standard 3.2(b)(4);
- Bad faith obstruction of the disciplinary proceeding given Mr. Rush's conduct in the disciplinary process, including through his "argumentative and unprofessional" conduct at the

deposition of Ms. Sanchez and by refusing to attend a sworn statement before TFB counsel and a grievance committee member, *see* Standard 3.2(b)(5);

- Refusal to acknowledge the wrongful nature of his conduct, Standard 3.2(b)(7); and
- Substantial experience in the law, Standard 3.2(b)(9).

(ROR at 64-65.)

Balanced against those factors, the Referee found a single mitigating one: absence of a prior disciplinary record. (ROR at 66); *see also* Standard 3.3(b)(1).

The Referee then turned to the appropriate sanction. He considered the recommended discipline under three Standards: Standard 4.3 (failure to avoid conflicts of interest); Standard 6.2 (abuse of the legal process); and Standard 7.1 (unreasonable or improper fees). (ROR at 66-67.) In light of the arguments made at the sanctions hearing, and several of this Court's cases ordering attorney discipline, the Referee recommended that this Court suspend Mr. Rush from the practice of law for three years and that he pay TFB's costs in these proceedings. (*Id.* at 67-73.)

Mr. Rush's request for review of the Report of Referee followed.

SUMMARY OF ARGUMENT

In the course of the litigation underlying this disciplinary proceeding, Mr. Rush violated several RRTFB when he repeatedly sought to maximize his attorney's fees, and overzealously pursued the payment of those fees, without concern for the objectives and interests of his clients. In doing so, Mr. Rush pursued remedies his clients explicitly did not want to pursue, delayed the resolution of the litigation when his clients' primary objective was to conclude the litigation as quickly as possible, made a settlement offer without his clients' approval or knowledge, made a subsequent settlement offer containing different terms than the terms his clients requested, filed motions his clients did not authorize, intimidated his clients into believing they could not terminate his representation without owing him up to \$1 million in attorney's fees for which his clients would not be responsible if Mr. Rush's representation continued, and filed two lis pendens encumbering his clients' property, despite having no recorded interest in that property and there being no arguable nexus between his claim for fees and the property, among other misconduct.

While there is little question that an attorney has a right to seek payment for his work, Mr. Rush's overzealous pursuit of his attorney's fees crossed the ethical line. Because the Referee's findings of fact and recommendations of guilt are supported by competent, substantial evidence, and because the recommended discipline is supported by case law and the Standards, this Court should accept the Referee's recommendations and suspend Mr. Rush from the practice of law for three years.

In his initial brief, Mr. Rush challenges each of the rule violations found, largely asking this Court to accept his version of the facts over those found by the Referee. But the Referee was not required to accept Mr. Rush's version of the facts, and the record amply supports the Referee's conclusions.

As to the Referee's conclusion that Mr. Rush violated Rule 4-1.5(a) of the RRTFB—which prohibits attorneys from entering agreements for illegal, prohibited, or excessive fees—the record shows that Mr. Rush's 2014 eminent domain representation agreement contained confusing provisions regarding his compensation that he used against his clients. Specifically, the agreement said that Mr. Rush would look to only the condemning

authority for payment, but at the same time warned his clients that they would be responsible for his fees if they terminated the representation. Mr. Rush used this confusion to his advantage, causing his clients to delay terminating his representation under the threat of substantial fees of up to \$1 million. Mr. Rush argues that Rule 4-1.5 does not apply to his agreement, but Rule 4-1.5 plainly applies to all attorney fee agreements, contingency or not. Mr. Rush further argues that his clients “repudiated” the agreement, but, even if that were true, nothing excused Mr. Rush from complying with the RRTFB.

The record also supports the Referee’s conclusion that Mr. Rush had a prohibited conflict of interest under Rule 4-1.7 of the RRTFB. Mr. Rush pushed beyond reason in pursuit of his own interests—his claim for fees including fees premised on the recovery of nonmonetary benefits—delaying the resolution of the eminent domain case to his clients’ detriment.

With respect to Rule 4-3.1, the record supports the Referee’s finding that Mr. Rush pursued claims that had no basis in law or fact. Mr. Rush filed two lis pendens encumbering North Park’s property, despite having no recorded interest in that property and

there being no arguable nexus between his claim for fees and that property.

The record likewise supports the Referee's determinations as to the other rule violations charged against Mr. Rush. Namely, the record supports that Mr. Rush is guilty of violating Rule 4-3.4 (fairness to opposing party and counsel) because the Referee was entitled to find Ms. Sanchez's testimony regarding Mr. Rush's threats credible. Similarly, the record supports the Referee's conclusion that Mr. Rush violated Rules 4-1.2 (objectives and scope of representation) and 4-1.4 (communications), as demonstrated by Mr. Rush's numerous efforts to advance his claim for fees based on a legal theory his clients did not support, including making two unauthorized settlement offers to FDOT. Finally, all the evidence of Mr. Rush's relentless and unreasonable pursuit of fees supports the Referee's finding that Mr. Rush's conduct was prejudicial to the administration of justice under Rule 4-8.4(d).

