
IN THE SUPREME COURT OF FLORIDA

Case No. SC21-011
The Florida Bar File No. 2018-70, 073 (11G)

THE FLORIDA BAR,

Complainant,

v.

STEPHEN MATTHEW BANDER,

Respondent.

THE FLORIDA BAR'S ANSWER BRIEF

Mark Mason
Florida Bar No. 98013
Patricia Ann Toro Savitz
Florida Bar No. 559547
The Florida Bar
651 E. Jefferson St.
Tallahassee, Florida 32399
(850) 561-5600
psavitz@floridabar.org
mmason@floridabar.org

Jennifer R. Falcone
Florida Bar No. 624284
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445
jfalcone@floridabar.org

Kevin W. Cox
Florida Bar No. 34020
Tiffany A. Roddenberry
Florida Bar No. 92524
Kathryn Isted
Florida Bar No. 1005163
Holland & Knight LLP
315 S. Calhoun St., Suite 600
Tallahassee, Florida 32301
(850) 224-7000
kevin.cox@hklaw.com
tiffany.rodtenberry@hklaw.com
kathryn.isted@hklaw.com

Counsel for Complainant, The Florida Bar

RECEIVED, 09/12/2022 04:58:21 PM, Clerk, Supreme Court

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE AND FACTS.....	1
I. NATURE OF THE CASE.....	1
II. FACTUAL BACKGROUND.....	1
A. The 2015 SEC Proceedings Against Mr. Bander's Father and His Law Firm.....	2
B. Respondent's EB-5 Representations Underlying the Disciplinary Proceedings.....	3
III. DISCIPLINARY PROCEEDINGS	6
A. The Final Hearing.....	7
1. <i>Evidence Showing the Purpose and Nature of the MMRC Payments as Property Belonging to Mr. Bander's Clients</i>	7
2. <i>Evidence Showing How Mr. Bander Handled the MMRC Payments and Related Communications with His Clients</i>	12
B. The Report of Referee	16
SUMMARY OF ARGUMENT	21
ARGUMENT	25
I. THE COURT SHOULD ADOPT THE REFEREE'S RECOMMENDATIONS OF GUILT.	25
A. Standard of Review	25
B. Mr. Bander Is Guilty of Violating Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e).....	26
1. <i>The Referee's Determination that the MMRC Payments Were the Property of Mr. Bander's Clients Is a Factual Finding Afforded a Presumption of Correctness</i>	28
2. <i>Competent, Substantial Evidence Supports the Referee's Finding that the MMRC Payments Were the Property of Mr. Bander's Clients</i>	29

3.	<i>The Evidence Demonstrates the Actual Nature and Purpose of the MMRC Payments, Not Just the Labels Placed on Them.</i>	33
4.	<i>Respondent's Exhibit 9 Was Properly Excluded as Irrelevant.</i>	34
5.	<i>The Referee's Finding that the MMRC Payments Were Reimbursements of Legal Fees Is Not Contradicted by His Finding that Mr. Bander Was Required to Obtain His Clients' Informed Consent Before Accepting the Payments.</i>	37
6.	<i>Because the MMRC Payments Were Entrusted Funds, Mr. Bander's Conduct Violated Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e).</i>	39
C.	<i>Mr. Bander Is Guilty of Violating Rule 4-8.4(c).</i>	40
1.	<i>The Referee's Determination That Mr. Bander Acted Intentionally Is a Fact Finding Afforded a Presumption of Correctness.</i>	41
2.	<i>Substantial, Competent Evidence Supports the Referee's Finding That Mr. Bander Acted Intentionally.</i>	42
D.	<i>Mr. Bander Is Guilty of Violating Rules 4-1.7 and 4-1.8.</i>	44
1.	<i>Substantial, Competent Evidence Supports the Referee's Findings that Mr. Bander Violated Rules 4-1.7 and 4-1.8.</i>	44
2.	<i>TFB Did Not Waive Its Charge That Mr. Bander Violated Rule 4-1.8(f).</i>	46
E.	<i>Mr. Bander Is Guilty of Violating Rule 4-1.4.</i>	47
II.	THE COURT SHOULD ACCEPT THE REFEREE'S RECOMMENDATION OF DISBARMENT.	49
A.	Standard of Review	49
B.	Mr. Bander's Serious Misconduct Warrants Disbarment.	50
1.	<i>The Pertinent Standards and Case Law Support Disbarment for Mr. Bander's Misconduct.</i>	50
2.	<i>The Aggravating and Mitigating Factors Support Disbarment for Mr. Bander's Misconduct.</i>	56
	CONCLUSION	63

CERTIFICATE OF SERVICE.....	65
CERTIFICATE OF COMPLIANCE	65

TABLE OF CITATIONS

Page(s)

Cases

<i>Fla. Bar v. Alters</i> , 260 So. 3d 72 (Fla. 2018)	51, 61, 62
<i>Fla. Bar v. Altman</i> , 294 So. 3d 844 (Fla. 2020)	49
<i>Fla. Bar v. Barley</i> , 831 So. 2d 163 (Fla. 2002)	50, 56
<i>Fla. Bar v. Benchimol</i> , 681 So. 2d 663 (Fla. 1996)	28, 29, 40
<i>Fla. Bar v. Brownstein</i> , 953 So. 2d 502 (Fla. 2007)	51
<i>Fla. Bar v. Chapman</i> , No SC22-340 (Fla. June 16, 2022)	54
<i>Fla. Bar v. Dupee</i> , 160 So. 3d 838 (Fla. 2015)	54
<i>Fla. Bar v. Forrester</i> , 818 So. 2d 477 (Fla. 2002)	42
<i>Fla. Bar v. Frederick</i> , 756 So. 2d 79 (Fla. 2000)	<i>passim</i>
<i>Fla. Bar v. Germain</i> , 957 So. 2d 613 (Fla. 2017)	25, 37, 59
<i>Fla. Bar v. Gross</i> , 896 So. 2d 742 (Fla. 2005)	54
<i>Fla. Bar v. Herman</i> , 8 So. 3d 1100 (Fla. 2009)	61
<i>Fla. Bar v. Kinsella</i> , 260 So. 3d 1046 (Fla. 2018)	54
<i>Fla. Bar v. Mason</i> , 826 So. 2d 985 (Fla. 2002)	54

<i>Fla. Bar v. Massari</i> , 832 So. 2d 701 (Fla. 2002)	50
<i>Fla. Bar v. Mirk</i> , 64 So. 3d 1180 (Fla. 2011)	39, 52
<i>Fla. Bar v. Nicnick</i> , 963 So. 2d 219 (Fla. 2007)	41, 42
<i>Fla. Bar v. Nowacki</i> , 697 So. 2d 828 (Fla. 1997)	46
<i>Fla. Bar v. Parrish</i> , 241 So. 3d 66 (Fla. 2018)	55
<i>Fla. Bar v. Pincket</i> , 398 So. 2d 802 (Fla. 1981)	50
<i>Fla. Bar v. Silver</i> , 788 So. 2d 958 (Fla. 2001)	54
<i>Fla. Bar v. Sorce</i> , No. SC2020-881, 2020 WL 3441154 (Fla. June 8, 2020)	55
<i>Fla. Bar v. Tauler</i> , 775 So. 2d 944 (Fla. 2000)	57
<i>Fla. Bar v. Tobkin</i> , 944 So. 2d 219 (Fla. 2006)	26, 32, 35
<i>Fla. Bar v. Valentine-Miller</i> , 974 So. 2d 333 (Fla. 2008)	55, 56, 62
<i>Fla. Bar v. Watson</i> , 76 So. 3d 915 (Fla. 2011)	42
<i>Fla. Bar v. Wolf</i> , 930 So. 2d 574 (Fla. 2006)	54
<i>Florida Bar v. Lumley</i> , 517 So. 2d 13 (Fla. 1987)	55
<i>Holliday v. State</i> , 389 So. 2d 679 (Fla. 3d DCA 1980)	36
<i>Winkler v. Lawyers Title Ins. Corp.</i> , 41 So. 3d 414 (Fla. 3d DCA 2010)	28

Rules Regulating The Florida Bar

Rule 4-1.4	<i>passim</i>
Rule 4-1.7	<i>passim</i>
Rule 4-1.8	<i>passim</i>
Rule 4-1.15	54
Rule 4-8.4	<i>passim</i>
Rule 5-1.1	<i>passim</i>

Florida's Standards for Imposing Lawyer Sanctions

Standard 3.2	20, 21
Standard 3.3	21
Standard 4.1	20, 50
Standard 5.1	20, 50

STATEMENT OF THE CASE AND FACTS

I. NATURE OF THE CASE

Respondent Stephen Matthew Bander ("Mr. Bander" or "Respondent") seeks review of a Report of Referee recommending that he be found guilty of misconduct in violation of several Rules Regulating The Florida Bar ("RRTFB") and disbarred. 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 the Court to approve the Referee's recommendation that Mr. Bander be found guilty on all rule violations charged and disbarred.

II. FACTUAL BACKGROUND

This disciplinary matter stems from Mr. Bander's representation of clients seeking U.S. residency through the Program (the "Program"). (See TFB Ex. 1 at 1, 7.)¹ Under that program, foreign

¹ Citations to "ROR" are to the Report of Referee dated February 15, 2022 (Tab 75 in the Index of Record). Citations to "1 Tr." and "2 Tr." are to the transcripts of the first and second days of the final hearing on guilt that occurred on November 23 and 24, 2021, respectively.

nationals can qualify for an EB-5 immigrant visa by, among other things, investing in new enterprises that create full-time jobs for qualifying U.S. workers. (See TFB Ex. 4-D.) Such investments may be made through an EB-5 regional center designated by the U.S. Citizenship and Immigration Service ("USCIS").

