IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, *Complainant*, vs. STEPHEN MATTHEW BANDER, *Respondent*.	CASE NO. SC21-11 Fla. Bar File 2018-70,073 (11G)

On Review of a Report of Referee
in a Florida Bar Disciplinary Proceeding

RESPONDENT'S INITIAL BRIEF

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PREFACE

This is Respondent's initial brief. Documents contained in the record will be cited by reference to their tab numbers in the Index to Record ("R. at [tab number]"). The Report of Referee (R. at 75) will be cited as "Report."

The transcript of the two-day final hearing (guilt phase) comprises two volumes that are separately paginated. The transcript of the November 23, 2021, session will be cited as "1 Trial Tr." and the transcript of the November 24, 2021, session as "2 Trial Tr." The transcript of the December 17, 2021, sanctions hearing will be cited as "Sanctions Tr."

This brief is accompanied by an appendix containing two exhibits offered by Respondent at trial. It will be cited as "Initial Br. App."

STATEMENT OF THE CASE AND THE FACTS

A. The Case

This lawyer-disciplinary case is before the Court for review of a referee's report that recommends that Respondent, Stephen Bander, be found guilty of seven rule violations and be disbarred. It is a report of a referee in name only. The Referee adopted the Bar's proposed report substantially verbatim.[1]

The Bar opened this disciplinary matter in August 2017 in response to a letter from a lawyer employed by the U.S. Securities & Exchange Commission (SEC) dated July 27, 2017, suggesting "possible professional misconduct" by Mr. Bander. 1 Trial Tr. 17:9–15. The Bar charged Mr. Bander with violating seven Rules Regulating The Florida Bar:

(1) rule 4-1.4 (communication);

[1] The referee made two nonsubstantive changes (one inaccurately), corrected two typographical errors, changed the date of the report, and corrected the room number of his courthouse address. The inaccurate change was to add "in person" to describe the final hearing. Report at 3. The first day of the hearing was via Zoom. The Bar's proposed report is not part of the record but can be furnished if requested.

(2) rule 4-1.7 (concurrent-client conflict of interest);

(3) rule 4-1.8 (prohibited-transaction conflict);

(4) rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation);

(5) rule 5-1.1(a) (commingling of entrusted funds);

(6) rule 5-1.1(b) (misapplication of entrusted funds); and

(7) rule 5-1.1(e) (notification and delivery of entrusted funds).

R. at 1.

A final hearing was conducted on November 23 and 24, 2021. The Bar's evidence comprised the testimony of its staff auditor, Thomas Duarte, Mr. Duarte's written report with exhibits (Bar's Ex. 4), Mr. Bander's response to the Bar's initial inquiry about the matter (Bar's Ex. 2), and the transcript of testimony given by Mr. Bander to representatives of the SEC in an unrelated matter (Bar's Ex. 3). Mr. Bander presented the testimony of his firm's former accountant, the testimony of his SEC counsel, his own testimony, and several exhibits. One of the exhibits was a document prepared by a third party characterizing its payment of

Mr. Bander's fees, which is the principal focus of the case. Resp't's Ex. 9; Initial Br. App. 9–24. The Referee excluded the exhibit as irrelevant. 2 Trial Tr. 42:25–46:18.

A sanctions hearing was held on December 17, 2021. At the sanctions hearing, Mr. Bander presented in mitigation his sister's testimony, his own testimony, and additional exhibits.

The Referee requested the parties to submit proposed reports. The parties did so on January 24, 2022. On February 15, 2022, the Referee signed the Bar's 33-page proposed report without substantive change. The report recommends that Mr. Bander be found guilty on all seven charged rule violations and be disbarred.

B. The Facts

The evidentiary facts are substantially undisputed. The parties disagree on their legal significance.

Respondent and His Practice

Respondent, Stephen Matthew Bander, is an immigration and nationality lawyer. He has been a member of The Florida Bar in good standing since January 1999. He also is licensed to practice law in New York and Maine. He is a solo practitioner and the sole

owner-member of Bander Law Firm, P.L.L.C. The firm was founded by Mr. Bander's father, Michael A. Bander. Mr. Bander joined the firm in 1999. Mr. Bander's father passed away in September 2018. Mr. Bander's clientele comprises a diverse socioeconomic and geographical population. 2 Trial Tr. 19:19–22:16.

The EB-5 Immigrant Investor Program

Among Mr. Bander's clients are foreign nationals who wish to become lawful permanent residents of the United States pursuant to the EB-5 Immigrant Investor Program. The program permits foreign nationals to quality for EB-5 visas by investing in new commercial enterprises that create full-time jobs for qualifying U.S. workers. The investments may be made through regional centers designated by the U.S. Citizenship and Immigration Service (USCIS) to promote economic growth. An application for an EB-5 visa is made by filing an I-526 petition with the USCIS. Bar's Ex. 4, ex. D; 2 Trial Tr. 23:3–24:14.

One of the USCIS-designated regional centers is the Miami Metropolitan Regional Center, LLC (MMRC). One of the commercial enterprises sponsored by MMRC was Skyrise Miami Tower

Investors, LLC, which planned to build an entertainment and observation tower adjacent to Bayside Marketplace in downtown Miami. 2 Trial Tr. 24:15–25:18; Bar's Ex. 4, ex. E. As an enticement to a potential investor, Skyrise offered to pay the investor's immigration lawyer's fees for seeking an EB-5 visa. 2 Trial Tr. 42:4–7.

Mr. Bander's Representation of EB-5 Applicants

Mr. Bander represented three EB-5 applicants who invested in Skyrise: Carlos Felix, Patricia Abarca, and Theodoros Niarchos. Mr. Bander executed written representation agreements with Felix in February 2015, Resp't's Ex. 7, and with Abarca in March 2016, Resp't's Ex. 8. He reached an oral representation agreement with Niarchos in or around May 2015. 2 Trial Tr. 40:9–20. All three agreements provided for a noncontingent flat fee of $25,000, with $12,500 nonrefundable and payable upon engagement and $12,500 payable upon receipt of USCIS's decision on the client's I-526 petition. 2 Trial Tr. 36:23–37:9, 39:21–40:8, 40:16–20.

When Mr. Bander learned that Skyrise had promised to pay his fees, he sent Skyrise a proposed agreement to that effect. Bar's

Ex. 3, at 99:5–14. In response, he received a telephone call from Henry Adorno, Skyrise's managing agent, who told Mr. Bander simply to bill him for those fees when certain benchmarks were reached (the filing of the I-526 petition and the receipt of the USCIS's decision on the petition). *Id.* at 99:15–19. Adorno told Mr. Bander to put "reimbursement for legal fees" on the invoices. Bar's Ex. 3, at 45:12–22. Skyrise never reduced to writing with Mr. Bander or the three investor-clients its commitment to pay Mr. Bander's fees. 2 Trial Tr. 42:14–22.