In addition to accepting the Referee's recommendations regarding Mr. Rush's guilt, the Court should also impose the Referee's recommended discipline: a three-year suspension and payment of TFB's costs in this proceeding. A three-year suspension

is authorized by the Standards and in line with several of this Court's discipline cases involving cumulative misconduct. And because Mr. Rush is guilty of the rule violations for which he is charged, this Court should impose the Referee's recommended sanction of payment of TFB's costs.

ARGUMENT

I. THE COURT SHOULD ADOPT THE REFEREE'S RECOMMENDATIONS OF GUILT.

A. Standard of Review

A party challenging "the referee's findings of fact and conclusions as to guilt . . . carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." *Fla. Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2017). A party will not meet that burden "simply by pointing to contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings." *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000) (internal quotation marks omitted). Moreover, a referee's "judgment regarding credibility" of witnesses "should not be overturned absent clear and convincing evidence that [the referee's] judgment is incorrect." *Fla. Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006).

B. The Referee's Recommendations of Guilt Are Supported by Competent, Substantial Evidence.

Mr. Rush attacks each of the rule violations found by the Referee. For the reasons that follow, the Court should approve the Referee's fact findings and recommendations of guilt.

1. Rule 4-1.5 (Fees and Costs for Legal Services)

Under Rule 4-1.5(a) of the RRTFB, an attorney must not enter into an agreement for an illegal, prohibited, or clearly excessive fee or cost. An agreement containing a discharge provision runs afoul of this rule if the "effect" of the discharge provision is to "intimidate the client into not exercising [his or] her right to discharge" the attorney and "to penalize any such exercise of that right." *Fla. Bar v. Doe*, 550 So. 2d 1111, 1112-13 (Fla. 1989). The Referee correctly found that Mr. Rush's 2014 agreement to represent North Park in the eminent domain action produced such an effect.

Mr. Rush's 2014 agreement confusingly stated both that: (1) his fees would "be limited to the amount paid to Attorney" by FDOT "through a settlement or the amount awarded by the Court"; and (2) that North Park would be obligated to pay Mr. Rush "the reasonable value of his services" if they chose to terminate his representation.

(TFB Ex. 7 at 1, 3.) North Park understood the agreement to mean that only FDOT would be required to pay Mr. Rush's fees, not North Park. (See, e.g., Tr. 672:3-9.) Mr. Rush used this confusion to his advantage, telling the clients at the critical April 12, 2018 meeting at which North Park indicated it wanted to get to closing as soon as possible that North Park could be on the hook for his fees, which he could only guess were in the range of \$300,000 to \$1 million by that point. (*Id.* 86:20-87:8, 670:24-671:8, 671:20-672:9, 748:13-749:25; see also *id.* 84:11-85:21.)

This seemingly arbitrary figure bore little if any relation to the reasonable value of services rendered by Mr. Rush as of April 12, 2018. When the case eventually settled at mediation, the attorney fee paid by FDOT was around \$110,000. (*Id.* 642:13-20.) Instead, the attorney's fees of up to \$1,000,000 appear to be Mr. Rush's estimation of the amount of a fee award that would follow a substantial nonmonetary benefit, if proven. Mr. Rush was pursuing this nonmonetary benefit theory on his own without the approval of his clients. Therefore, the message by Mr. Rush to his clients was clear: either allow him to continue his strategy of pursuing a nonmonetary benefit or face a penalty up to \$1,000,000 in attorney's

fees.

As North Park's managing member Jack Suarez credibly testified at the final hearing, he believed that if North Park did not settle the case as Mr. Rush wanted it to, North Park would be responsible for Mr. Rush's fees; Mr. Suarez was thus hesitant to terminate Mr. Rush because he was "fearful of the fee arrangement and being in violation of the agreement." (*Id.* 689:18-25, 690:1-8.) This is consistent with his statements at the May 24, 2018 hearing at which Mr. Rush disputed who represented North Park, where Mr. Suarez stated he was "confused about what to do" given the terms of the representation agreement, particularly the discharge term, and the large dollar fees at stake. (TFB Ex. 23 Attachment, H'rg Tr. 9:2-13.) The Referee found Mr. Suarez's testimony credible, and the Referee's judgment on the credibility of witness testimony should not be overturned absent clear and convincing evidence that his judgment was incorrect. *See Tobkin*, 944 So. 2d at 224. Accordingly, the evidence presented at the final hearing demonstrated that the "effect" of the discharge provision in Mr. Rush's agreement with North Park was to "intimidate [North Park] into not exercising [its] right to discharge [Mr. Rush] from representation," and therefore violated

Rule 4-1.5. *See Doe*, 550 So. 2d at 1112-13.

Mr. Rush falls far short of showing that the record evidence “clearly contradicts” the Referee’s findings that Mr. Rush violated Rule 4-1.5. Instead, Mr. Rush makes a variety of arguments that miss the mark.