A. The 2015 SEC Proceedings Against Mr. Bander's Father and His Law Firm

In 2015, the SEC instituted cease-and-desist proceedings against Michael A. Bander (Respondent's father) and the Bander Law Firm, PLLC (the "Firm") (the "2015 SEC Proceedings") in connection with their representation of clients who were seeking U.S. residency through the Program. (See TFB Ex. 1 at 1, 7.) The SEC charged Mr. Bander's father and the Firm with violating SEC rules by acting as unregistered broker-dealers. (See TFB Ex. 1 at 1, 7.) Specifically, in addition to receiving legal fees from their clients, Mr. Bander's father and the Firm would receive a commission or "finder's fee" from the

and citations to "2 Tr." Citations to "TFB Ex." are to TFB's exhibits entered at the final hearing. Citations to "Resp. Ex." are to Mr. Bander's exhibits entered at the final hearing. Citations to "SEC Tr." are to TFB Exhibit 3, the transcript of Mr. Bander's testimony before the U.S. Securities and Exchange Commission ("SEC") on March 23, 2017. Other references are to the record, including to the appropriate "Tab" number in the Index of Record.

EB-5 regional center in which their clients invested. (TFB Ex. 4-D.)

As a result of the 2015 SEC Proceedings, Mr. Bander's father and the Firm agreed to pay disgorgement of \$228,750, plus prejudgment interest and a \$25,000 penalty. (TFB Exs. 4-B and 4-C.) Respondent signed the cease-and-desist order and executed the settlement agreement on behalf of his father and the Firm on August 17, 2015. (TFB Ex 4-C). Respondent was therefore on notice that the Firm was prohibited from receiving commissions or compensation in connection with the EB-5 program. (See SEC Tr. at 20:15–23.)

B. Respondent's EB-5 Representations Underlying the Disciplinary Proceedings

Respondent's father retired, leaving Respondent as the sole attorney practicing at the Firm during the time period relevant to this disciplinary action. (ROR at 5.) Shortly after signing the cease-and-desist order on behalf of his Firm, Mr. Bander began representing three clients seeking U.S. residency through the Program: Theodoros Niarchos, Carlos Felix, and Patricia Abarca. (See SEC Tr. 21:15–22:15 & Exhibits 225, 226, 228.)

The clients invested in SkyRise Miami Tower Investors, LLC ("SkyRise") through an EB-5 regional center, Miami Metropolitan Regional Center LLC ("MMRC"). (SEC Tr. 22:7–15.) MMRC informed Mr. Bander that, if his clients invested in the Skyrise project through MMRC, then MMRC would reimburse his clients' attorney's fees (up to a certain amount) incurred in applying for EB-5 visas. (SEC Tr. 22:7–23:8.) Mr. Bander did not inform his clients that MMRC had offered to reimburse their legal fees.

While representing Mr. Niarchos, Mr. Felix, and Ms. Abarca from 2015 to 2017, Mr. Bander billed his clients, and each timely paid their invoice in full. (See TFB Exs. 4-G, 4-H.) However, Mr. Bander also billed MMRC for "[r]eimbursement of legal fees" for those same three clients, and MMRC timely paid those invoices in full (the "MMRC Payments"). (See Resp. Exs. 3–5.) Instead of using the MMRC Payments to reimburse his clients for the legal fees they had paid, Mr. Bander used the MMRC Payments for his own personal benefit (see SEC Tr. 89:3–90:2, 95:12–96:16; 154:13–155:12) and, for the most part, did not inform his clients that any reimbursements had been made on their behalves. (See SEC Tr. 55:9–12; 99:5–101:5.)

In 2017, the SEC reopened the investigation of the Firm (the "2017 SEC Investigation") to consider potential misconduct similar to the misconduct discovered during the 2015 SEC Proceedings, namely, the payment of compensation by an EB-5 regional center for facilitating investments by their clients through the Program. (See TFB Ex. 1 at 1, 7.) However, the new investigation concerned Mr. Bander's actions, and not those of his father. (See *id.*) The SEC sent Mr. Bander a subpoena on February 22, 2017 (the "SEC Subpoena"), requiring his testimony before SEC officials on March 23, 2017. (See *id.*)

At the time he received the SEC Subpoena, Mr. Bander had received \$90,000 in MMRC Payments, and he had not refunded any of those funds to his clients. (See SEC Tr. 21:8–22:25, 166:13–20.) Shortly after Mr. Bander received the SEC Subpoena—and prior to his testimony before the SEC—Mr. Bander refunded the MMRC Payment funds to his clients. (See SEC Tr. 207:18–210:17, 211:22–25; Resp. Exs. 3–5.)

Mr. Bander testified under oath before the SEC on March 23, 2017 (the "SEC Testimony"). He was represented by counsel during that testimony. (See SEC Tr.) Mr. Bander testified that none of the

money he received from MMRC was compensation to him; rather, the MMRC Payments were reimbursements to his clients for the legal fees his clients had paid. (*E.g.*, SEC Tr. 22:16–23:8, 51:21–53:6, 92:22–93:11.) However, Mr. Bander admitted that he had not held the MMRC Payment funds belonging to his clients in trust, and, instead, had used the funds to pay his Firm's expenses. (See SEC Tr. 89:3–90:2, 95:12–96:16; 154:13–155:12.)

III. DISCIPLINARY PROCEEDINGS

On July 25, 2017, the SEC sent a letter to TFB notifying TFB that Mr. Bander "may have committed professional misconduct" in connection with his handling of the MMRC Payments. (TFB Ex. 1 at 1.) The letter specifically stated:

A review of the firm's bank records from 2015 to 2017 revealed \$90,000 in payments from a third party that Bander told investigators was for the benefit of three clients. The investigation further revealed, and Bander admitted during sworn testimony, that (1) he did not hold those client funds in a trust account; (2) he did not notify the clients about the funds he was holding for months and, in some instances, for over a year; and (3) he used the funds for law firm expenses. Bander eventually sent the funds to his clients, but only after he learned the Commission had reopened its investigation of the Bander Law Firm.

(TFB Ex. 1 at 1.)

On January 5, 2021, TFB filed a formal complaint initiating these disciplinary proceedings against Mr. Bander, asserting that his conduct violated Rules 4-1.4, 4-1.8, 4-8.4, and 5-1.1 of the RRTFB. (See Tab 1, TFB Compl.) The matter was assigned to the Honorable Carlos Lopez, Circuit Court Judge for the Eleventh Judicial Circuit (the "Referee"). (See ROR at 1.)

A. The Final Hearing

The Referee conducted a final evidentiary hearing on guilt on November 23 and 24, 2021. The Referee took testimony from Mr. Bander, Thomas Duarte (TFB staff auditor and expert witness), Elaine Naughton Allen (Mr. Bander's bookkeeper), and David Weinstein (Mr. Bander's attorney in defending the 2017 SEC Investigation).

1. Evidence Showing the Purpose and Nature of the MMRC Payments as Property Belonging to Mr. Bander's Clients

During the final hearing, evidence was presented that the purpose of the MMRC Payments was to reimburse Mr. Bander's clients for their payment of Mr. Bander's legal fees. Thus, the nature of the payments was funds belonging to Mr. Bander's clients that Mr. Bander was holding on their behalf—not compensation or income to

Mr. Bander. As outlined below, such evidence included Mr. Bander's sworn SEC Testimony, the testimonies of Elaine Naughton Allen and Thomas Duarte, and documentary evidence.

Mr. Bander testified under oath before the SEC that the MMRC Payments were reimbursements or refunds belonging to his clients:

Q And what purpose -- what was the purpose of those funds?

A ***It was a refund.***

Q A refund of what?

A ***I was told it was a refund of legal fees.***

Q Who were you told by?

A Hank Adorno [a representative of MMRC].

(SEC Tr. 22:23–23:4 (emphasis added).)

Q And what did Mr. Adorno -- what was this conversation with Mr. Adorno about the refund of legal fees? What did that involve?

A Just that ***he would reimburse the legal expenses of investors for a certain amount.***

(*Id.* 25:20–24 (emphasis added).)

A ***I had been told that my clients were eligible for a refund of their fees.*** I asked, how are they supposed to get this ***refund***? I was told to invoice for half of the amount upon the filing of the I-526 petition and I was told to invoice upon the petitions being decided. ***I was told the invoices to say reimbursement, refund,*** I forget what the exact words were.

(*Id.* 45:15–22 (emphasis added).)

A In the end, I thought that it was a better practice **to refund the money that's owed to all the clients, that their refunds should go to them so as to -- that there'd be no confusion that this was not compensation.**

Q And why did you think that way? . . .

A **It was always treated as a refund. It was always credited to the client, it was always a liability to the firm.**

(Id. 52:4–17 (emphasis added).)

A Why was [it] in the best interests of my clients [to receive a refund of the MMRC Payments]? **It's in the best interests of my clients because it's my clients' money.**

(Id. 53:2–6 (emphasis added).)

Q So would refunds to clients in February and March of 2017 be included for the 2016 corporate return?

A **It was never income**, so it wouldn't have been part of the return

(Id. 54:11–15 (emphasis added).)

A This is probably an internal document, showing that **we have an unearned retainer of \$20,000**, a credit for Theodoros Niarchos. I don't know why it's titled "Bill," but I think that this is just an accounting device to show that we had this on our books as a liability, that the \$20,000 that had been received was a liability . . .

Q And what does it mean **unearned retainers, unearned expenses**?

A **That this money belongs to my client, that my client -- we're holding \$20,000 on behalf of my client.**

(Id. 92:22–93:11 (emphasis added).)

Q And how did you view this \$20,000 [payment from MMRC]?

A **I viewed it as money that is my client's.**

(Id. 95:24–25 (emphasis added).)

A I didn't see a problem with it because ***it wasn't compensation, it wasn't income.*** And so that's the way I did it, because ***I wanted to get my client the refund.***

(Id. 100:2–5 (emphasis added).)

Q [Y]ou also testified that the fees were reimbursed by the entities in which they invested?

A ***That's what I was told that that \$40,000 would be, yes, a reimbursement.***

(Id. 125:22–25 (emphasis added).)

[I]t was always the intent this was my clients' money and to be -- it would be refunded to them.

(Id. 152:1–3 (emphasis added).)

A I told [my bookkeeper] that . . . ***it was time to tell [my clients] . . . that the money should go directly to them*** . . . So I decided that ***since it's my clients' money***, I would take -- I would fall on the side of just sending them a check or wiring or whatever their instructions were for that money, rather than face it being disgorged to the federal government, even though it was their money.