Mr. Bander's Billings

Because Skyrise Miami had not confirmed in writing its promise to pay his fees, Mr. Bander billed both the client and Skyrise. He billed the clients to ensure payment for his services in case Skyrise reneged on its promise and Skyrise to obtain for his clients the benefit of Skyrise's promise. 2 Trial Tr. 62:6–63:16.

Mr. Bander's billings employed various terminology. *See* Resp't's Exs. 3, 4, 5.; Initial Br. App. 3–8 (Felix). Each of the bills to Skyrise is titled "Invoice." Pursuant to Adorno's instructions, each of the Skyrise invoices states "Reimbursement of Legal Fees for the case of

[Client]." When Mr. Bander received a payment from Skyrise, his accountant, Elaine Naughton Allen, created a "Bill" for that amount. 2 Trial Tr. 7:3–15. Each such "Bill" shows as "Vendor" the client or client-related party to whom to credit the payment, characterizes the funds as "Unearned Retainers," and in the memo line says "Refund." Ms. Allen selected *Invoice* and *Bill* from the QuickBooks menu of documents and chose the terms *vendor*, *unearned retainers*, and *refund* from the QuickBooks menu of terms. 2 Trial Tr. 7:16–8:24.

Because he considered the payments to be for fees earned, Mr. Bander deposited both the clients' payments and Skyrise's payments in his firm's operating account. He thereafter used the funds for the firm's business purposes. He at all times considered the overpayments as subject to refunds to the clients or, if the clients so instructed, as credits against fees for future work. 2 Trial Tr. 65:14–20. For accounting and tax purposes, he credited the overpayments to the clients' accounts and carried them as firm liabilities. 2 Trial Tr. 10:4–11:25; Resp't's Ex. 6. He always had the ability to make the refunds, either from cash on hand or by

borrowing on the firm's existing line of credit. 2 Trial Tr. 65:25–66:6.

Mr. Bander's Notification to Clients and Refund of Overpayments

Mr. Bander received Skyrise's payments for the Felix matter on August 5, 2015, and October 17, 2016. Bar's Ex. 4, ex. 7, "Client F." He informed Felix of the payments on October 4, 2016. 2 Trial Tr. 69:6–17; Resp't's Ex. 10. He received Skyrise's payments for the Abarca matter on August 26, 2016, and February 9, 2017. Bar's Ex. 4, ex. 7, "Client A." He informed Abarca of those payments on February 27, 2017. Resp't's Ex. 11. He received Skyrise's payments for the Niarchos matter on November 2, 2015, and November 23, 2016. Bar's Ex. 4, ex. 7, "Client N." Mr. Bander refunded the overpayments to all three clients in February and March 2017. 2 Trial Tr. 69:22–70:14, 71:25–72:8, 72:9–15. He never intended to keep the overpayments. 2 Trial Tr. 65:21–24.

The Referee asserts that Mr. Bander made the refunds "only after he learned the SEC had reopened its investigation of the firm." Report at 6.[2] This innuendo is contradicted by direct evidence:

1. On February 22, 2017, Mr. Bander received a letter and subpoena from the SEC requiring his testimony before SEC officials on March 23, 2017, in Washington, D.C.[3] The letter and subpoena referenced "In the Matter of American Life, Inc., HO-12050." Resp't's Ex. 1. Two years earlier Mr. Bander's father had been one of several immigration lawyers nationwide investigated by the SEC for accepting commissions or finder's fees from EB-5 regional centers or projects for introducing clients as potential investors. 2 Trial Tr. 29:11–31:20. The SEC asserted that the lawyers were acting as unregistered securities broker-dealers. 2 Trial Tr. 49:19–50:1.[4]

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[2] The Referee cites the SEC's letter to the Bar as indicating that the SEC had "reopened" its earlier investigation of the Bander firm. That letter (Bar's Exhibit 1) was neither offered nor admitted in evidence.

[3] The transcript is replete with references to the "FCC." The correct reference is to the SEC.

[4] The Florida Bar Professional Ethics Committee 35 years earlier had opined that accepting a finder's fee was ethical as long as the lawyer did not charge the client a fee for the same service. *See* Fla. Bar Prof'l Ethics Comm. Op. 70-13, 1970 WL 10147 (1970).

Mr. Bander's father and the Bander Law Firm entered into a settlement agreement whereby, without admitting fault, they agreed to pay to the SEC $228,750 as disgorgement, plus prejudgment interest of $19,434 and a penalty of $25,000. Bar's Ex. 4, ex. C. (Mr. Bander's father was 76 and in ill health, a factor in the decision to settle. 2 Trial Tr. 31:21–32:6.) As a result of that experience, Mr. Bander was concerned that the SEC would claim that his accepting legal fees (as opposed to commissions) from an EB-5 entity (Skyrise) was improper and would require disgorgement of those fees, thereby depriving his clients of their benefit. He decided to refund the overpayments at that time rather than risk their disgorgement and loss to the clients. 2 Trial Tr. 74:16–76:2.

2. Because the subpoena referred to "In the Matter of American Life, Inc.," Mr. Bander assumed that the inquiry would focus on payments received from EB-5 entities, not on trust-account rules or their application to such payments. 2 Trial Tr. 27:22–28:18. He made the refunds before testifying—before he

learned that he would be questioned about ethical issues related to his handling of the funds. 2 Trial Tr. 69:22–72:15.[5]

Mr. Bander's Dealings with the Clients

Mr. Bander's billing both the clients and Skyrise, receipt of payments from Skyrise, deposit of those funds in the operating account, and use of the funds for the firm's business purposes in no way limited the courses of action that Mr. Bander carried out in pursuit of his clients' EB-5 visas. 2 Trial Tr. 78:15–79:20. He never told the three clients that he had not received the Skyrise payments or actively concealed from them anything about the billing and collection of those fees. 2 Trial Tr. 77:7–78:7. None of the three clients has complained about Mr. Bander's billings and collections, his use or refund of the funds received from Skyrise, or the case overall. 2 Trial Tr. 79:21–80:8. All three received EB-5 visas. 2 Trial Tr. 80:8–9.

[5] Mr. Bander subsequently provided the SEC with various documents. He thereafter had no contact from the SEC. 2 Trial Tr. 35:17–36:9.