First, Mr. Rush contends that he did not violate Rule 4-1.5 because his fee agreement was lawful and unambiguous. Mr. Rush points to testimony by attorneys Michael Rocha and Henry Campbell to support this argument, but mischaracterizes their testimony as stating that the agreement was “lawful, unambiguous and enforceable.” (Initial Br. at 22-23, 25-26.) Instead, Mr. Campbell simply testified that statutory attorney’s fees in eminent domain cases are not contingent (Tr. 1037:10-24), and that certain provisions of the 2014 representation agreement appeared in line with law (*id.* 1041:13-24, 1042:17-1043:4, 1050:14-1051:13); he did not testify that the agreement was completely “lawful, unambiguous, and enforceable,” particularly in the context of how Mr. Rush used the provisions to intimidate his clients. Similarly, Mr. Rocha testified that various provisions in the 2014 representation agreement were not “out of the ordinary” (*see id.* 995:16-1000:25), but he did not

testify regarding the conflicting fee provisions specifically or the agreement as a whole.

Mr. Rush further contends that “North Park’s expert attorney Michael Rocha testified that North Park directed Rocha to review the 2014 fee agreement and Rocha determined that the fee agreement was clear, unambiguous, reasonable and enforceable” (Initial Br. at 12), but that is not an accurate account of Mr. Rocha’s testimony. Instead, Mr. Rocha testified that, although he may have looked over the fee agreement during his representation of North Park, that was not the purpose of his engagement, and he did not review the agreement to determine its legality. (*See* Tr. 944:19-947:23, 987:20-988:23.) Indeed, at the final hearing, Mr. Rush agreed with the Referee that “[the North Park clients] weren’t asking [Mr. Rocha] for an opinion about whether [the fee agreement] was legal or illegal.” (*See id.* 987:20-988:23.)

Moreover, regardless of the substance of the attorneys’ testimony, the Referee did not need Mr. Rocha’s or Mr. Campbell’s opinions on the legality or interpretation of the fee agreement, and such purported expert testimony is improper. *See, e.g., In re Crossen*, 880 N.E.2d 352, 380 (Mass. 2008) (quoting *Fishman v. Brooks*, 487

N.E.2d 1377, 1381-82 (Mass. 1986) (“Expert testimony concerning the fact of an ethical violation is not appropriate. . . . A judge can instruct the jury (or himself) concerning the requirements of ethical rules.”)); *see also Matter of Tobin*, 628 N.E.2d 1268, 1271 (Mass. 1994) (“Neither was it error for the committee to conclude in the absence of expert testimony that the respondent needlessly probated the will. Expert testimony is unnecessary to prove ethical violations.”); *see also, e.g., Waite, Schneider, Bayless & Chesley Co., L.P.A. v. Davis*, 253 F. Supp. 3d 997, 1012 (S.D. Ohio June 3, 2015) (expert testimony that was “essentially, an instruction how to interpret the fee agreement” was improper subject matter for an expert; “experts may not testify about the meaning of contractual language, absent some indication—which is not present here—the contract uses terms of art or refers to industry customs beyond the ken of average jurors”).

Second, Mr. Rush suggests that the agreement cannot be construed to impose a penalty in violation of Rule 4-1.5 because it is not a contingency fee agreement. (Initial Br. at 12.) Even accepting the premise that Mr. Rush’s representation agreement was not based on a contingency, Rule 4-1.5 does not apply to only contingency fee

agreements. *See, e.g., Fla. Bar v. Carlon*, 820 So. 2d 891, 898 (Fla. 2002) (determining an hourly fee arrangement violated Rule 4-1.5). What is prohibited by Rule 4-1.5 is any agreement which is used to foreclose clients' "freedom to substitute attorneys without economic penalty." *Doe*, 550 So. 2d at 1113 (citing *Rosenberg v. Levin*, 409 So. 2d 1016, 1021 (Fla. 1982)). As explained above, the record supports the finding that Mr. Rush's agreement produced the effect prohibited by Rule 4-1.5.

Third, Mr. Rush essentially contends that because North Park "repudiated" its agreement with him, he was no longer obligated to comply with the agreement. (Initial Br. at 37-38.) Even if that were true, Mr. Rush is still obligated to comply with the RRTFB, and his clients' "repudiation" of their agreement would not otherwise entitle him to enforce a penalty provision barred by Rule 4-1.5.

Finally, Mr. Rush complains that TFB failed to disclose "expert" opinions offered by several witnesses, specifically, Mr. Burns, Mr. Petitt, and Ms. Sanchez. (Initial Br. at 39.) But, as the Referee explained, these witnesses were fact witnesses, not experts. (*See Tr.* 1044:22-1045:13.)

In sum, there is ample support in the record for the Referee's

finding that the fee agreement's confusing and intimidating fee provisions violated Rule 4-1.5, and Mr. Rush's various arguments to the contrary are unavailing.

2. Rule 4-1.7 (Conflict of Interest)

Rule 4-1.7 of the RRTFB bars a lawyer from representing a client if, among other things, "there is a substantial risk that the representation" of that client "will be materially limited by . . . a personal interest of the lawyer." RRTFB 4-1.7(a)(2).