(Id. 209:19–210:17 (emphasis added).)

Other evidence submitted at the final hearing consistent with Mr. Bander's sworn testimony that the MMRC Payments were funds belonging to his clients included:

- Mr. Bander's response to TFB's grievance letter stating that "[p]ursuant to [its] agreement [with MMRC], the Bander Law Firm received payments of approximately \$90,000 **as reimbursements to these clients for their expenditures of legal fees related to their EB-5 visas.** (TFB Ex. 2 at 2 (emphasis added).)
- Invoices Mr. Bander sent to MMRC, which each stated that it was for "**Reimbursement of Legal Fees** for the case of [client name]." (See Resp. Exs. 3–5 (emphasis added).)
- An email from MMRC to Mr. Bander, dated February 15, 2016, in which MMRC stated that, if a certain potential investor was retained by Mr. Bander, MMRC would "**reimburse** legal fees up to \$20,000." (See TFB Ex. 3, Exhibit 234 to SEC Testimony (emphasis added).)
- Testimony from Ms. Allen that Mr. Bander directed her to classify the payments as "liabilit[ies]" or "Unearned retainers" and those classifications meant money owed to his clients. (See 2 Tr. 8:16–24, 16:1–16.)
- Testimony by Mr. Duarte that the purpose of the MMRC Payments was to reimburse Mr. Bander's clients for legal fees

they had paid to Mr. Bander and, as such, the MMRC Payments were entrusted funds belonging to Mr. Bander's clients. (1 Tr. 77:13–78:19.)

- The Firm's tax records, in which Mr. Bander designated the MMRC payments as liabilities, indicating that the payments were not income to the Firm. (See Resp. Ex. 6; *see also* 1 Tr. 77:13–78:7.)

Despite his repeated sworn testimony before the SEC—and all the other evidence outlined above—Mr. Bander testified at the final hearing that MMRC was not actually paying reimbursements to his clients, but rather MMRC was paying his fees outright. (See 2 Tr. 64:12–65:13.) Thus, the MMRC Payments belonged to him and not to his clients. (See 2 Tr. 64:12–65:13.) In addition, Mr. Bander claimed in his final hearing testimony that his bills to both his clients and MMRC for the same legal services, and the double payment by both his clients and MMRC for those same services, was acceptable. (See 2 Tr. 64:12–65:13, 84:1–16.)

2. Evidence Showing How Mr. Bander Handled the MMRC Payments and Related Communications with His Clients.

The evidence was undisputed that Mr. Bander did not hold the

MMRC Payments in a trust account or other segregated account, and, instead, he deposited the funds into his Firm's operating account, commingled the funds with other Firm money, and used the funds to pay his Firm's expenses. (See, e.g., SEC Tr. 89:3–90:2, 95:12–96:16, 154:13–155:3; 1 Tr. 78:8–22; 2 Tr. 64:12–65:13, 79:6–15; Resp. Exs. 12–14; TFB Ex. 4-I.) As Mr. Bander testified before the SEC:

That's right, [the MMRC Payment funds] wasn't held. But what I -- how I -- what I had done with [the MMRC Payment funds] was to pay down the line of credit of the firm. The firm has a line of credit, like most law firms do. And all of the -- and if you were to look at the firm's records that you have, what you will see is ***shortly after the receipt of some of these [MMRC Payments], the firm's line of credit was paid down by that amount, corresponding amount,*** because it was a revolving line of credit.

(SEC Tr. 154:13–155:3 (emphasis added).)

Per his arrangement with his clients, Mr. Bander billed each of his clients his total fee of \$25,000 for their representations in two installments: \$12,500 for the initial engagement fee and \$12,500 after a decision on the client's EB-5 visa application was issued. (See 2 Tr. 36:23–37:9, 39:21–40:20.) Each client timely paid his or her invoices in full. (1 Tr. 30:22–8.) Either simultaneously, or in some

cases subsequent to billing his clients, Mr. Bander sent invoices to MMRC for "[R]eimbursement of legal fees" for those same three clients in amounts that, in total, exceeded the total amounts the clients incurred during their representations. (See Resp. Exs. 3–5.) In fact, for some of his clients' payments, Mr. Bander billed and was paid by his clients even though he had already received full payment for his services through payments made by the clients and those made by MMRC on the clients' behalves.²

The timing of when Mr. Bander informed his clients about the MMRC Payments and refunded the payments to them was also undisputed. The evidence demonstrated that Mr. Bander never informed his clients that MMRC had offered to reimburse their legal fees, never told his clients that he was invoicing MMRC for reimbursement of those same fees, never informed his clients when

² For example, on September 9, 2016, Mr. Bander billed Mr. Felix and MMRC on the same day for the second and final \$12,500 installment, even though Mr. Bander already had received \$32,500 in funds from Mr. Felix and MMRC on Mr. Felix's behalf, and the total cost for Mr. Bander's representation was only \$25,000. (See Resp. Ex. 3.) Similarly, on November 15, 2016, Mr. Bander billed Mr. Niarchos and MMRC on the same day for the second and final \$12,500 installment, even though Mr. Bander already had received \$32,500 in funds from Mr. Niarchos and MMRC on Mr. Niarchos's behalf, and the total cost of the representation was only \$25,000. (See Resp. Ex. 5.)

he received the MMRC Payments, and, for all but a portion of one of the MMRC Payments, never told his clients about the MMRC Payments until after he received the SEC Subpoena. (See SEC Tr. 55:9–12; 99:5–101:5; 1 Tr. 38:3–13.)

At the time Mr. Bander received the SEC Subpoena on February 22, 2017, he had received a total of \$75,000 in full payment of his legal fees from his clients and a total of \$90,000 in MMRC Payments to reimburse his clients for the same legal fees. (See SEC Tr. 22:16–23:8.) It had been over a year-and-a-half since Mr. Bander first began receiving the MMRC Payments, but Mr. Bander had not refunded his clients any of the payments for legal fees they had paid.³ Days after Mr. Bander received the SEC Subpoena, Mr. Bander informed his clients regarding the funds he had received from MMRC on their behalves and refunded those funds to his clients. (See Resp. Exs. 10, 11; *see also* SEC Tr. 207:18–210:23.) Consequently, when Mr. Bander testified before the SEC on March 23, 2017, he was able to state that he had refunded his clients the full amount of the MMRC

³ Mr. Bander received the first MMRC Payment on August 8, 2015, but he did not refund any of the MMRC Payment funds until the week of March 3, 2017. (See Resp. Ex. 3; SEC Tr. 49:14:–51:3.)

Payments. (See SEC Tr. 207:18–210:23.)

B. The Report of Referee

Following the final hearing, the Referee held a sanction hearing on December 17, 2021. Thereafter, Mr. Bander moved the Referee to reconsider his ruling to exclude Respondent's Exhibit 9, a 2018 amendment to the agreement between Skyrise and its investors which Mr. Bander claimed supported his argument that MMRC had directly paid his legal fees and were not reimbursing his clients, even though the amendment was created after the events relevant to this matter. After a hearing on January 18, 2022, the Referee denied the motion.

The Referee issued his Report of Referee on February 15, 2022, recommending that Mr. Bander be found guilty of all RRTFB charged and disbarred. (ROR at 21, 27.)

First, the Referee found that Mr. Bander was guilty of violating Rule 5-1.1(a), which requires an attorney to hold property belonging to a client in trust (ROR at 13), and Rule 5-1.1(b), which requires "property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses," to be held "in trust" and to "be applied only to that purpose" (ROR at 12–13).

The Referee found "there [wa]s no doubt" that the MMRC Payments were "the property of [Mr. Bander's] client[s]" and, as such, Mr. Bander was required to abide by Rule 5-1.1 in his handling of and communications regarding the payments. (ROR at 7, 13.) In so finding, the Referee considered and rejected "as devoid of all credibility" Mr. Bander's testimony during the final hearing that "MMRC was not actually paying refunds or reimbursements to his clients, but rather the MMRC was paying the lawyer's fees outright." (ROR at 17.) The Referee found that such testimony "contradict[ed] . . . his prior sworn and detailed testimony on the subject" and "his written response to the Bar, submitted in October 2017," and stated that "there [wa]s not a single piece of evidence in the Record which support[ed] the Respondent's late uttered contention that the MMRC was paying him legal fees, that belonged to him and the firm, not to his clients." (ROR at 17–18.)

Having found Rule 5-1.1 applicable to the MMRC Payments, the Referee determined that Mr. Bander violated Rule 5-1.1(a) because he did not hold the MMRC Payments in trust, and, instead "he commingled [the MMRC Payments] with his own when he deposited same into his operating account." (ROR at 13.) The Referee similarly

found that Mr. Bander violated Rule 5-1.1(b) because he did not apply the MMRC Payments for the purpose for which they had been paid—reimbursing his clients—and instead "used the funds for his own benefit to pay firm expenses for months and even up to a year." (ROR at 18.)

Second, the Referee found that Mr. Bander violated Rule 5-1.1(e), which requires a lawyer to promptly notify a client upon receiving funds or other property in which the client has an interest, and Rule 4-1.4, which requires reasonable and prompt communication with clients. (ROR at 13–14.) The Referee found that Mr. Bander "neither notified his clients of the expectation they would receive a refund, nor did he notify them at the time he received funds on their behalf from the MMRC." (ROR at 13–14.)

Third, the Referee found Mr. Bander guilty of violating Rule 4-8.4(c), which prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." RRTFB 4-8.4(c). The Referee found that Mr. Bander knew the MMRC Payments belonged to his clients (ROR at 18), but he deliberately and knowingly "converted [the funds] to his own use and benefit" without his clients' knowledge or consent (ROR at 14). The Referee noted that Mr.

Bander's "guilty knowledge" was demonstrated by the fact that he did not refund any of the MMRC Payment funds to his clients until after he received the SEC Subpoena. (See ROR at 19.)