SUMMARY OF THE ARGUMENT

The essential issue in this case is whether a third party's payments of a lawyer's earned fees that duplicate the client's payment of those fees must be treated as entrusted funds to be deposited in the lawyer's trust account or are to be handled like any other payment of earned fees that become the property of the lawyer, albeit subject to refund. The Referee concluded that the duplicate payments received by Mr. Bander from Skyrise were entrusted funds. He bases that conclusion on labels and terminology loosely and inconsistently applied to the payments by Mr. Bander and Skyrise. As opined by the Bar's own Professional Ethics Committee, labels do not control, rather such issues are determined by the nature and purpose of the payments. Here, the payments clearly were on account of earned fees. The Referee's error is compounded by his excluding from evidence as irrelevant a formal document prepared by Skyrise that describes the funds as payments of legal fees.

The Referee erred in concluding that Mr. Bander's accepting the Skyrise payments constituted a material-limitation conflict of

interest. A material-limitation conflict arises when there is a substantial risk that the interest of another client or a third party or the lawyer's own interests will foreclose the lawyer's pursuit of an appropriate course of action in furtherance of the client's objectives. The record contains no evidence that Mr. Bander's accepting the Skyrise payments in any way risked materially limiting the courses of action that he pursued in the furtherance of his clients' objectives, namely, obtaining EB-5 visas.

The Referee likewise erred in finding that Mr. Bander engaged in dishonest conduct concerning his receipt and use of the Skyrise payments. Proof of dishonesty requires a showing of intent, which may be satisfied by showing that the conduct was deliberate or knowing. The record contains no evidence that Mr. Bander deliberately or knowingly misrepresented or concealed his receipt or use of the Skyrise payments. The Referee merely draws an inference that is contracted by direct evidence.

The Referee also erred in concluding that Mr. Bander failed to meet his communication obligations by not promptly notifying his clients of the payments. The ethical communication obligation

relates to decisions affecting the pursuit of the client's objectives—here, pursuit of EB-5 visas. Mr. Bander's receipt of the Skyrise payments did not invoke decisions affecting the clients' objectives.

Finally, regardless of this Court's decisions on guilt or innocence of the various charges, disbarment is unduly harsh. Mr. Bander at worst made an honest mistake about how to handle the Skyrise payments. The unique circumstances and many mitigating factors in this case make disbarment a disproportionate sanction.

ARGUMENT

I.

The Referee's legal conclusion that duplicate payments of Mr. Bander's earned fees by a third party (Skyrise) were entrusted funds is unsupported by the evidence and contrary to law.

A. The Standard of Review

This issue addresses the Referee's legal conclusion, drawn from substantially undisputed facts, that Skyrise's payments of Mr. Bander's fees constituted entrusted funds. If a referee's findings of fact are supported by competent substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000). The referee's factual findings, however, must be sufficient under the applicable rules to support the recommendations as to guilt. *Fla. Bar v. Shoureas*, 913 So. 2d 554, 557–58 (Fla. 2005). A referee's conclusions of law are not given the same presumption of correctness afforded a referee's findings of fact. *Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 736 (Fla. 2002). The party attacking the referee's conclusions of guilt must demonstrate that the record

evidence clearly contradicts the conclusions. *Fla. Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007).

An additional consideration is the Referee's verbatim adoption of the Bar's proposed report. Although this may not require reversal per se, *see Fla. Bar v. Picon*, 205 So. 3d 759, 763 (Fla. 2016), the Referee's verbatim adoption denies this Court the proper assurance that his factual findings and legal conclusions are the product of the independent, thoughtful study and deliberation that warrant the usual deference.

B. The nature of funds received is not determined by labels applied to them but by their purpose.

The essential question in this case is the nature and purpose of the funds that Mr. Bander received from Skyrise—were they payments of earned fees, or were they entrusted funds? The Referee leaps to the legal conclusion that they were the latter based on labels such as *reimbursement* and *refund* loosely and inconsistently applied to them by the participants. From there the Referee concludes that Mr. Bander improperly commingled the funds by depositing the payments in his firm's operating account and

thereafter misappropriated the funds by using them for his firm's business purposes. Report at 13, 14.

To quote the Bar's own Professional Ethics Committee:

> [T]rust-accounting questions should be analyzed not by the application of labels, but by considering the purpose of the subject funds in light of the facts and circumstances attending their payment.

Fla. Bar Prof'l Ethics Comm. Op. 93-2, 1993 WL 761327, at *2 (1993). The Referee's reliance on labels is contrary to law.

C. Payments of earned fees are the lawyer's property and are not to be deposited in the lawyer's trust account.

The following is undisputed:

1. Payments for earned fees are properly deposited in a lawyer's operating account and may not be commingled with trust funds. *Cf. Fla. Bar v. Mitchell*, 645 So. 2d 414, 415 (Fla. 1994) (depositing legal fees in trust account constitutes commingling).

2. Payments properly deposited in a lawyer's operating account are the lawyer's property and may be used for the lawyer's business or personal purposes.

3. The foregoing is true notwithstanding the possible occurrence of an event that gives rise to a refund claim by the client. *Cf.* Op. 93-2, at *3 (by implication).

4. The lawyer need not maintain in his operating account sufficient funds to cover the contingency of a refund claim.

The Bar's own expert, Mr. Duarte, confirmed these points. 1 Trial Tr. 86:14–94:16.

D. The Skyrise payments were for earned fees.

Regardless of various labels applied to the Skyrise payments by the participants, they were on account of earned fees for work performed—but for the work performed, no bills would have been sent and no payments made. If Mr. Bander had billed only Skyrise, the Skyrise payments would properly be deposited in his operating account as payment of earned fees. Mr. Duarte confirmed this. 1 Trial Tr. 91:22–92:6. The resulting overpayments, as with any overpayment, simply were subject to a refund obligation. That does not change their nature and purpose when made. What is significant is that Skyrise's managing agent, Henry Adorno, told Mr. Bander to bill Skyrise for his fees upon reaching certain

performance benchmarks—upon the conclusion of certain stages of the representation—unrelated to his billing the clients or receiving payments from the clients. The Skyrise payments were of earned fees—fees for work performed.

That the funds were subject to a possible refund obligation does not change this. It is no different than a lawyer's refunding in whole or in part an otherwise nonrefundable fee when a client dies or discharges the lawyer before the lawyer has rendered services. The lawyer uses his or his law firm's funds to make the refund. Whether those funds were readily available or borrowed is irrelevant, because the fee became the lawyer's property when received. The issue is not whether the lawyer has misappropriated the funds in the interim, but whether, given the changed circumstances, the lawyer will be deemed in hindsight to have charged an excessive fee. *See* Op. 93-2, at *4.

The Referee notes that Mr. Bander recorded the funds as "liabilities" on his accounts, meaning monies owed to the clients. Report at 11. This is consistent with overpayments of earned fees subject to refund obligations. How else would they be recorded?