Mr. Rush argues that Rule 4-1.7 simply does not apply to a dispute concerning lawful fees. (Initial Br. at 40-41.) But that mischaracterizes what occurred. Mr. Rush took numerous actions designed to advance his own claim for fees based on purported nonmonetary benefits not sought by the clients and prolonged the case in spite of his clients' expressed desire to quickly settle. As just some examples, Mr. Rush filed new motions for partial summary judgment without his clients' approval that largely mirrored the motions the clients previously directed him to withdraw (*compare* TFB Ex. 26B, Attachment, *and* TFB 26B, "Exhibit 'A,'" *with* TFB Ex. 26I), sent a settlement offer to FDOT without his clients' approval, and sent another settlement offer contrary to the precise language

his clients dictated he follow (TFB Ex. 14 at 2-3; TFB Ex. 21; TFB Ex. 22; Tr. 241:7-244:5). Even if Mr. Rush believed that the settlement language approved by his clients and drafted by Mr. Pettitt was not lawful, this did not authorize Mr. Rush to instead submit a settlement offer with modified language to FDOT without his clients' approval. His clients had explicitly instructed him not to deviate from the language of the settlement drafted by Mr. Pettitt. (TFB Ex. 21.) FDOT's counsel, Ms. Sanchez, testified unequivocally that Mr. Rush's actions—including his never-ending pursuit of nonmonetary benefits—impeded settlement of North Park's case. (Tr. 475:2-9.) Later, after Mr. Rush was discharged and a settlement was reached between North Park and FDOT, Mr. Rush filed various motions with the court to undo that settlement, calling it a "sham" and accusing his former clients and FDOT of fraud, allegations that were later stricken by a court. (TFB Exs. 26O, 26P, 26Q, 26R; Tr. 409:9-22, 472:12-18, 474:5-11.)

In short, the record supports the Referee's finding that Mr. Rush violated Rule 4-1.7. Despite Mr. Rush's contention that he "reasonably refused" to waive his claim for attorney's fees (Initial Br. at 41), the record evinces that Mr. Rush's conduct went far beyond

the edge of reason in his aggressive pursuit for fees.

3. Rule 4-3.1 (Meritorious Claims and Contentions)

Rule 4-3.1 prohibits a lawyer from bringing or defending a proceeding, or asserting or controverting an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. RRTFB 4-3.1. The Referee found that Mr. Rush violated this rule by filing two unauthorized lis pendens that needlessly clouded the title to North Park's property, in addition to filing motions unauthorized by the client. (ROR at 61-62.) The Referee's recommendation of guilt is supported by the record and law.

Mr. Rush contends that he was permitted by Rule 4-1.8(a) and (i)(1) of the RRTFB to file a charging lien to secure his attorney's fees. While those provisions authorize Mr. Rush to acquire a lien to secure his fees against any money judgment or settlement, they do not go so far as to authorize Mr. Rush to file a lis pendens encumbering North Park's title to its real property. Contrary to what the initial brief suggests (*see* Initial Br. at 34), Mr. Rush did not file a charging lien in the eminent domain proceeding to secure his attorney's fees; he instead filed the lis pendens on the property that was the subject of the eminent domain proceeding in his *separate* lawsuit against North

Park—a lawsuit founded not on claims concerning North Park’s property itself but on claims that, among other things, North Park breached the agreement and committed fraud. (TFB Ex. 27; *see also* TFB Ex. 29 at 2-7 (listing claims).) The lis pendens—“a harsh and oppressive remedy”—did not secure Mr. Rush’s fees in the eminent domain action; rather, it merely “operate[d] as a cloud on the title” and effectively “prevent[ed] [the] owner from selling” the property. *See Avalon Assocs. of Del. Ltd. v. Avalon Park Assocs.*, 760 So. 2d 1132, 1134 (Fla. 5th DCA 2000).

Consistent with the testimony that North Park successfully dissolved the lis pendens (*see* Tr. 245:13-19, 404:18-405:16), Mr. Rush’s lis pendens was improper because he did not have a recorded interest in the property and there was no nexus between his litigation to enforce his attorney’s fee agreement and the apparent legal or equitable ownership of the property against which he filed the lis pendens. *DeGuzman v. Balsini*, 930 So. 2d 752, 755 (Fla. 5th DCA 2006) (“When the primary purpose of a lawsuit is to recover money damages and the action does not directly affect the title to or the right of possession of real property, the filing of a notice of lis pendens is not authorized.”); *see also, e.g., Martell v. Dubner*, 885 So. 2d 469,

471 (Fla. 4th DCA 2004) (To support entry of a lis pendens, “the plaintiff is not required to show a substantial likelihood of success on the merits, only that there is a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit.” (internal quotations omitted)); *Burnette v. Black*, 578 So. 2d 740, 741 (Fla. 5th DCA 1991) (dissolving lis pendens because “this litigation could not result in a judgment which would award that undisputed land to Respondents. There is no justification for interfering with Petitioners’ right to transfer that land.”).

In response, Mr. Rush cites *S&T Builders v. Globe Properties, Inc.*, 944 So. 2d 302 (Fla. 2006), for the proposition that he could lawfully file and record a lis pendens premised on an equitable lien, even when that lien is not based upon any mortgage or duly recorded instrument. (Initial Br. at 44.) But *S&T* involved an *equitable construction lien*, not an attorney’s charging lien, and it largely concerned what attorney’s fees may be included in a lis pendens bond, not the propriety of the actual filing of the lis pendens. *S&T Builders*, 944 So. 2d at 306; *see also S&T Builders v. Globe Props., Inc.*, 900 So. 2d 375, 375 (Fla. 4th DCA 2005). *S&T* does not

undermine the well-settled law that a lis pendens is not available where the filing party's claim has no relation to the property the party seeks to encumber. *See, e.g., Blue Star Palms, LLC v. LED Trust, LLC*, 128 So. 3d 36, 39 (Fla. 3rd DCA 2012) (“When a plaintiff can be afforded complete relief on a claim without reference to the title to the real property, a lis pendens cannot be maintained.”).