Finally, the Referee found Mr. Bander guilty of violating Rule 4-1.7(a)(2), which prohibits a lawyer from representing a client where "there is a substantial risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer," RRTFB 4-1.7(a)(2), and Rule 4-1.8(f), which prohibits a lawyer from accepting compensation for representing a client from someone other than the client absent the client's informed consent and the independence of the lawyer's professional judgment, RRTFB 4-1.8(f). The Referee found that "Respondent's actions constituted a conflict of interest between himself and his clients because his own benefit of receiving and using the funds at issue cannot be separated from the client's interests in choosing the best [EB-5 regional center] and project in which to invest." (ROR at 20.) The Referee also found that Mr. Bander's actions "created a conflict of interest when he accepted payment for some portion of the client's fees (here as a reimbursement) without receiving the client's informed consent for same." (ROR at 20.)

Turning to the recommended discipline, the Referee detailed the case law from this Court, Standards, and aggravating and mitigating factors he considered in concluding that disbarment was the appropriate sanction for Mr. Bander's misconduct.

Specifically, the Referee considered Standard 4.1(a), which provides that "[d]isbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." Standard 4.1(a). The Referee also considered Standard 5.1(a)(6), which provides that "[d]isbarment is appropriate when a lawyer . . . engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Standard 5.1(a)(6).

In addition, the Referee found seven aggravating factors under Standard 3.2: (i) dishonest or selfish motive, Standard 3.2(b)(2); (ii) a pattern of misconduct, Standard 3.2(b)(3); (iii) multiple offenses, Standard 3.2(b)(4); (iv) submission of false evidence, false statements, or other deceptive practices during the disciplinary process, Standard 3.2(b)(6); (v) refusal to acknowledge the wrongful nature of the conduct, Standard 3.2(b)(7); (vi) vulnerability of the victim,

Standard 3.2(b)(8); and (vii) substantial experience in the practice of law, Standard 3.2(b)(9). (ROR at 27–29.)

The Referee found only three mitigating factors under Standard 3.3: (i) absence of a prior disciplinary record, Standard 3.3(b)(1); personal or emotional problems, Standard 3.3(b)(3); and (iii) timely good faith effort to make restitution or to rectify the consequences of the misconduct, Standard 3.3(b)(4). (ROR at 29.)

Based on the foregoing Standards and aggravating and mitigating factors, and pertinent case law from this Court, the Referee recommended that this Court disbar Mr. Bander and that he pay TFB's costs in these proceedings. (ROR at 27, 32.)

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

SUMMARY OF ARGUMENT

Without his clients' knowledge, Mr. Bander entered an arrangement in which he would receive reimbursements of his clients' legal fees from a third party, MMRC. Mr. Bander did not inform his clients when he received reimbursements on their behalves, nor did he hold the payments in trust for his clients. Instead, each time Mr. Bander received an MMRC Payment, he deposited it into his Firm's operating account and used it for his own

personal benefit. Over the course of more than a year-and-a-half, Mr. Bander received \$75,000 in full payment of his legal fees from his clients and \$90,000 in MMRC Payments to reimburse his clients for those same fees. For all but a portion of one of the MMRC Payments, Mr. Bander did not inform his clients regarding the existence of the MMRC Payments until after he was served with the SEC Subpoena. Likewise, Mr. Bander did not refund his clients any of the MMRC Payments until after he received the SEC Subpoena and needed to state to the SEC that he had refunded all of the MMRC Payments to avoid legal trouble similar to that of his father's and his Firm's during the 2015 SEC Proceedings.

In his initial brief, Mr. Bander 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. Bander's version of the facts, and the record amply supports the Referee's conclusions.

First, Mr. Bander's own sworn SEC Testimony and substantial other evidence in the record support the Referee's findings that the purpose of the MMRC Payments was to reimburse Mr. Bander's clients for their legal fees, and, thus, the payments belonged to Mr.

Bander's clients which he could only hold on their behalves. Under those facts, the MMRC Payments constituted entrusted funds subject to the requirements of Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e). The record further shows—and Mr. Bander does not dispute—that he did not follow the requirements of Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e) in his handling of and communications regarding the MMRC Payments. Consequently, the Referee correctly found Mr. Bander guilty of violating each of those rules.

Second, the record supports the Referee's finding that Mr. Bander's use of the MMRC Payments for his own personal benefit without his clients' knowledge or consent was deliberate and knowing. Thus, the Referee correctly concluded that Mr. Bander committed the foregoing conduct intentionally and is guilty of "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation" in violation of Rule 4-8.4(c).

Third, the record supports the Referee's findings that Mr. Bander violated Rule 4-1.7, which requires an attorney to obtain her client's informed consent if there is a substantial risk that the representation will be materially limited by a personal interest of the attorney, and Rule 4-1.8(f), which requires an attorney to obtain the

client's informed consent before accepting compensation for the client's legal fees from someone other than the client. Mr. Bander's financial arrangement with MMRC created a substantial risk that a conflict of interest between Mr. Bander and his clients may arise during his representations. Therefore, Mr. Bander was required to obtain his clients' informed consent before he accepted any of the MMRC Payments, and his failure to do so constitutes a violation of Rule 4-1.7 and Rule 4-1.8(f).

Fourth, the evidence shows that Mr. Bander violated Rule 4-1.4(a)(1) by failing to promptly inform his clients of circumstances with respect to which the clients' informed consent was required by the RRTFB, such as his financial arrangement with MMRC. Similarly, the offer by one of the available EB-5 regional centers to reimburse his clients' legal fees would have reasonably influenced the clients' decisions of which regional center and project to invest in for purposes of obtaining the EB-5 visa. Thus, Mr. Bander's failure to promptly inform his clients of such information violated Rule 4-1.4(a)(2).

In addition to accepting the Referee's recommendations regarding Mr. Bander's guilt, the Court should also approve the

Referee's recommended sanction of disbarment. Under this Court's case law, where an attorney has misappropriated or misused client funds, there is a strong presumption that disbarment is the appropriate discipline. Finally, this Court should also impose on Mr. Bander the Referee's recommended sanction of the 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). That burden is not met "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. Mr. Bander Is Guilty of Violating Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e).

Rule 5-1.1(a) provides, in pertinent part:

A lawyer must hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for fees, costs, and expenses, must be kept in a separate federally insured bank, credit union, or savings and loan association account . . . and clearly labeled and designated as a trust account

RRTFB 5-1.1(a).

Rule 5-1.1(b) similarly provides:

Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over the property on demand is conversion.

RRTFB 5-1.1(b).

In addition, Rule 5-1.1(e) requires, among other things, that "[o]n receiving funds or other property in which a client or third person has an interest, a lawyer must promptly notify the client or third person." RRTFB 5-1.1(e).

Mr. Bander does not dispute that: (i) he did not hold the MMRC Payments in trust as required by Rule 5-1.1(a); (ii) he did not apply the MMRC Payments only for the specific purpose for which they were entrusted to him as required by Rule 5-1.1(b); and (iii) he did not promptly notify his clients after receiving the MMRC Payments as required by Rule 5-1.1(e). Rather, Mr. Bander's challenges are each founded on his contention that the Referee erred in finding that the MMRC Payments were subject to Rule 5-1.1 because they were property belonging to Mr. Bander's clients. (See ROR at 12–13.) Mr. Bander contends that the Referee should have determined that the MMRC Payments were direct payments of his earned fees and, therefore, he was not required to abide by Rule 5-1.1 in connection with the payments. (See Initial Br. at 15–23.)

As provided below, Mr. Bander's challenges to the Referee's findings of guilt for his violation of Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e) fail because the findings are supported by substantial, competent evidence, and Mr. Bander's arguments cannot overcome that fact.

1. The Referee's Determination that the MMRC Payments Were the Property of Mr. Bander's Clients Is a Factual Finding.

As a threshold matter, Mr. Bander erroneously contends that the Referee's determination that the MMRC Payments were reimbursements of attorney's fees paid by his clients and thus were "the property of his client[s]" (ROR at 13) was a "legal conclusion" by the Referee (Initial Br. at 16). Contrary to Mr. Bander's contention, this determination was a finding of fact, which carries "a presumption of correctness that should be upheld unless clearly erroneous or without support in the record." *See Fla. Bar v. Benchimol*, 681 So. 2d 663, 665 (Fla. 1996); *c.f. Winkler v. Lawyers Title Ins. Corp.*, 41 So. 3d 414, 417 (Fla. 3d DCA 2010) (stating that the determination of whether certain funds were "funds held in trust" was a "finding[] of fact" that will "not be disturbed unless the appellant can show that [it was] clearly erroneous").

For example, in *Frederick*, the referee found that a portion of \$18,000 paid to the respondent was refundable costs that should have been held in trust under Rule 5-1.1. *See* 756 So. 2d at 84–86. The respondent argued that the entire \$18,000 was for payment of his attorney's fees and did not need to be held in trust. *See id.* This

Court reviewed the referee's finding as a finding of fact, ruling that, because the finding was "supported by competent, substantial evidence," the Court was "precluded from reweighing the evidence and substituting [its] judgment for that of the referee." *Id.* at 86.

Here, like the determination in *Frederick* that part of the \$18,000 paid to the respondent was refundable costs subject to Rule 5-1.1, the determination of the purpose and nature of the MMRC Payments constitutes findings of fact. *See id.* at 85–86. Accordingly, such findings by the Referee carry "a presumption of correctness" that should not be disturbed unless Mr. Bander demonstrates that there is "no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." *See Benchimol*, 681 So. 2d at 665. Mr. Bander falls far short of carrying that burden.

2. Competent, Substantial Evidence Supports the Referee's Finding that the MMRC Payments Were the Property of Mr. Bander's Clients.

Mr. Bander argues that there was no competent, substantial evidence to support the Referee's finding that the MMRC Payments were reimbursements of his clients' attorney's fees and thus were "the property of his client[s]." (ROR at 13.) Although TFB needs to show

only that there is some competent, substantial evidence in the record to support the Referee's findings of fact, the evidence supporting the Referee's finding is in fact "overwhelming[]." (See ROR at 7.)