Mr. Bander disclosed these liabilities on his firm's tax return. *See* Resp't's Ex. 6.

Regardless, labels and terminology used in the billing documents or by the parties themselves do not determine the issue. As the Bar's own Professional Ethics Committee has opined, trust-accounting questions "should be analyzed not by the application of labels, but by considering the purpose of the subject funds in light of the facts and circumstances attending their payment." Op. 93-2, at *2. The Bar has not disputed or tried to downplay that opinion, and the Referee ignores it. Mr. Duarte himself testified that "[i]t doesn't matter what Mr. Bander calls the funds," that "the description of the funds is determined by the actual facts and circumstances surrounding the payment of those funds." 1 Trial Tr. 75:23–76:1. Because the Skyrise payments were for earned fees, Mr. Bander properly deposited them in his operating account and permissibly used the funds for his firm's business purpose.

E. The Referee's conclusions that Mr. Bander (1) improperly received payment of earned fees from a third party and (2) failed to treat those payments as entrusted funds are inherently contradictory.

The Referee has adopted inconsistent positions on the nature and significance of the Skyrise payments:

1. The Referee asserts that Mr. Bander violated rule 4-1.8 by accepting compensation from a third party (Skyrise) without the clients' consent. Report at 20–21. If the payments are compensation to Mr. Bander, they are not entrusted funds that must be deposited in the trust account.

2. The Referee suggests that the SEC's 2015 investigation put Mr. Bander on notice that he was not allowed to receive any compensation in connection with the EB-5 program. Report at 4–5. The Referee thus is suggesting that Mr. Bander improperly accepted compensation from Skyrise. Compensation in this context means earned fees.

These inconsistent findings demonstrate the absence of competent substantial evidence that the Skyrise payments were entrusted funds.

F. Mr. Bander was not required promptly to notify the clients of the receipt of overpayment of earned fees.

The Referee concludes that Mr. Bander violated Rule 5-1.1(e) by not promptly notifying his clients of his receipt of the duplicate payments from Skyrise. Report at 13–14. Rule 5-1.1(e) provides that upon 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 . . . [and] must promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive."

This obviously applies to entrusted funds. It does not apply to funds received in payment of earned fees, which are the lawyer's property, not the client's.

G. Summary and Conclusion

To sum up:

1. The legal significance of funds received by a lawyer is determined not by labels applied to them but by their nature and purpose.

2. Strip away the labels loosely and inconsistently applied to the Skyrise payments by the participants, and what remains simply are payments on account of earned fees.

3. They are payments of earned fees even if they resulted in overpayments that were subject to refund obligations.

4. Earned fees must be deposited in the lawyer's operating account and not in the trust account. Thus, Mr. Bander did not commingle his funds with client funds in violation of rule 5-1.1(a).

5. Fees properly deposited into a lawyer's operating account become the lawyer's property, to use as the lawyer sees fit. Accordingly, Mr. Bander's use of the funds for his firm's business purposes did not violate rule 5-1.1(b).

6. A lawyer is not obligated to notify the client of the receipt of earned fees. Therefore, Mr. Bander did not violate rule 5-1.1(e).

No competent substantial evidence supports a violation of rule 5-1.1(a), rule 5-1.1(b), or rule 5-1.1(e). The Court should reject the Referee's recommendation of guilt on those charges.

II.

The Referee crippled Mr. Bander's defense by erroneously excluding from evidence as irrelevant Mr. Bander's Exhibit 9 reflecting Skyrise's purpose and intent regarding the payments.

A. The Standard of Review

This issue invokes a ruling denying the admission of certain evidence as irrelevant. A referee's evidentiary rulings are reviewed for abuse of discretion. *Fla. Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006).

B. Exhibit 9 was relevant as reflecting Skyrise's purpose and intent regarding the funds at issue.

The principal issue in this case is the nature and purpose of the payments that Mr. Bander received from Skyrise Miami Tower Investors, LLC—whether they were payments of earned fees, hence properly deposited in the operating account, or entrusted funds that were required to be deposited in the trust account. At the final hearing, Mr. Bander offered into evidence a "Notice to Investors and Fifth Amendment to Confidential Private Offering Memorandum" dated October 12, 2018. Resp't's Ex. 9. Attached to the Notice is

"Addendum No. 5 to Confidential Private Placement Memorandum of Skyrise Miami Tower Investors LLC" dated as of October 12, 2018. The Addendum provides Skyrise's investors with the opportunity to withdraw their investments. It states that upon request to do so, Skyrise "will return the investor's Capital Contribution and Administration Fee, if any amount remains after *payment of Investing Member's legal fees* and/or agent's fee." Resp't's Ex. 9, Addendum at 3 (emphasis added). Attached to the Addendum is an "Investor Consent Letter," which provides a withdrawal option that includes the language, "I understand I may not receive a refund of all or any of the Administration Fee if same was utilized *to pay for my legal fees* and/or agent's fee." (Emphasis added.) The exhibit, therefore, indicates that Skyrise considered the funds at issue to be payments for legal fees.

Bar Counsel objected to the exhibit as irrelevant because it was created in 2018—after the payments at issue had been made. The Referee sustained the objection and excluded the exhibit. 2 Trial Tr. 42:25–46:18.

Bar Counsel argued in closing argument that the nature and purpose of the payments was determined by the party making them and that Skyrise had characterized the payments as "reimbursements," not payments of legal fees. 2 Trial Tr. 106:1–15. This argument was contrary to what Bar Counsel knew was reflected in Mr. Bander's Exhibit 9, which for obvious reasons she had blocked from being admitted into evidence.

Mr. Bander's Exhibit 9 was a crucial piece of his defense. Evidence is relevant if it tends to prove a material fact. Fla. Stat. § 90.401 (2021). All evidence tending to prove or disprove a material fact is admissible except as otherwise provided by law. *Id.* § 90.402; *Wright v. State*, 19 So. 3d 277, 291 (Fla. 2009). Mr. Bander's Exhibit 9 reflected Skyrise's own characterization of the type of payments at issue. That the statement was made in 2018 does not render it irrelevant. The date of the document, if anything, goes merely to its weight, not its relevance per se—just as would a witness's testimony about an event after some lapse of time. Remoteness in time relates to weight, not admissibility. *Holliday v. State*, 389 So. 2d 679, 681 (Fla. 3d DCA 1980). If a Skyrise

representative had testified about the payments at the final hearing, the testimony patently would have been admissible. Mr. Bander's Exhibit 9 is a formal document dealing with securities offerings and governed by securities law. Given its legal significance, its accuracy can be safely assumed—more so than the memory of human beings.