Further, Mr. Rush's filing of motions that were substantially similar to the ones his clients directed him to withdraw also supports the Referee's finding that Mr. Rush violated Rule 4-3.1. *See, e.g., Fla. Bar v. Committe*, 916 So. 2d 741, 747–48 (Fla. 2005) (referee could properly find that respondent's multiple attempts to relitigate the same nonmeritorious and frivolous issues were without a good faith basis in law, in violation of Rule 4-3.1).

In conclusion, the record supports the Referee's finding that Mr. Rush violated Rule 4-3.1, given a number of Mr. Rush's filings, including his meritless lis pendens.

4. Rule 4-3.4 (Fairness to Opposing Party and Counsel)

RRTFB 4-3.4 provides, in relevant part, that a lawyer may not “threaten to present disciplinary charges under these rules solely to

obtain an advantage in a civil matter.” RRTFB 4-3.4(h). The Referee found that Mr. Rush violated this rule “by unjustifiably threatening to file a bar complaint and lawsuit against another attorney due to her alleged, but nonexistent, interference with [Mr. Rush’s] ability to collect attorney’s fees.” (ROR at 62.) The Referee’s finding is supported by competent, substantial evidence and should be accepted.

Ms. Sanchez credibly testified that, after the July 18, 2018 hearing, Mr. Rush told her he “would sue [her] for tortious interference with a business relationship, and he also stated that he was going to take [her] to The Florida Bar.” (Tr. 466:22-467:5.) This is consistent with emails Ms. Sanchez sent to Mr. Pettit and her supervisor shortly after the hearing on July 18, 2018, in which she stated that Mr. Rush “threaten[ed] to sue me personally as well as file a bar complaint against me.” (TFB Ex. 24; Resp. Ex. 422 (July 18, 2018 5:24 PM email).) The Referee appropriately found Ms. Sanchez credible (ROR at 10), and the Referee’s judgment on Ms. Sanchez’s testimony should not be overturned absent clear and convincing evidence that his judgment was incorrect. *See Tobkin*, 944 So. 2d at 224.

Mr. Rush essentially argues two things in response: it was Ms. Sanchez, and not he, that violated Rule 4-3.4 in “disparaging” one of his experts, and Ms. Sanchez and Mr. Hobby purportedly falsified a memorandum recounting the incident, undermining Ms. Sanchez’s credibility. (Initial Br. at 48-49.)

First, whether or not Ms. Sanchez violated Rule 4-3.4 is not at issue in this proceeding. *Fla. Bar v. Norkin*, 132 So. 3d 77, 86 (Fla. 2013) (opposing counsel’s conduct “does not provide a license for an attorney to engage in misconduct”). Regardless, Mr. Rush overstates what Ms. Sanchez said. Although Mr. Rush accuses Ms. Sanchez of violating the rule by “disparag[ing] North Park’s appraiser” in an “unsolicited and ex-parte attack” at a hearing (Initial Br. at 48), the record shows that Ms. Sanchez did not name any expert, but stated only that she had received the bills for two of Mr. Rush’s experts and was “quite astounded” by the amount of the expert appraisal, as it was more than Ms. Sanchez made in a year. (Resp. Ex. 388 at 15.)

Second, Mr. Rush’s claims that FDOT falsified a memorandum prepared by FDOT employee Phillip Hobby recounting the incident are unsubstantiated. (See Initial Br. at 52-53.) To be sure, Ms. Sanchez’s testimony alone supports the Referee’s finding.

Regardless, Mr. Rush's arguments regarding the Hobby memorandum should be rejected. Although Mr. Rush challenged the memorandum, he ultimately declined to serve a subpoena on a FDOT records custodian to further test his theory and did not recall Mr. Hobby to press the topic. (Tr. 1254:24-1255:6, 1257:15-20, 1309:10-15.) At the end of the day, both "versions" of the Hobby memorandum are in the record, and it was the Referee's job to decide the credibility of Ms. Sanchez and Mr. Hobby on the stand. Mr. Rush does not present clear, convincing evidence to require reversal of the Referee's finding that both witnesses were credible, and the Referee was not required to accept Mr. Rush's version of events. *See Norkin*, 132 So. 3d at 84 n.1; *see also Fla. Bar v. Petersen*, 248 So. 3d 1069, 1077 (Fla. 2018) ("Ultimately, this case is one that comes down to witness credibility," and given the referee's "unique position to assess the credibility of witnesses," the Court will "defer to the referee's credibility assessments" absent "clear and convincing evidence that his judgment is incorrect" (internal quotation marks omitted)).