Indeed, that evidence includes Mr. Bander's own repeated sworn statements in his SEC Testimony that the purpose of the MMRC Payments was to reimburse his clients for legal fees they incurred, and the nature of the payments was money belonging to his clients, not compensation or income to him. (See, e.g., SEC Tr. 22:23–25, 51:21–53:6, 52:4–8, 52:15–16, 54:13, 92:22–93:11, 95:25, 151:22–152:3, 210:3–12). In addition, Mr. Bander's SEC Testimony is corroborated by: (i) Mr. Bander's response to TFB's grievance letter, stating that "the Bander Law Firm received payments of approximately \$90,000 as reimbursements to these clients for their expenditures of legal fees" (TFB Ex. 2 at 2); (ii) the Firm's invoices to MMRC referring to the MMRC Payments as "[r]eimbusement[s] of Legal Fees" (see Resp. Exs. 3, 4, 5); (iii) correspondence between Mr. Bander and MMRC in which MMRC indicated its payments are reimbursements (see TFB Ex. 3, Exhibit 234 to SEC Testimony); (iv) testimony of Ms. Allen that Mr. Bander directed Ms. Allen to classify the payments as "liabilit[ies]" or "Unearned retainers" and those

classifications meant money owed to his clients (see 2 Tr. 8:16–24, 16:1–16; see also SEC Tr. 109:23–110:23); (v) testimony of Mr. Duarte that the purpose of the MMRC Payments was to reimburse Mr. Bander's clients for their legal fees, and, as such, the MMRC Payments were entrusted funds belonging to Mr. Bander's clients (see 1 Tr. 77:13–78:19); and (vi) the Firm's tax records in which Mr. Bander designated the MMRC payments as liabilities. (See Resp. Ex. 6; see also 1 Tr. 77:13–78:7.)

In stark contrast to this substantial body of evidence, the only record evidence that the MMRC Payments were meant to directly compensate Mr. Bander rather than reimburse attorney's fees paid by his clients was Mr. Bander's own self-serving testimony at the final hearing. Because that testimony directly contradicted Mr. Bander's prior sworn SEC Testimony—and all of the other record evidence—the Referee found the testimony to be "devoid of all credibility":

As Respondent's late offered testimony contradicts the entirety of the record evidence in this matter, I reject this testimony as devoid of all credibility. Such statements contradict not only his prior sworn and detailed testimony on the subject, but also his written response to the Bar, submitted in October 2017. These statements contradict his own bookkeeper's testimony that Respondent was the one that directed her to designate the funds as liabilities, rather than income, on the account

records and taxes. ***There is not a single piece of evidence in the Record which supports the Respondent's late uttered contention that the MMRC was paying him legal fees, that belonged to him and the firm, not to his clients.***

(ROR at 17–18 (emphasis added).)

A referee's "judgment regarding credibility" of witnesses "should not be overturned absent clear and convincing evidence that [the referee's] judgment is incorrect." *Tobkin*, 944 So. 2d at 224. Given the weight of testimony and other evidence contradicting Mr. Bander's final hearing testimony, the Referee's judgment that Mr. Bander's final hearing testimony lacked any credibility should not be disturbed. Moreover, even if Mr. Bander's final hearing testimony had any weight—which it does not—Mr. Bander "[can]not meet the burden of showing that [the] [R]eferee's findings are erroneous simply by pointing to contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings." *See Frederick*, 756 So. 2d at 86.

In sum, not only does competent, substantial evidence support the Referee's finding that the MMRC Payments were reimbursements of legal fees belonging to Mr. Bander's clients, the record is replete

with such evidence. The Court should therefore approve the Referee's finding.

3. *The Evidence Demonstrates the Actual Nature and Purpose of the MMRC Payments, Not Just the Labels Placed on Them.*

Mr. Bander argues that the Referee merely relied on the labels and terminology in the billing records in finding that the MMRC Payments were property belonging to his clients, and there was no evidence of the actual nature or purpose of those payments. (See Initial Br. at 16, 20.) But that argument is refuted by the substantial evidence outlined above showing the purpose of the payments was to reimburse Mr. Bander's clients for legal fees they paid, and, the nature of the MMRC Payments was property belonging to Mr. Bander's clients.

In particular, Mr. Bander repeatedly testified that both he and MMRC understood the purpose of the MMRC Payments to be refunds or reimbursements of legal fees paid by Mr. Bander's clients and "not compensation" to Mr. Bander. (See, *e.g.*, SEC Tr. 52:4–8; see also *id.* at 22:23–25 ("Q [W]hat was the purpose of those funds? A It was a refund."); *id.* at 52:15–16 (Q [What was] [t]he reason that you decided to refund, to actually refund Mr. Felix's fees -- A It was always treated

as a refund. It was always credited to the client."); *id.* at 54:13 ("It was never income.".) Likewise, Mr. Bander repeatedly testified that the nature of the MMRC Payments was "money belong[ing] to [his] client" which he was "holding . . . on behalf of [his] client." (See *id.* at 92:22–93:11; see also *id.* at 95:25 ("I viewed it as money that is my client's."); *id.* at 151:22–152:3 ("[I]t was always the intent this was my clients' money and . . . it would be refunded to them."); *id.* at 51:21–53:6 ("It's in the best interests of my clients [to refund the MMRC Payments] because it's my clients' money."); *id.* at 210:3–12 ("[T]he money should go directly to [my clients] . . . since it's my clients' money.".)

Accordingly, the Referee's finding that the MMRC Payments were property belonging to Mr. Bander's clients is supported by competent, substantial evidence confirming the actual purpose and nature of the payments.

4. Respondent's Exhibit 9 Was Properly Excluded as Irrelevant.

The MMRC Payments were made in 2015, 2016, and early 2017, yet Mr. Bander sought to introduce at the final hearing a fifth addendum (the "Fifth Addendum") to an agreement between SkyRise

and its investors, dated **October 12, 2018**. The Fifth Addendum states that SkyRise will return certain funds to an investor "if any amount remains after payment of Investing Member's legal fees and/or agent's fee." (See Resp. Ex. 9 at 3.) Mr. Bander argued that the document showed that MMRC intended for the MMRC Payments ***made before the document was created*** to be direct payment of legal fees and not reimbursements for fees already paid by his clients. TFB objected to the Fifth Addendum because the document was not created until years after the MMRC Payments were made, and the Referee sustained the objection. (See 2 Tr. 42:25–46:18.) Mr. Bander challenges that ruling.

"Because Bar disciplinary proceedings are quasi-judicial rather than civil or criminal, the referee is not bound by the technical rules of evidence," and "has wide latitude to admit or exclude evidence." *Tobkin*, 944 So. 2d at 224 (citation omitted). Consequently, a "referee's decisions about the admissibility of evidence will not be disturbed absent an abuse of discretion. *Id.*

As TFB explained in its objection, the Fifth Addendum does not indicate how MMRC viewed the MMRC Payments at the time they were made in 2015, 2016, and early 2017. (See 2 Tr. 42:25–46:18.)

Rather, the document speaks only to how MMRC viewed payments it was making on behalf of its investors in late 2018, which is not at issue in this matter. (See 2 Tr. 42:25–46:18.) In addition, the Fifth Addendum is inadmissible because it is the fifth modification to the SkyRise investor agreement, and there was nothing in the record to indicate which of the terms, including the characterization of payments for legal fees, was changed, added, or deleted from the fourth, third, second, and first addendums. (See 2 Tr. 42:25–46:18.)

Mr. Bander fails to explain how a document made long after the pertinent time period—which on its face indicates it has been modified multiple times—is probative evidence of what prior iterations of the document may or may not have said in prior years. Skipping over this essential element of admissibility, Mr. Bander contends that the document's creation after the events at issue here merely goes to "[r]emoteness in time relat[ing] to weight, not admissibility." (See Initial Br. at 26–27.) But the case Mr. Bander cites for that proposition, *Holliday v. State*, 389 So. 2d 679, (Fla. 3d DCA 1980), shows that this is not merely an issue of remoteness in time. Unlike the Fifth Addendum here, the evidence in *Holliday* was created **before** the crime at issue, **not after**. See 389 So. 2d at 681.

Mr. Bander cites to no cases in which evidence created *after* the events at issue was found to be relevant to explain events preceding the creation of the evidence.

In short, Mr. Bander's argument falls far short of showing that the Referee abused his discretion in excluding the Fifth Addendum.⁴

5. *The Referee's Finding that the MMRC Payments Were Reimbursements of Legal Fees Is Not Contradicted by His Finding that Mr. Bander Was Required to Obtain His Clients' Informed Consent Before Accepting the Payments.*

Mr. Bander argues that the Referee's finding that the MMRC Payments were reimbursements of his clients' legal fees which he was required to hold in trust for purposes of Rule 5-1.1 is inconsistent with the Referee's finding that the payments were compensation in whole or part of his clients' legal fees from a third party and, thus, required his clients' informed consent under Rule 4-1.8(f). Mr. Bander's argument misunderstands the different purposes of Rule 5-

⁴ Even if the Referee erred in excluding Respondent's Exhibit 9—which he did not—the error would be harmless because competent, substantial evidence in the record demonstrates the purpose of the MMRC Payments was to reimburse Mr. Bander's clients for their legal fees, not to pay Mr. Bander's legal fees directly. *See Germain*, 957 So. 2d at 620 (stating that any error in the referee's exclusion of the evidence at issue "would have been harmless" because competent, substantial evidence in the record supported the referee's finding).

1.1 and Rule 4-1.8(f) and how those rules are applied.

Pursuant to Rule 5-1.1, if ***at the time an attorney receives funds***, the attorney's client has an interest in or claim to the funds, the attorney must hold the funds in trust. See RRTFB 5-1.1(a).

Under Rule 4-1.8(f), an attorney must obtain his client's informed consent ***before*** accepting compensation, whether direct or indirect, from a third party to pay for the client's legal expenses because such an arrangement carries a risk of creating a conflict of interest between the attorney and his client. RRTFB 4-1.8(f). Here, the arrangement with MMRC was subject to Rule 4-1.8(f) because, ***at the time the arrangement was formed***, Mr. Bander had a financial interest in receiving reimbursement payments from MMRC, and, thus, the risk of a conflict of interest had arisen.