Likewise, the absence of the four earlier addenda did not render Addendum 5 incomplete. It is complete in and of itself. It required no extraneous explanation.

The Referee's decision was not based on a balancing of probative value against undue prejudice under § 90.403. It was based on relevance per se. The Referee abused his discretion in excluding clearly relevant evidence. The exclusion of the exhibit was highly prejudicial to Mr. Bander's defense. The Court should reverse for a new trial.

III.

The Referee's legal conclusion that Mr. Bander's receipt of the Skyrise payments constituted a conflict of interest is contrary to law absent evidence that it risked precluding him from carrying out an appropriate course of action for the clients.

A. The Standard of Review

This issue addresses the Referee's legal conclusion, drawn from substantially undisputed facts, that Mr. Bander engaged in an impermissible conflict of interest by receiving the Skyrise payments. If a referee's findings of fact are supported by competent substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000). The referee's factual findings, however, must be sufficient under the applicable rules to support the recommendations as to guilt. *Fla. Bar v. Shoureas*, 913 So. 2d 554, 557–58 (Fla. 2005). A referee's conclusions of law are not given the same presumption of correctness afforded a referee's findings of fact. *Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 736 (Fla. 2002). The party attacking the referee's conclusions of guilt must demonstrate

that the record evidence clearly contradicts the conclusions. *Fla. Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007).

An additional consideration is the Referee's verbatim adoption of the Bar's proposed report. *See supra* p. 16 (Issue I, Standard of Review).

B. A material-limitation conflict arises when a substantial risk exists that the lawyer's pursuit of the client's objectives will be materially limited by the interests of others.

The Referee recommends that Mr. Bander be found guilty of violating rule 4-1.7. He does not specify which subsection or subsections of the rule Mr. Bander violated. Report at 20. He concludes (adopting verbatim the Bar's language) that Mr. Bander's actions "constituted a conflict of interest between himself and his client's [sic] because his own benefit of receiving and using the funds at issue cannot be separated from the client's interests in choosing the best MMRC and project in which to invest." *Id.*

The Referee apparently is invoking a material-limitation conflict under rule 4-1.7(a)(2). The gist of a material-limitation conflict is a substantial risk that a lawyer's loyalty to a client will be impaired if

the lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. R. Regulating Fla. Bar 4-1.7 cmt. para. [4]. The critical question is whether any such other interests will materially interfere with the lawyer's independent professional judgment in considering alternatives or will foreclose courses of action that reasonably should be pursued on behalf of the client. *Id.*

C. Mr. Bander's receipt of payments from Skyrise did not create a substantial risk of limiting his pursuit of his clients' objectives.

The clients' investment decisions were unrelated to the objectives for which the clients retained Mr. Bander—pursuit of EB-5 visas. The Referee did not find that Mr. Bander's receipt of payments from Skyrise in any way created a substantial risk of materially limiting his pursuit of those objectives, much less actually did so. The only direct evidence is to the contrary. Mr. Bander testified that the billing, receipt, and use of those funds in no way limited or foreclosed any course of action in his pursuit of his clients' objectives. 2 tr. at 78:15–79:20. He also testified that he provided the clients with other EB-5 project investment options and

that their selection made no difference to him. 2 Trial Tr. 42:1–42:3. This makes perfect sense, because he stood to be paid by his clients regardless of their investment choices. In the final analysis, the clients benefitted from the arrangement: Skyrise paid Mr. Bander's fees.

D. The Bar did not plead that Mr. Bander improperly received compensation from a third party.

The Referee further concludes (in the Bar's language) that Mr. Bander engaged in a transaction prohibited by rule 4-1.8 "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" (presumably a violation of subdivision (f) of rule 4-1.8). No such allegation appears in the Bar's Complaint. Rule Regulating The Florida Bar 3-7.6(h)(1)(B) requires that the complaint "set forth the particular act or acts of conduct for which the attorney is sought to be disciplined." This is a newly asserted issue not properly preserved for review. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537

So. 2d 561, 562–63 (Fla. 1988) (specific negligence theory not alleged in pleading).[6]

E. Summary and Conclusion

The Referee's factual findings are insufficient to support his conclusion that Mr. Bander's receipt and use of the Skyrise payments constituted a conflict of interest in violation of rule 4-1.7, and that conclusion is contrary to law. The Referee's basis for finding a violation of rule 4-1.8 was not pleaded by the Bar. The Court should reject the Referee's recommendation of guilt on those charges.

[6] This contention also is inconsistent with the Bar's assertion that the payments were entrusted funds.

IV.

The Referee's legal conclusion that Mr. Bander engaged in dishonest conduct by not promptly informing his clients of the Skyrise billings and payments is contrary to law absent evidence of knowing or deliberate misrepresentation or concealment.

A. The Standard of Review

This issue addresses the Referee's legal conclusion, drawn from substantially undisputed facts, that Mr. Bander engaged in dishonest conduct by not promptly informing his clients of the Skyrise billings and payments. If a referee's findings of fact are supported by competent substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000). The referee's factual findings, however, must be sufficient under the applicable rules to support the recommendations as to guilt. *Fla. Bar v. Shoureas*, 913 So. 2d 554, 557–58 (Fla. 2005). A referee's conclusions of law are not given the same presumption of correctness afforded a referee's findings of fact. *Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 736 (Fla. 2002). The party attacking the referee's conclusions of guilt must demonstrate that the record

evidence clearly contradicts the conclusions. *Fla. Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007).

An additional consideration is the Referee's verbatim adoption of the Bar's proposed report. *See supra* p. 16 (Issue I, Standard of Review).

B. A violation of rule 4-8.4(c) requires a showing of intent.

Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. A violation of rule 4-8.4(c) requires a showing of intent by clear and convincing evidence. *Fla. Bar v. Cramer*, 643 So. 2d 1069, 1070 (Fla. 1994). The requisite intent can be satisfied by showing that the conduct in question was deliberate or knowing. *Fla. Bar v. Fredericks*, 731 So. 2d 1249, 1253 (Fla. 1999). This means more than simply that an inaccurate statement was made. *Deliberate* means "Done with or marked by full consciousness of the nature and effects." *American Heritage Dictionary of the English Language* 479 (5th ed. 2011) (adjective, definition 1). The Bar bore the burden of proving not only that a false and misleading statement was made, but also that Mr. Bander knew that it was false and misleading. *Fla. Bar v.*

Herman, 297 So. 3d 516, 520 (Fla. 2020); *accord* Fla. Std. Imposing Law. Sancs. 1.2(b) ("'Intent' is the conscious objective or purpose to accomplish a particular result.").