Mr. Hobby also did not undermine Ms. Sanchez's testimony that Mr. Rush threatened a TFB complaint. Mr. Hobby testified that everything in his memorandum—including the assertion Mr. Rush

threatened a TFB complaint—was true and correct to the best of his knowledge. (Tr. 572:4-6; *see also* TFB Ex. 25.) At the final hearing, Mr. Hobby specifically recalled Mr. Rush being “very aggressive” towards Ms. Sanchez, threatening to sue her, and accusing her of fraud, but he was “not sure” when asked if he remembered any statements Mr. Rush made about taking Ms. Sanchez to TFB. (Tr. 540:12-541:19.) As Mr. Hobby testified, that is why he created the memorandum soon after the incident—because he would not necessarily remember everything that occurred, and he thought it would likely end up in litigation one day. (*Id.* 579:8-13.)

In short, competent, substantial evidence, including Ms. Sanchez’s credible testimony, supports the Referee’s recommendation of guilt on Rule 4-3.4.

5. Rule 4-8.4(d) (Misconduct)

Rule 4-8.4(d) of the RRTFB bars a lawyer from engaging “in conduct in connection with the practice of law that is prejudicial to the administration of justice.” RRTFB 4-8.4(d). Mr. Rush does not contest the evidence supporting the Referee’s findings, but instead argues that his conduct cannot violate this rule because it was speech protected by the First Amendment. (*See* Initial Br. at 58-59.)

Threats to opposing counsel, like Mr. Rush's threats to Ms. Sanchez, are not protected by the First Amendment. *Fla. Bar v. Sayler*, 721 So. 2d 1152, 1155 (Fla. 1998); *see also Fla. Bar v. Wasserman*, 675 So. 2d 103, 104-05 (Fla. 1996). Mr. Rush also ignores the other evidence that supports the Referee's finding that Mr. Rush engaged in conduct prejudicial to the administration of justice. While Florida law entitled Mr. Rush to recovery of certain fees, Mr. Rush's incessant pursuit of those fees and his baseless allegations against FDOT, his client, and Mr. Petitt are not protected by the First Amendment and are the appropriate subject of discipline. *See Committe*, 136 So. 3d at 1116 (observing that "filing a baseless allegation . . . is not protected by the First Amendment" and may violate Rule 4-3.4 and citing cases).

The record and law support the Referee's determination that Mr. Rush violated Rule 4-8.4(d).

6. Rule 4-1.2 (Objectives and Scope of Representation)

Rule 4-1.2 of the RRTFB requires a lawyer to "abide by a client's decisions concerning the objectives of representation" and "reasonably consult with the client as to the means by which they are

to be pursued.” RRTFB 4-1.2(a). While a lawyer “may take action on behalf of the client that is impliedly authorized to carry out the representation,” *id.* 4-1.2(a), Mr. Rush violated Rule 4-1.2 by taking several actions that were contrary to his client’s express objectives.

In response, Mr. Rush asserts he never wavered from the client’s objective and emphasizes North Park’s continual efforts to have the drainage pond relocated by FDOT a second time; Mr. Rush also notes that even if there were a change in objective, it “did not alter North Park’s obligation to pay Rush’s hourly attorney’s fees in the event that FDOT did not pay these attorney’s fees and costs.” (Initial Br. at 60-62.) However, the record evidence demonstrates that Mr. Rush took a number of actions contrary to the client’s objectives and instructions.

Mr. Rush essentially refiled motions his clients had directed him to withdraw. (*Compare* TFB Ex. 26C *and* TFB Ex. 26D, *with* TFB Ex. 26I.) He made a settlement offer without his clients’ approval, which was not even revealed to the clients until later litigation on Mr. Rush’s fees. (TFB Ex. 14; Tr. 241:7-244:5.) Mr. Rush also made a subsequent settlement offer contrary to the one his clients asked him

to make, after his clients explicitly directed him not to vary from the precise terms they had approved. (TFB Exs. 21 & 22.)

Mr. Rush has little response to these facts. With respect to the last, Mr. Rush contends that he could not send the exact settlement offer he was directed to send because it would result in the waiver of his fees and expert costs. (Initial Br. at 68.) In support, Mr. Rush falsely contends that his clients' direction "secretly deleted" his claim for fees and costs. (*Id.* at 69.) This is not true. As Mr. Rush's own exhibit shows, Mr. Petitt's June 28, 2018 letter, signed by client Jack Suarez, asked Mr. Rush to send a settlement offer to FDOT which stated at paragraph 5, "FDOT will pay the attorneys' fees and costs claimed by my firm, as established by the court at an appropriate hearing after entry of the stipulated final judgment." (Resp. Ex. 299, Exhibit B at 2; *see also* TFB Ex. 21 (same).) Mr. Rush's claim that he "faithfully sent the entire substance of the June 28, 2018 Petitt/North Park settlement proposal" is false. (*See* Initial Br. at 70.) Instead, Mr. Rush took it upon himself to rewrite the settlement offer by inserting a specific claim for fees and a requirement that those fees be included in the stipulated final judgment, as well as inserting numerous paragraphs related to his claim of nonmonetary benefits.