There is no inconsistency between the foregoing determination and the finding that, ***at the time Mr. Bander actually received the MMRC Payments***, he was required to hold them in trust pursuant to Rule 5-1.1 because the payments were funds belonging to his clients. Rule 5-1.1's requirements do not turn on whether the funds may or may not ultimately compensate the attorney for his fees, and, in fact, expressly include funds that are meant to compensate the attorney

for his fees. *See, e.g.*, RRTFB 5-1.1(b) (stating that funds required to be held in trust include "advances for fees, costs, and expenses"); *see also Fla. Bar v. Mirk*, 64 So. 3d 1180, 1185–86 (Fla. 2011) (rejecting the attorney's claim that he was permitted to use the funds at issue rather than hold them in trust because the client owed him money for legal fees on another matter). Instead, Rule 5-1.1's requirements turn on whether or not, ***at the particular time the funds are received***, the client has an interest in or claim to the funds. *See* RRTFB 5-1.1.

Therefore, the Referee's finding that, at the time Mr. Bander agreed to the financial arrangement with MMRC, he was required under Rule 4-1.8(f) to obtain his clients' informed consent is not inconsistent with the Referee's finding that, at the time Mr. Bander received the MMRC Payments, he was required under Rule 5-1.1 to hold the funds in trust.

6. *Because the MMRC Payments Were Entrusted Funds, Mr. Bander's Conduct Violated Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e).*

For all the foregoing reasons, Mr. Bander cannot demonstrate that the Referee's findings that the MMRC Payments belonged to Mr. Bander's clients and were subject to Rule 5-1.1 are "clearly erroneous

or without support in the record." *See Benchimol*, 681 So. 2d at 665. Those findings, therefore, should be approved. *See id.*

Having established that Rule 5-1.1 applies to the MMRC Payments, there is no dispute that Mr. Bander is guilty of violating Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e). Specifically, Mr. Bander has admitted that: (i) he did not hold the MMRC Payments in trust as required by Rule 5-1.1(a); (ii) he did not apply the MMRC Payments only for the specific purpose for which they were entrusted to him as required by Rule 5-1.1(b); and (iii) he did not promptly notify his clients after receiving the MMRC Payments, as required by Rule 5-1.1(e). (*E.g.*, 2 Tr. 64:12–65:13, 79:6–15; 1 Tr. 78:8–19; SEC Tr. 89:3–90:2, 95:12–96:16, 154:13–155:3; Resp. Exs. 12–14; TFB Ex. 4-I.) Accordingly, substantial, competent evidence supports the Referee's findings that Mr. Bander is guilty of violating Rules 5-1.1(a), 5-1.1(b), and 5-1.1(e), and those findings should be approved.

C. Mr. Bander Is Guilty of Violating Rule 4-8.4(c).

Rule 4-8.4(c) states, in pertinent part, that "[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation" RRTFB 4-8.4(c). The Referee concluded that Mr. Bander is guilty of violating Rule 4-8.4(c) because

he used [the MMRC Payment funds] that belonged to his clients; without notifying the client's [sic] of his possession of same; used the [MMRC Payment] funds for his own benefit to pay firm expenses for months and even up to a year; and waited until after he was informed the SEC wished to conduct a sworn statement before refunding any of those monies.

(ROR at 18.) The Referee determined that "[t]here is no doubt that these acts were intentional." (ROR at 18.)

Mr. Bander challenges this finding by contending that there is insufficient evidence that he did the foregoing acts with the necessary intent. (See Initial Br. at 34–36.) The record shows that the opposite is true.

1. The Referee's Determination That Mr. Bander Acted Intentionally Is a Fact Finding Afforded a Presumption of Correctness.

Mr. Bander erroneously asserts that the Referee's finding regarding his intent is a "legal conclusion," and, thus, it is not afforded the same presumption of correctness afforded to findings of fact. (See Initial Br. at 33.) Contrary to Mr. Bander's contention, this Court has repeatedly stated that "[a] referee's finding with regard to intent is a factual finding which must be upheld if there is competent, substantial evidence in the record to support it." *Fla. Bar v. Nicnick*,

963 So. 2d 219, 224 (Fla. 2007).⁵ And as with other findings of fact, where a referee's factual findings regarding an attorney's intent "are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *Id.*

2. Substantial, Competent Evidence Supports the Referee's Finding That Mr. Bander Acted Intentionally.

It is a "well-established principle that 'in order to satisfy the element of intent [for purposes of Rule 4-8.4(c)] it must only be shown that the conduct was deliberate or knowing.'" *Watson*, 76 So. 3d at 922 (quoting *Frederick*, 731 So. 2d at 1252). "The motive behind the attorney's action is not the determinative factor. Rather, the issue is whether the attorney deliberately or knowingly engaged in the activity in question." *Id.* Under this standard, if there is competent, substantial evidence in the record showing Mr. Bander "deliberately or knowingly engaged in the acts [charged], [then] his conduct was intentional." *See id.*

⁵ *See also, e.g., Fla. Bar v. Watson*, 76 So. 3d 915, 922 (Fla. 2011) (stating that the referee's finding regarding the attorney's intent was a factual finding); *Fla. Bar v. Forrester*, 818 So. 2d 477, 483 (Fla. 2002) (same).

Here, ample competent, substantial evidence in the record demonstrates deliberate and knowing acts of dishonesty. Mr. Bander repeatedly testified before the SEC that he understood the MMRC Payments were funds belonging to his clients and were not compensation or income belonging to him. (*E.g.*, SEC Tr. 92:22–93:11.) In spite of that knowledge, Mr. Bander intentionally used the MMRC Payment funds for his own benefit, namely to pay his firm's expenses and pay down his firm's line of credit. (*E.g.*, SEC Tr. 154:13–24.) Mr. Bander further testified that he intentionally kept his expected receipt, invoicing, actual receipt, and use of the MMRC Payment funds secret from his clients. (See Resp. Exs. 10, 11; *see also* SEC Tr. 207:18–210:23.) Finally, the evidence is undisputed that, for almost all of the MMRC Payments, Mr. Bander did not disclose or refund the payments to his clients until after he received the SEC Subpoena. (See Resp. Exs. 10, 11; *see also* SEC Tr. 207:18–210:23.)

Given this evidence, the Referee's factual finding that Mr. Bander knowingly and deliberately misappropriated his clients' funds is well supported and should be approved.

D. Mr. Bander Is Guilty of Violating Rules 4-1.7 and 4-1.8.

1. Substantial, Competent Evidence Supports the Referee's Findings that Mr. Bander Violated Rules 4-1.7 and 4-1.8.

Pursuant to Rule 4-1.7, absent informed consent by the lawyer's client, a lawyer is prohibited from representing a client if "there is a substantial risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer." RRTFB 4-1.7(a)(2), (b). Similarly, Rule 4-1.8(f) specifically requires a lawyer to obtain the client's informed consent before accepting compensation for representing the client from a third person. See RRTFB 4-1.8(f).

Mr. Bander concedes that he did not obtain his clients' informed consent to receive reimbursements of his legal fees from MMRC. Instead, he contends that he was not required to abide by Rule 4-1.7 because MMRC's reimbursement of his legal expenses on his clients' behalves did not create a substantial risk of materially limiting his pursuit of his clients' objectives. (See Initial Br. at 30.) Mr. Bander's contention is refuted by the RRTFB and the comments thereto.

Citing to Rule 4-1.8(f), the comments to Rule 4-1.7(a)(2) convey that, where a client's legal fees will be paid in whole or in part by a

third party, Rule 4-1.7(a)(2) requires a client's informed consent. RRTFB 4-1.7, cmt. Thus, the RRTFB and comments thereto expressly provide that payment of a client's legal expenses by a third party can create a substantial risk that the representation will be materially limited by a personal interest and require the client's informed consent. *See id.*; *see also* RRTFB 4-1.8(f).

Here, the circumstances of Mr. Bander's financial arrangement with MMRC carried a particular "substantial risk" of creating a conflict of interest. *See* RRTFB 4-1.7(a)(2). MMRC's offer to reimburse Mr. Bander's legal fees if his clients invested through it gave Mr. Bander a personal financial interest in having his clients choose to invest through MMRC rather than through another EB-5 regional center. Indeed, Mr. Bander substantially benefitted from the interest-free use of the MMRC Payments for months and even over a year. Moreover, there is no requirement that TFB prove that this financial interest did in fact have a material limitation on his clients' representation—just that it created a substantial risk of doing so. *See* RRTFB 4-1.7(a)(2). Thus, the Referee correctly found that, pursuant to Rules 4-1.7 and 4-1.8(f), Mr. Bander was required to obtain his clients' informed consent before entering his financial

arrangement with MMRC. Because Mr. Bander did not do so and, instead, kept the arrangement secret from his clients, he is guilty of violating those rules.

2. TFB Did Not Waive Its Charge That Mr. Bander Violated Rule 4-1.8(f).

As discussed above, the Referee found Mr. Bander guilty of violating Rule 4-1.8(f) because he did not obtain his clients' informed consent to MMRC reimbursing their legal fees. Mr. Bander does not dispute the accuracy of that finding. Instead, he contends that "[n]o such allegation appears in the Bar's Complaint" and, thus, the rule violation "is a newly asserted issue not properly preserved for review." (Initial Br. at 31.)

This Court has held that, even where TFB's complaint does not refer to a specific rule violation, an attorney can be found guilty of violating the rule as long as "the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint." *Frederick*, 731 So. 2d at 1253; *see also Fla. Bar v. Nowacki*, 697 So. 2d 828, 832 (Fla. 1997) ("We find that the conduct referenced by the referee in his report in this case, though not specifically pled in the Bar's complaint, was clearly within the scope

of the Bar's accusations."). Here, TFB's Complaint exceeds that standard because it not only alleges the conduct giving rise to the Rule 4-1.8 violation, but it specifically states that Mr. Bander violated "Rule 4-1.8 (Conflict of Interest; Prohibited and Other Transactions)." (See Tab 1, TFB Compl. ¶ 20.) In addition, the Complaint alleges that Mr. Bander received \$90,000 in MMRC Payments as reimbursements for his clients' legal fees, but he "did not notify the clients he had received the funds on their behalf until after the time the Commission re-opened its investigation," which was "months, and sometimes over a year, after respondent received and spent the funds." (See Tab 1, TFB Compl. ¶ 19.) Mr. Bander's failure to get his clients' informed consent before accepting the MMRC Payments falls "within the scope" of the Complaint's allegations that Mr. Bander failed to communicate to his clients his expected and actual receipt of the MMRC Payments. See *Frederick*, 731 So. 2d at 1253.