C. Mr. Bander did not misrepresent or conceal the Skyrise billings and collections.

The record contains no evidence that Mr. Bander made a false and misleading statement to his clients about his billing or receipt of the Skyrise payments, much less knowingly or deliberately. The Referee's conclusion that Mr. Bander violated rule 4-8.4(c) is based on his using the Skyrise payments to pay firm expenses and not refunding the payments until after he received the SEC subpoena. Report at 18. The Referee apparently relies on this as circumstantial evidence of intent to deceive. Circumstantial evidence is legally sufficient to support guilt only if it is inconsistent with any reasonable hypothesis of innocence. *Fla. Bar v. Marable*, 645 So. 2d 438, 443 (Fla. 1994). The Referee's inference is contradicted by direct evidence that Mr. Bander harbored no intent to mislead his clients or conceal the receipt of those funds, rather that he acted in the belief that the funds were properly deposited in his firm's operating account and, as such, properly available to use

for the firm's purposes while crediting the clients with the overpayments. 2 Trial Tr. 65:3–13, 77:7–78:7.

The Referee's factual findings are insufficient to support his legal conclusion that Mr. Bander's not informing his clients of the Skyrise billings and payments constituted dishonesty in violation of rule 4-8.4(c), and that conclusion is contrary to law. The Court should reject the Referee's recommendation on this charge.

V.

The Referee's conclusion that Mr. Bander failed to meet his communication obligation by not promptly informing his clients of the Skyrise billings and payments is contrary to law.

A. The Standard of Review

This issue addresses the Referee's legal conclusion, drawn from substantially undisputed facts, that Mr. Bander violated his communication obligation by not promptly informing his clients of the Skyrise billings and payments. If a referee's findings of fact are supported by competent substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000). The referee's factual findings, however, must be sufficient under the applicable rules to support the recommendations as to guilt. *Fla. Bar v. Shoureas*, 913 So. 2d 554, 557–58 (Fla. 2005). A referee's conclusions of law are not given the same presumption of correctness afforded a referee's findings of fact. *Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 736 (Fla. 2002). The party attacking the referee's conclusions of guilt must demonstrate that the record

evidence clearly contradicts the conclusions. *Fla. Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007).

An additional consideration is the Referee's verbatim adoption of the Bar's proposed report. *See supra* p. 16 (Issue I, Standard of Review).

B. A lawyer's communication obligation under rule 4-1.4 relates to decisions regarding pursuit of the client's objectives.

The Referee recommends that Mr. Bander be found guilty of violating rule 4-1.4. He does not specify which subsection or subsections of rule 4-1.4 that Mr. Bander violated. Report at 20.

Rule 4-1.4 lists six specific requirements for communication with clients:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;

> (4) promptly comply with reasonable requests for information;
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law; and
>
> (6) explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

R. Regulating Fla. Bar 4-1.4.

The rule refers to communication that enables a client to make decisions about the objectives of the representation and that informs the client about the status and progress of the matter. This is to enable the client "to effectively participate in the representation," *id.* R. 4-1.4 cmt. para. [1], and to provide the client with "sufficient information to participate intelligently in decision concerning the objectives of the representation and the means by which they are to be pursued," *id.* cmt. para. [6]. *Cf. Fla. Bar v. Whitney*, 132, So. 3d 1095, 1103 (Fla. 2013) (lawyer violated

rule 4-1.4 by failing to explain what procedures needed to be followed to resolve client's immigration matter).

C. The Skyrise billings and payments did not invoke decisions regarding pursuit of the clients' objectives.

The Referee concludes (adopting verbatim the Bar's language) that Mr. Bander violated the rule (1) "for his failure to advise his clients of the expectation that they may receive reimbursements from the MMRC, which would assist them to make informed decisions concerning the representation and which MMRC to invest in" and (2) "for his failure to notify his client's [sic] either of his receipt of funds on their behalf, or that he was using same to pay firm expenses." Report at 20. The Referee does not explain how receipt of the so-called "reimbursements" would assist the clients in making informed decisions about the objectives of the representation, and the record contains no evidence that such information would do so. Likewise, deciding which MMRC to invest in was unrelated to the purpose of Mr. Bander's representation: pursuit of EB-5 visas for the clients.

The Referee did not find that Mr. Bander failed to (1) promptly inform his clients of any decision or circumstance with respect to

which their informed consent was required, (2) reasonably consult with his clients about the means by which their objectives (obtaining EB-5 visas) were to be accomplished, (3) keep his clients reasonably informed about the status of their EB-5 applications, (4) promptly comply with any requests by his clients for information, (5) consult with his clients about any relevant limitation on his conduct in response to a client's expecting assistance not permitted by the Rules of Professional Conduct or other law, or (6) explain a matter to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation. The Referee's factual findings are insufficient to support his conclusion that Mr. Bander's not promptly informing his clients of the Skyrise billings and payments violated his communication obligations under rule 4-1.4, and that conclusion is contrary to law. The Court should reject his recommendation that Mr. Bander be found guilty of violating rule 4-1.4.

VI.

Disbarment is a disproportionate sanction under the unique circumstances and mitigating factors in this case.

D. The Standard of Review

In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because it is ultimately the Court's responsibility to order the appropriate sanction. *Fla. Bar v. Germain*, 957 So. 2d 613, 623 (Fla. 2007). Generally, the Court will not second-guess a referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *Id.* Like other findings of fact, a referee's factual findings regarding aggravation and mitigation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record. *Id.* at 621. A referee's finding that an aggravating or mitigating factor does not apply is entitled to the same deference. *Id.*

E. The evidence and the law do not support the Referee's recommendation of disbarment.

The Referee recommends that Mr. Bander be disbarred. Although he does not say, one presumes that this is based principally on his conclusion that Mr. Bander mishandled the Skyrise payments. Even if this Court approves the Referee's recommendation that Mr. Bander be found guilty on all charged violations, the imposition of disbarment is unsupported by the evidence and contrary to law.

1. *Standards and Caselaw*

a. *Mishandling of Funds (Rules 5-1.1(a), (b), (e))*

(1) *Standards*

If Mr. Bander's handling of the Skyrise payments violated the trust-account rules, the appropriate sanction under the Standards —even before considering mitigating factors—is at most a public reprimand. Standard 4.1 applies to cases involving the failure to preserve client property. It provides that admonishment is appropriate "when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client, where there are trust account procedures or record keeping

violations, or where there is an unintentional mishandling of client property." Std. 4.1(d). It suggests that a public reprimand is appropriate "when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Std. 4.1(c). The circumstances here fall within one of those two categories. Mr. Bander did not deliberately misuse the funds, and his actions caused his clients no injury or loss.