(TFB Ex. 22 at 2; *see also* Tr. 461:8-19.) Ultimately, Mr. Rush seemed concerned with requiring the trial court to retain jurisdiction in order to entertain motions for attorney’s fees after entering any stipulated final judgment, but that was implicit in the client-approved settlement offer. Regardless, no record evidence supports Mr. Rush’s assertion that he was being required to waive his claim for attorney’s fees.

What is more, at the May 24, 2018 hearing, Mr. Rush’s relentless desire to protect his claim for fees delayed the trial court’s ruling on two uncontested motions designed to expedite resolution of the case, to the clients’ detriment. Despite Mr. Rush’s suggestions, this conduct *was* contrary to the scope of Mr. Rush’s representation agreement (*see* Initial Br. at 62), which was to simply “represent Client in a condemnation proceeding” involving claims against FDOT with regard to the taking of North Park’s property. (TFB Ex. 7 at 1.)

7. Rule 4-1.4 (Communication)

Rule 4-1.4 of the RRTFB requires a lawyer to reasonably consult with the client about the means by which the client’s objectives are to be accomplished, and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding

the representation. RRTFB 4-1.4(a)(2), (b).

The record supports the Referee's finding that Mr. Rush violated this rule on numerous grounds. Mr. Rush communicated a settlement offer without his clients' knowledge and consent or approval, then later deliberately and significantly altered a client-approved settlement offer without consulting with or notifying his clients. Additionally, Mr. Rush refiled motions that his clients previously directed him to withdraw.

In response to the Referee's finding, Mr. Rush points to the numerous meetings and communications he had with his clients and contends that the Court could not reasonably find he failed to communicate with his clients. (Initial Br. at 72-73.) But that misses the point. At several critical junctures, Mr. Rush did not communicate or consult with North Park, likely because his intended action was contrary to their interests. Mr. Rush does not dispute those instances. The Court should accept the Referee's conclusion that Mr. Rush violated Rule 4-1.4.

II. THE COURT SHOULD ACCEPT THE REFEREE'S RECOMMENDATION OF A THREE-YEAR SUSPENSION.

A. Standard of Review

It is ultimately the responsibility of this Court to order the appropriate sanction. *Fla. Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020). Generally, the Court will not second-guess a referee's recommended discipline as long as that discipline (1) is authorized under the Standards and (2) has a reasonable basis in existing case law. *Id.* The Court has also expressly signaled to all members of TFB that it "has moved towards imposing harsher sanctions" for unethical and unprofessional conduct. *Id.*

B. Mr. Rush's Serious Misconduct Warrants a Three-Year Suspension.

The Court should approve the Referee's recommended discipline as it is supported by the Standards and case law.

Each of the applicable Standards considered by the Referee—Standards 4.3(b), 6.2(b), and 7.1(b)—supports a suspension. Standard 4.3(b) counsels a suspension because Mr. Rush knowingly had a conflict of interest with his clients, North Park, in pursuing his claim for fees no matter the interests of his clients and notwithstanding the fact that the eminent domain court's order

authorizing his withdrawal expressly preserved Mr. Rush's claim for fees. (See TFB Exs. 13, 21, 22, 26B, 26C, 26D, 26E, 26H, 26I, 26M, 26N, 26O, 26P, 26Q, 26R.) North Park suffered injury because Mr. Rush's conduct delayed the resolution of the eminent domain action and forced North Park to incur additional attorney's fees to help settle the eminent domain action and to fight Mr. Rush's separate action for fees.

With respect to Standard 6.2(b), suspension is warranted because Mr. Rush's conduct interfered with a legal proceeding in numerous respects, including by needlessly encumbering North Park's property through filing two lis pendens and by attempting to interfere with and undo North Park's settlement of the eminent domain action. (See Tr. 384:8-24, 475:2-9, 493:5-16; TFB Exs. 26O, 26 26P, 26Q, 26R, 27.)

Finally, Standard 7.1(b) counsels suspension because Mr. Rush's conduct evinces a clear violation of his duty owed to his clients: Mr. Rush elevated his own interests in obtaining attorney's fees above the clients' directive to settle the case.

In addition, the record supports the aggravating factors found by the Referee. Mr. Rush acted with a selfish motive (Standard

3.2(b)(2))—he pushed past the bounds of reason in seeking to protect not just his entitlement to fees, but the amount to which he believed he was entitled, based on an unproven theory of nonmonetary benefits—and the record supports finding Mr. Rush committed multiple offenses (Standard 3.2(b)(4)). The Referee also appropriately found that Mr. Rush engaged in bad faith obstruction of the disciplinary proceeding, including through his “argumentative and unprofessional” conduct while taking the deposition of Ms. Sanchez and his conduct at the final hearing. (ROR at 64; *see also* Tab 130 (attachment); *see, e.g.*, Tr. 1293:17-1294:22.) Mr. Rush also continues to refuse to acknowledge the wrongful nature of his misconduct, even now, as he spends much of his initial brief attempting to shift the blame to others, including Mr. Petitt, Ms. Sanchez, and his former clients, accusing them of, among other things, violating their own ethical and/or contractual obligations and committing or attempting fraud, extortion, and falsification of evidence. (*See, e.g.*, Initial Br. at 2-3, 5-6, 9-12, 28-29, 30-31, 40-41, 48-49, 51-53, 56-58, 74.) Finally, there can be no dispute that Standard 3.2(b)(9)’s aggravating factor, substantial experience in the law, applies as Mr. Rush has been licensed to practice law since

1982. (Tr. 25:10-26:13.)