Accordingly, TFB's Complaint was sufficient for Mr. Bander to be found guilty of violating Rule 4-1.8(f), and the Referee's finding of guilt on that rule violation should be approved.

E. Mr. Bander Is Guilty of Violating Rule 4-1.4.

Rule 4-1.4 requires reasonable communication with a client

regarding the representation. See RRTFB 4-1.4. Mr. Bander contends that he was not required by Rule 4-1.4 to inform his clients regarding his financial arrangement with MMRC, his receipt of MMRC Payments, or his personal use of MMRC Payment funds because that information was not needed to "assist the clients in making informed decisions about the objectives of the representation." (See Initial Br. at 40.) Mr. Bander's contention ignores the express language of the rule.

Rule 4-1.4(a)(1) requires an attorney to "promptly inform [his] client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules." RRTFB 4-1.4(a)(1). As discussed above, Mr. Bander's financial arrangement with MMRC was a circumstance in which his clients' informed consent was required by Rules 4-1.7(b) and 4-1.8(f). Consequently, Mr. Bander was required under Rule 4-1.4(a)(1) to promptly inform his clients regarding MMRC's offer to reimburse their legal fees, and his failure to do so violated that rule.

Rule 4-1.4(a)(2) requires an attorney to reasonably consult with his client about the means by which the client's objectives are to be accomplished. RRTFB 4-1.4(a)(2). Here, the information that Mr.

Bander had obtained an agreement from one of the available regional centers to reimburse his clients' legal fees would have reasonably influenced the clients' decisions of which regional center and project to invest in for purposes of obtaining an EB-5 visa. Such information, therefore, was required to be promptly disclosed by Mr. Bander to his clients under Rule 4-1.4(a)(2), and Mr. Bander's failure to do so violated that rule. See RRTFB 4-1.4(a)(2).

II. THE COURT SHOULD ACCEPT THE REFEREE'S RECOMMENDATION OF DISBARMENT.

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). However, the Court generally 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.* Notably, the Court has expressly signaled to all members of TFB that it "has moved towards imposing harsher sanctions" for unethical and unprofessional conduct. *Id.*

B. Mr. Bander's Serious Misconduct Warrants Disbarment.

1. The Pertinent Standards and Case Law Support Disbarment for Mr. Bander's Misconduct.

Pursuant to Standard 4.1(a), "[d]isbarment is appropriate when a lawyer intentionally or knowingly converts client property **regardless of injury or potential injury.**" Standard 4.1(a) (emphasis added). In addition, under Standard 5.1(a)(6), "[d]isbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Standard 5.1(a)(6).

Consistent with these Standards, this Court has recognized that "disbarment is the appropriate sanction for misuse of client funds because it is unquestionably one of the most serious offenses a lawyer can commit." *Fla. Bar v. Massari*, 832 So. 2d 701, 706 (Fla. 2002). Indeed, "[t]he overwhelming majority of cases involving the misuse of client funds have resulted in disbarment despite the presence of mitigation." *Fla. Bar v. Barley*, 831 So. 2d 163, 171 (Fla. 2002); *see also Fla. Bar v. Pincket*, 398 So. 2d 802, 803 (Fla. 1981) ("We again reiterate that the misuse of clients' funds is one of

the most serious offenses a lawyer can commit, and we will not be reluctant to disbar an attorney for this type of offense even where there is restitution."). This Court has disbarred attorneys for gross negligence in maintaining a trust account even though the attorney's conduct was found to be unintentional. *See Fla. Bar v. Alters*, 260 So. 3d 72, 84 (Fla. 2018). However, the "presumption of disbarment is exceptionally weighty when the attorney's misuse is intentional rather than a result of neglect or inadvertence." *Id.*

The Court has allowed the strong presumption of disbarment for misuse or misappropriation of client funds to be rebutted only in limited circumstances where "substantial mitigating circumstances . . . demonstrate that the presumed sanction of disbarment would be unfair and inappropriate in a particular case." *Fla. Bar v. Brownstein*, 953 So. 2d 502, 511 (Fla. 2007). Such cases "are exceptional and generally involve relatively isolated instances of misconduct made in the face of dire circumstances." *Alters*, 260 So. 3d at 84.⁶

⁶ *See also, e.g., Brownstein*, 953 So. 2d at 512 (finding disbarment was appropriate despite the application of eight mitigating factors).

For example, in *Mirk*, 64 So. 3d at 1185, the respondent used \$31,487.50 in client trust funds for his own personal use. The respondent argued that, pursuant to an agreement with his client, he was entitled to retain the funds as payment towards the \$40,000 the client owed him for work on another project. *Id.* This Court disagreed and held that disbarment was the appropriate sanction for the respondent's knowing misappropriation of client funds. *See id.* at 1185–86. The Court determined that the respondent could not overcome the strong presumption of disbarment in cases of misappropriation of trust funds. *See id.*

The reasoning of *Mirk* and the weight of this Court's cases disbarring attorneys for misappropriation or misuse of client funds apply squarely here. Indeed, in this case, the Referee found—based on substantial, competent evidence—that Mr. Bander "knowing[ly] and deliberate[ly] conver[ted] [] his client's funds to his own use," without his clients' knowledge that he had even expected to receive or received the funds on their behalves, much less that he was using the funds to pay his own expenses. (ROR at 19.) That is the definition of misappropriation of client funds and clearly a misuse of such funds. *See* Misappropriation, Black's Law Dictionary (11th ed.

2019) ("The application of another's property or money dishonestly to one's own use.").

Moreover, the record supports the Referee's finding that Mr. Bander's conduct was intentional and deceptive. Mr. Bander knew that the MMRC Payments belonged to his clients, but he deliberately kept his expected receipt, invoicing, actual receipt, and use of the MMRC Payment funds secret from them, and, for almost all of the MMRC Payments, he did not disclose any information regarding the payments to his clients until he received the SEC Subpoena. (*See* Resp. Exs. 10, 11; *see also* SEC Tr. 207:18–210:23.) Finally, Mr. Bander's intentional, dishonest misappropriation was not a single isolated event. Instead, over the course of over a year-and-a-half, Mr. Bander misappropriated a total of \$90,000 belonging to his clients through six separate transfers, which occurred during the course of three separate client representations, and only ended because Mr. Bander was essentially caught by the SEC. (*See* Resp. Exs. 10, 11; *see also* SEC Tr. 207:18–210:23.) Under these circumstances, "not only does the referee's recommended discipline of disbarment have a reasonable basis in the Standards and in existing case law, . . . any less severe discipline . . . [would be] insufficient to fulfill the threefold

purpose of attorney discipline." *See Fla. Bar v. Gross*, 896 So. 2d 742, 745 (Fla. 2005).

Despite these well-supported facts, Mr. Bander argues that the appropriate sanction here is a public reprimand or suspension. (Initial Br. at 45.) All of the cases Mr. Bander cites are distinguishable. Indeed, most of the cases Mr. Bander cites either do not even involve misappropriation or misuse of client funds⁷ or do not involve any intentional misconduct.⁸

⁷ *See Fla. Bar v. Silver*, 788 So. 2d 958, 961 (Fla. 2001) (involving an attorney's violation of Rule 4-1.15(b) for failing to notify all persons with interests in funds received by the attorney); *Fla. Bar v. Kinsella*, 260 So. 3d 1046, 1050 (Fla. 2018) (suspending a lawyer for stealing less than \$1,000 from cash registers at a department store); *Fla. Bar v. Dupee*, 160 So. 3d 838, 852 (Fla. 2015) (suspending a lawyer for filing her client's inaccurate financial statement in a divorce proceeding, withholding financial documents in discovery, allowing her client to present false deposition testimony, and failing to notify opposing counsel that she had possession of a disputed coin collection entrusted to her by her client); *Fla. Bar v. Chapman*, No. SC22-340 (Fla. June 16, 2022) (the Court's approval of an uncontested report of referee, filed Sept. 12, 2022 by Mr. Bander as "supplemental authority") (finding the respondent commingled client funds with her own, but "respondent did not personally benefit from it, and no clients were harmed or suffered any losses," finding one aggravating factor, but six mitigating factors, and not finding any intentional misconduct).

⁸ *See Fla. Bar v. Wolf*, 930 So. 2d 574, 577–79 (Fla. 2006) (ruling that, because the respondent's misconduct was unintentional and the misconduct occurred at the time the respondent was undergoing

The Florida Bar v. Lumley, 517 So. 2d 13 (Fla. 1987)—the only case Mr. Bander cites in which client funds were knowingly misused by the accused attorney—is both distinguishable and outdated. Unlike here, in *Lumley*, the referee "found that there was no intent on the part of [the] respondent to defraud or deprive his clients of their property." *Id.* at 14. Moreover, *Lumley* was decided 35 years ago, and this Court "has moved towards imposing harsher sanctions" for unethical and unprofessional conduct. *See Fla. Bar v. Valentine-Miller*, 974 So. 2d 333, 336 (Fla. 2008); *see also Fla. Bar v. Parrish*, 241 So. 3d 66, 80 (Fla. 2018) (stating that a case decided 15 years ago was not controlling due to the Court's move towards imposing harsher sanctions for attorney misconduct).

Simply put, the inapposite cases cited by Mr. Bander cannot overcome "[t]he overwhelming majority of cases" from this Court

psychotherapy, suspension was the appropriate sanction); *Fla. Bar v. Mason*, 826 So. 2d 985, 988 (Fla. 2002) ("Mason did not intentionally misappropriate client funds for her personal use. Rather, through accounting errors, she inadvertently transferred proceeds to an operating account without proper records."); Conditional Guilty Plea and Consent Judgment for Discipline, *Fla. Bar v. Sorce*, No. SC2020-881, 2020 WL 3441154 (Fla. June 8, 2020) ("There was no evidence of malfeasance with respect to client funds and all client funds were properly accounted for and promptly remitted."), *approved*, No. SC2020-881, 2020 WL 3606272 (Fla. July 2, 2020).

finding that disbarment is the appropriate sanction where an attorney has misappropriated or misused client funds. *See Barley*, 831 So. 2d at 171.