Suspension and disbarment are inappropriate. Under the Standards, suspension is appropriate "when a lawyer *knows or should know* that the lawyer is dealing improperly with client property *and* causes injury or potential injury to a client." Std. 4.1(b) (emphasis added). Disbarment is appropriate when a lawyer knowingly converts client property. Std. 4.1(a). Mr. Bander at most was negligent in his handling of the payments—indeed, the Bar's Professional Ethics Committee Opinion 93-2 reasonably can be read as supporting his handling of those funds—and his clients suffered no loss or injury as a result. Under the Standards, at most a public reprimand is the appropriate sanction.

(2) *Caselaw*

Several of the Court's decisions support a public reprimand or at most a suspension:

- In *Florida Bar v. Sorce*, No. SC20-881, 2020 WL 3606272 (Fla. July 2, 2020) (order without opinion), the Court approved a consent judgment for a public reprimand for commingling when no malfeasance was involved and all funds were accounted for.[7]

- In *Florida Bar v. Silver*, 788 So. 2d 958 (Fla. 2001), the Court publicly reprimanded a lawyer for failing to timely notify medical providers who had letters of protection that the client's personal-injury case had settled and that the lawyer had received the settlement funds.

- In *Florida Bar v. Lumley*, 517 So. 2d 13 (Fla. 1987), the Court held that in the absence of intent to defraud or deprive clients of their funds and where all trust shortages were replaced, comingling personal funds in the same bank account with funds

[7] The facts are recited in the Conditional Guilty Plea and Consent Judgment for Discipline, *available at* <https://efactssc-public.flcourts.org/casedocuments/2020/881/2020-881_petition_75934 _appendix2dpetition.pdf>.

held in trust for clients and knowingly using entrusted funds for purposes other than those intended by clients warranted a public reprimand.

- In *Florida Bar v. Kinsella*, 260 So. 3d 1046 (Fla. 2018), the Court suspended a lawyer for stealing money from cash registers at a store where she worked.

- In *Florida Bar v. Dupee*, 160 So. 3d 838 (Fla. 2015), the Court suspended a lawyer for knowingly filing her client's inaccurate financial statement in a dissolution-of-marriage proceeding, deliberately withholding financial documents in discovery, knowingly allowing her client to present false deposition testimony without taking remedial action, and failing to notify opposing counsel that she had possession of a disputed coin collection entrusted to her by her client.

- In *Florida Bar v. Mason*, 826 So. 2d 985 (Fla. 2002), the Court rejected disbarment and imposed a two-year suspension for transferring money from a trust account to cover operating-account shortages on 82 separate occasions, where the lawyer was not intentionally attempting to steal money from clients and caused

harm to no client. Many of the mitigating factors in the case are present here.

- In *Florida Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006), the Court reduced a recommended three-year suspension to two years where the lawyer's misappropriation of client funds through six separate deposits and commingling of operating funds with clients funds was negligent rather than intentional and occurred when the lawyer was undergoing psychotherapy. In addition, the Bar unreasonably delayed the filing of the action.

The Bar presented no competent substantial evidence that Mr. Bander intended to defraud his clients or deprive them of the refunds, rather relied on conclusory argument or on what at best was circumstantial evidence that was contradicted by direct evidence, namely, Mr. Bander's testimony. It is not sufficient merely to claim that the opponent's evidence is not credible without offering competent substantial evidence to the contrary. Circumstantial evidence of intent must be inconsistent with any reasonable hypothesis of innocence. *Fla. Bar v. Marable*, 645 So. 2d 438, 443 (Fla. 1994).

The appropriate sanction for Mr. Banner's alleged mishandling of the Skyrise payments—even before considering mitigating factors—is a public reprimand or at most a suspension.

b. *Conflict of Interest (Rules 4-1.7 and 4-1.8)*

(1) *Standards*

If Mr. Bander created a conflict of interest as found by the Referee, the appropriate sanction under the Standards—even before considering mitigating factors—is an admonishment. Standard 4.3 provides that admonishment is appropriate "when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests or whether the representation will adversely affect another client and causes little or no injury or potential injury to a client." Std. 4.3(d). A public reprimand is appropriate "when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests or whether the representation will adversely affect another client and causes injury or potential injury to a client." Std. 4.3(c). Mr. Bander's billing, collection, and use of

the Skyrise payments caused his clients no injury or potential injury: the clients received the full benefit of those payments.

(2) *Caselaw*

The following caselaw by contrast supports at most a public reprimand:

- In *Florida Bar v. Patterson*, 257 So. 3d 56 (Fla. 2018), the Court imposed a one-year suspension on a lawyer who, among other things, placed his personal and financial interests at the forefront of the client's appeal of an order imposing sanctions equally on the client and the lawyer.

- In *Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011), the Court imposed a three-year suspension on a lawyer for negotiating a seven-million-dollar settlement for seven named plaintiffs in a class action, abandoning the thousands of putative class members, and actively concealing the settlement from those putative class members.

The misconduct involved in the foregoing cases is considerably more serious than Mr. Bander's conflict of interest. By contrast they support something less than a suspension.

c. *Dishonesty (Rule 4-8.4(c))*

(1) *Standards*

If Mr. Bander violated rule 4-8.4(c), the appropriate sanction under the Standards—even before considering mitigating factors—is at most a public reprimand. Standard 4.6 provides that admonishment is appropriate "when a lawyer negligently fails to provide a client with accurate or complete information and causes little or no actual or potential injury to a client." Std. 4.6(d). A public reprimand is appropriate "when a lawyer negligently fails to provide a client with accurate or complete information and causes little or no injury or potential injury to a client." Std. 4.6(c). Here, Mr. Bander's delay in informing his clients of the Skyrise payments and using the funds for his firm's business purposes caused his clients no injury or potential injury: the clients received the full benefit of those payments.

Suspension and disbarment are inappropriate. Standard 4.6 suggests suspension when a lawyer knowingly deceives a client and causes injury or potential injury to a client. Std. 4.6(b). Disbarment is appropriate when a lawyer knowingly or intentionally deceives a

client with the intent to benefit the lawyer or another regardless of injury or potential to the client. Std. 4.6(a). Mr. Bander did not knowingly or intentionally deceive his clients.