Balanced against this host of aggravating factors is a single mitigating one: Mr. Rush has not been previously disciplined by TFB. (ROR at 66.) Given the applicable Standards, and the aggravating factors found, suspension is appropriate.

Because the Standards do not distinguish among discipline of differing lengths, this Court considers case law to determine whether the recommended term of suspension has a reasonable basis. See *Fla. Bar v. Dupee*, 160 So. 3d 838, 853 (Fla. 2015). The Referee's recommended sanction of a three-year suspension fits comfortably within this Court's precedent, including a trio of cases cited by the Referee: *The Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010); *The Florida Bar v. Committe*, 136 So. 3d 1111 (Fla. 2014); and *The Florida Bar v. Petersen*, 248 So. 3d 1069 (Fla. 2018).

In *Scott*, this Court rejected a referee's recommendation of an 18-month suspension in favor of a three-year suspension. The respondent was found to have violated numerous RRTFB including rules regarding conflicts of interest for representing multiple clients "either seriatim or in conjunction," who all had claims to the same limited funds in the attorney's trust account. *Scott*, 39 So. 3d at 316.

The referee found no aggravating factors and two mitigating factors—the absence of a prior disciplinary record and the respondent’s age. *Id.* at 314. Yet this Court imposed a harsher sanction in light of the respondent’s cumulative misconduct. This Court acknowledged that the Standards do not prescribe the appropriate length of a suspension; “[h]owever, if the egregiousness of the conduct is viewed as falling along a continuum, the closer the conduct falls on the continuum to the dividing line between suspension and disbarment, the longer the suspension that such conduct would warrant.” *Id.* at 318. Because the respondent’s conflict of interest fell “so close to the dividing line on the continuum between disbarment and suspension,” it supported imposition of the longest available suspension—three years. *Id.* Likewise, the cumulative nature of Mr. Rush’s misconduct warrants a longer suspension.

In *Committe*, this Court rejected a referee’s recommended sanction and instead imposed a three-year suspension “[g]iven [the respondent’s] serious ethical misconduct, and the aggravating factors.” 136 So. 3d at 1112. The respondent in *Committe* was charged with violating several RRTFB, including Rules 4-3.1 (non-meritorious claims), 4-3.4(g) (threatening criminal charges to obtain

an advantage), and 4-8.4(d) (conduct prejudicial to the administration of justice), in connection with the respondent's conduct in a lawsuit. 136 So. 3d at 1112-13. This Court noted that each of the respondent's violations, "standing alone," would warrant the 91-day rehabilitative suspension recommended by the referee. *Id.* at 1117. But given the "serious and egregious" nature of the misconduct altogether—that the respondent filed a frivolous lawsuit, refused to pay the attorney's fees he was ordered to pay, and erroneously accused a party of extortion—"a severe sanction" of a three-year suspension was warranted. *Id.* at 1117-18. Much like the respondent in *Committe*, Mr. Rush made frivolous filings—the two lis pendens, a RICO lawsuit, and baseless accusations of fraud in the eminent domain proceeding—and unjustifiably threatened opposing counsel with an ethics complaint and lawsuit, among other misconduct. The seriousness of this cumulative misconduct supports imposition of a longer suspension.

Likewise, this Court ordered a three-year suspension in *Petersen*, premised on an attorney's litany of misconduct including the failure to apprise the client of important information and an illegal fee agreement. *See* 248 So. 3d at 1071, 1077-81. The

numerous rule violations Mr. Rush has committed similarly supports imposition of a three-year suspension.

Because Mr. Rush's cumulative, egregious misconduct falls "close to the dividing line on the continuum between disbarment and suspension," *Scott*, 39 So. 3d at 318, TFB asks the Court to impose the Referee's recommended three-year suspension.

III. MR. RUSH SHOULD BE REQUIRED TO PAY TFB'S COSTS IN THESE PROCEEDINGS.

Mr. Rush contends that, because TFB has "failed to prove all or substantially all of its charges that Rush violated" the RRTFB, he is the "prevailing party" and should not be ordered to pay TFB's costs. (Initial Br. at 73-74.) However, because the record supports the Referee's recommendations of guilt, the Court should approve the Referee's recommendation that Mr. Rush pay TFB's costs in these proceedings. See RRTFB 3-7.6(q)(3) (where TFB is successful, in whole or in part, the referee may assess TFB's costs against the respondent unless it is shown that the costs were unnecessary, excessive, or improperly authenticated).

CONCLUSION

For the foregoing reasons, TFB respectfully requests that the Court approve the Referee's recommendations of guilt, recommended discipline of a three-year suspension, and recommended payment of TFB's costs.

Respectfully submitted on July 27, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served via the Florida Courts E-Portal and by email on July 27, 2022:

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CERTIFICATE OF COMPLIANCE

I certify this document complies with the applicable font and page requirements as modified by this Court's June 23, 2022 order. See Fla. R. App. P. 9.045(e) & 9.210.

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