2. *The Aggravating and Mitigating Factors Support Disbarment for Mr. Bander's Misconduct.*

"A referee's findings as to mitigation and aggravation carry a presumption of correctness and will not be disturbed unless clearly erroneous or without support in the record." *Valentine-Miller*, 974 So. 2d at 336. Mr. Bander challenges each of the seven aggravating factors found by the Referee other than the Referee's finding that Mr. Bander had substantial experience in the practice of law. Mr. Bander further contends that the Referee should have found more mitigating factors than the three found by the Referee. As provided below, Mr. Bander's challenges to the Referee's findings regarding the aggravating and mitigating factors fail because the findings are each supported by substantial, competent evidence in the record.

First, Mr. Bander contends that, instead of finding he had a dishonest or selfish motive as an aggravating factor, the Referee should have found that his good moral character or reputation and absence of dishonest motive were mitigating factors. (See Initial Br.

at 55–56, 60–61.) Mr. Bander's contentions are unavailing, as the record is replete with evidence of his dishonest or selfish motive, including: (i) evidence that Mr. Bander used the MMRC Payment funds for his personal benefit interest free over the course of a year-and-a-half (*e.g.*, 2 Tr. 64:12–65:13, 79:6–15; 1 Tr. 78:8–19; SEC Tr. 89:3–90:2, 95:12–96:16, 154:13–155:3; Resp. Exs. 3–5); (ii) Mr. Bander's testimony that he wanted to hold the funds to ensure his clients would engage him for future legal services (*see* SEC Tr. 151:15–152:15); (iii) evidence that Mr. Bander kept the MMRC Payments secret from his clients and did not come clean about them until after he received the SEC Subpoena (*see* SEC Tr. 55:9–12; 99:5–101:5; 1 Tr. 38:3–13); and (iv) Mr. Bander's testimony that he did not tell his clients about the funds to avoid having a difficult conversation with them (*see* SEC Tr. 55:6–57:4). On these facts, there is ample support for the Referee's findings that Mr. Bander had a dishonest or selfish motive and mitigating factors contrary to that motive did not apply. *See Fla. Bar v. Tauler*, 775 So. 2d 944 (Fla. 2000) (approving a referee's finding in aggravation of selfish motive when attorney issued checks from the firm's trust account to satisfy personal and business obligations, even though attorney replenished the trust

account and disbursed the funds to the clients before TFB initiated its investigation).

Second, Mr. Bander argues that the Referee erred in finding a pattern of misconduct and multiple offenses were aggravating factors. (See Initial Br. at 56.) But the undisputed evidence demonstrates that Mr. Bander's misappropriation of his clients' funds occurred through six separate transfers, over the course of more than a year-and-a-half, and during the course of three separate client representations. (See Resp. Exs. 3–5; *see also* SEC Tr. 207:18–210:23.)

Third, Mr. Bander argues that the Referee should not have found that he submitted false evidence, false statements, or committed other deceptive practices during the disciplinary process, and, instead, should have found that his "full and free disclosure to the Bar and cooperative attitude toward the proceedings" was a mitigating factor. (See Initial Br. at 60–61.) The Referee found that Mr. Bander's testimony at the final hearing, which directly contradicted his detailed sworn SEC Testimony—and all of the other record evidence—supported this aggravating factor. Essentially, Mr. Bander's explanation for his stark change in testimony is that, when

he was testifying before the SEC, his story needed to conform his conduct to SEC rules, but when he was testifying in his disciplinary proceedings, his story needed to conform his conduct to the RRTFB. (See Initial Br. at 57.) Mr. Bander's explanation only further shows his lack of honesty and credibility in connection with this matter.

Fourth, Mr. Bander contends that the Referee erred in finding that he refused to acknowledge the wrongful nature of his conduct. Mr. Bander testified at the final hearing that he did nothing wrong, even though the evidence clearly and convincingly shows that he converted his clients' property for his own personal benefit. Mr. Bander's claim that he believed the MMRC Payments were his direct compensation that he could use as he wished is refuted by his own detailed testimony to the contrary before the SEC (*e.g.*, SEC Tr. 22:16–23:8, 51:21–53:6, 92:22–93:11), and "there is nothing to suggest he [has] experienced any true remorse for his conduct," see *Germain*, 957 So. 2d at 621.

Fifth, Mr. Bander contends that the Referee should not have found vulnerability of the victim as an aggravating factor. This factor is supported by the undisputed evidence that Mr. Bander's clients were kept completely in the dark about the MMRC Payments—

including the fact that MMRC had even offered to make the payments—and, thus, the clients had no ability to object to Mr. Bander's personal use of the payments or otherwise assert their rights to the payments. (See SEC Tr. 55:9–12; 99:5–101:5; 1 Tr. 38:3–13). Mr. Bander's rebuttal that "he did, in fact, inform the clients of those payments, just not promptly" (Initial Br. at 59) noticeably omits that he did not inform his clients regarding the MMRC Payments for over a year after he started receiving them, and, for all but part of one payment, he only informed his clients about them after being served with the SEC Subpoena (see SEC Tr. 55:9–12; 99:5–101:5; 1 Tr. 38:3–13).

Sixth, Mr. Bander challenges the Referee's finding that Mr. Bander failed to establish that physical or mental disability or impairment was an applicable mitigating factor. (Initial Br. at 61.) Mr. Bander's only support for this factor was his own anecdotal testimony regarding his medical conditions, and he did not provide any evidence that those conditions had any causal effect on his misconduct at issue in these proceedings. (See Sanction Hr'g Tr. 77:12–78:19.) The Referee was, therefore, entitled to determine that Mr. Bander failed to establish the applicability of that mitigating

factor. *See Fla. Bar v. Herman*, 8 So. 3d 1100, 1106 (Fla. 2009) ("The fact that there is some evidence in the record to support a finding that a mitigating factor might apply does not mean that the referee should have necessarily found it applicable.").

Finally, Mr. Bander challenges the Referee's finding that unreasonable delay is not an applicable mitigating factor. In order to apply that mitigating factor, Mr. Bander not only needed to show unreasonable delay in the disciplinary proceedings, he also needed to demonstrate that he did not contribute to the delay and he has been prejudiced by the delay. *See Alters*, 260 So. 3d at 83. The Referee found that he failed to carry that burden. (ROR at 30–31.)

Specifically, the Referee found that Mr. Bander contributed to the delay by requesting several continuances following the filing of TFB's Complaint, including one for an indefinite period of time. In addition, the Referee found that Mr. Bander was not prejudiced by any delay in the disciplinary proceedings. (ROR at 30–31.) Although Mr. Bander contended that he would have preserved his late father's testimony if he had known sooner that TFB was going to file a formal complaint, the Referee determined that such testimony would not have been relevant to Mr. Bander's disciplinary proceedings anyway.

(ROR at 30–31.) Mr. Bander stated that his father would have testified regarding the 2015 SEC Proceedings the Firm's handling of client fees. (*Id.*) But the Referee correctly recognized that the 2015 SEC Proceedings have "nothing to do with the current offense except it placed respondent on notice of impermissible conduct," and the funds at issue here were reimbursements belonging to clients, not the direct payment of client fees. (*Id.*)

Accordingly, because the Referee's findings regarding the aggravating and mitigating factors are well supported by the record, the findings should be approved. *See Valentine-Miller*, 974 So. 2d at 336.

The Referee's finding of seven aggravating factors and only three mitigating factors demonstrates that this is not one of the "exceptional" cases where the strong presumption of disbarment for misappropriation of client funds can be overcome by showing substantial mitigation of isolated conduct "made in the face of dire circumstances." *See Alters*, 260 So. 3d at 84. Indeed, there were no circumstances contributing to Mr. Bander's decision to secretly use the MMRC Payment funds belonging to his clients other than the obvious: he either wanted to keep the funds for himself or use them

as interest-free loans without his clients' knowledge or consent. Consequently, as in the vast majority of cases where an attorney has misappropriated or misused client funds, the Referee's recommended sanction of disbarment is appropriate here and should be approved.

CONCLUSION

For the foregoing reasons, TFB respectfully requests that the Court approve the Referee's recommendations of guilt, recommended discipline of disbarment, and recommended payment of TFB's costs.

Respectfully submitted on September 12, 2022.

THE FLORIDA BAR

Mark Mason
Florida Bar No. 98013
Patricia Ann Toro Savitz
Florida Bar No. 559547
The Florida Bar
651 E. Jefferson St.
Tallahassee, Florida 32399
(850) 561-5600
psavitz@floridabar.org
mmason@floridabar.org

Jennifer R. Falcone
Florida Bar No. 624284
The Florida Bar
444 Brickell Avenue, Ste. M-100
Miami, Florida 33131
(305) 377-4445
jfalcone@floridabar.org

HOLLAND & KNIGHT LLP

/s/Kathryn Isted
Kevin W. Cox
Florida Bar No. 34020
Tiffany A. Roddenberry
Florida Bar No. 92524
Kathryn Isted
Florida Bar No. 1005163
315 S. Calhoun St., Ste. 600
Tallahassee, FL 32301
(850) 224-7000
kevin.cox@hklaw.com
tiffany.rodtenberry@hklaw.com
kathryn.isted@hklaw.com
jennifer.gillis@hklaw.com

Counsel for Complainant The Florida Bar

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 September 12, 2022:

D. Culver Smith III
Culver Smith III, P.A.
500 S Australian Ave, Ste. 600
West Palm Beach, FL 33401-6237
csmith@culversmithlaw.com

Counsel for Respondent

/s/Kathryn Isted

Attorney

CERTIFICATE OF COMPLIANCE

I certify this document complies with the applicable font and page requirements. See Fla. R. App. P. 9.045(e) & 9.210.

/s/Kathryn Isted

Attorney