(2) *Caselaw*

Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000), supports a public reprimand. The Court publicly reprimanded a lawyer who, while a prosecutor, met with a criminally accused party, lied to the party's counsel about the contact, and continued to meet with the party without his lawyer's being present. By contrast, Mr. Bander here did not intentionally misrepresent anything to his clients or intentionally conceal anything from them. He simply did not inform them of the Skyrise payments when received, of their deposit in his operating account, or his use of the funds—all while believing that his deposit and use of the funds was permissible, subject to a refund obligation or as a credit against future fees.

d. *Deficient Client Communication (Rule 4-1.4)*

(1) *Standards*

If Mr. Bander's failure promptly to communicate with his clients about the Skyrise billings and payments violated rule 4-1.4, the

appropriate sanction under the Standards—even before considering mitigating factors—is an admonishment. The Standards do not expressly address deficient client communication. The most analogous is Standard 4.4 (Lack of Diligence), which applies in "cases involving a failure to act with reasonable diligence and promptness in representing a client." It provides that admonishment is appropriate "when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes little or no actual or potential injury to a client." Std. 4.4(d). A public reprimand is appropriate "when a lawyer is negligent, does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client." Std. 4.4(c).
Mr. Bander's delayed communication about the Skyrise billings and payments caused his clients no injury or potential injury: the clients received the full benefit of the Skyrise payments.

Suspension and disbarment are inappropriate. Standard 4.4 suggests suspension when a lawyer causes injury or potential injury to a client and knowingly fails to perform services for a client or engages in a pattern of neglect with respect to client matters.

Std. 4.4(b). Disbarment is appropriate when a lawyer causes serious or potentially serious injury to a client and abandons the lawyer's practice, knowingly fails to perform services for a client, or engages in a pattern of neglect with respect to client matters. Std. 4.4(a). Analogizing lack of communication to lack of diligence leads to the conclusion that admonishment is the appropriate sanction under the Standards.

(2) *Caselaw*

Because communication failures and lack of diligence are closely intertwined, relevant caselaw often involves both. That caselaw by factual comparison and contrast supports at most a public reprimand:

- In *Florida Bar v. Whitaker*, 596 So. 2d 672 (Fla.1992), the Court publicly reprimanded a lawyer who neglected a client matter by allowing the statute of limitations to run and who failed to keep the client reasonably informed about the client's matter.

- In *Florida Bar v. Petersen*, 248 So. 3d 1069 (Fla. 2018), the Court suspended a lawyer who took no action on a case for two years, made misrepresentations to the court, and fostered conflicts

with clients in order to withdraw while still being able to collect fees.

- In *Florida Bar v. Feige*, 937 So. 2d 605 (Fla. 2006), the Court suspended a lawyer for a total lack of diligence in representing clients, resulting in violations of sixteen different rules in seven different client matters. The lawyer not only grossly neglected clients and their matters but also gave unsound advice and misled parties in order to cover up the lack of diligence.

- In *Florida Bar v. Whitney*, 132 So. 3d 1095 (Fla. 2013), the Court suspended a lawyer who failed to act with reasonable diligence and promptness in representing a client who hired the lawyer to provide him and his cohabitating girlfriend with legal advice concerning the girlfriend's illegal immigration status. The lawyer did not seek information regarding the girlfriend's prohibited status and took no meaningful action other than two trips to the girlfriend's native country, one of which was for purposes other than the case.

The misconduct involved in the foregoing cases is considerably more serious than Mr. Bander's failure promptly to communicate with his clients about the Skyrise payments.

2. *Aggravating Factors*

Dishonest or selfish motive. The Referee suggests that this factor applies because "[e]ither Mr. Bander wanted to hold the funds so he can ensure future representation, or he wanted the benefit of using his client's money interest free for up to a year, or he didn't want the hassle of a difficult conversation—no matter which of numerous excuses he came up with for not telling his clients about the money, it was a dishonest or selfish motive." Report at 27–28. That is mere innuendo or supposition unsupported by competent substantial evidence. It is contradicted by Mr. Bander's testimony that he considered the payments to be for work performed, that he believed that he was required to deposit them in his operating account, and that he believed that once the funds were in the operating account, he was entitled to use them for his firm's expenses. 2 Trial Tr. 64:12–65:13. He at worst simply was mistaken. He was right that earned fees are to be deposited in the operating account and

are the firm's property available for use by the firm for its purposes. His error, if any, was mistakenly treating them as earned fees in the first place. It was an honest mistake. *Cf. Fla. Bar v. Brutus*, 216 So. 3d 1286, 1289 (Fla. 2017) (disbursement based on "genuine understanding" of Florida law inconsistent with dishonest or selfish motive). The Court should reject this finding.

Pattern of misconduct; multiple offenses. The Referee suggests that these factors apply because the events occurred with three different clients over a period of two years. Report at 28. The evidence does not support this conclusion. The so-called "pattern" involves a single method of treating a single type of payment under identical circumstances. The Court should reject this finding.

Submission of false evidence. The Referee suggests that Mr. Bander lied in his testimony at the final hearing, because he "contradicted all of his prior sworn statements, his own witnesses, his written statement to the Bar, and all of the documentary evidence." Report at 28. The Referee even makes the outrageous assertion (using the Bar's words) that Mr. Bander "compounded this false testimony" by offering into evidence his Exhibit 9 to show

that Skyrise considered the payments to be for legal fees. First the Referee excludes the exhibit, then asserts that even offering it is an act of dishonesty? The document itself was genuine.

The fact is that Mr. Bander's trial testimony was supported by other evidence, and his testimony to the SEC was given more than four years earlier under difficult and stressful conditions and circumstances—and when he reasonably expected to be questioned about compliance with SEC regulations but was all but ambushed with inquiries regarding trust-accounting rules. Mr. Bander presented evidence, including his own testimony, explaining many if not all of the otherwise apparent inconsistencies. The Court should reject the Referee's finding and decline to apply this factor.

Refusal to acknowledge wrongful nature of conduct. The Referee suggests (parroting the Bar's words) that this factor applies because Mr. Bander testified at trial that "it was his money and he could spend it." Report at 28–29. That is not accurate. Mr. Bander testified that he considered the payments to be for work performed, that he *believed* that, as such, he was required to deposit them in his operating account, and that he *believed* that once the funds

were in the operating account, he was entitled to use them for his firm's expenses. 2 Trial Tr. 64:12–65:13. Mr. Bander's denial of guilt and contesting the charges against him does not constitute a refusal to acknowledge the wrongful nature of the conduct that may be considered an aggravating factor. *See Fla. Bar v. Mogil*, 763 So. 2d 303, 312 (Fla. 2002). Mr. Bander denied the charges throughout this disciplinary proceeding. His claim of innocence cannot be used against him. *Id.* The Court should find that this factor does not apply.

Vulnerability of the victim. The Referee finds that the victims here (the clients) were vulnerable, asserting that this factor applies any time a victim has no possibility of stopping or preventing the misconduct. Report at 29. The Referee suggests that Mr. Bander's clients did not know that Mr. Bander had received the payments on their behalf and "had no way to know it through the exercise of due diligence."

No competent, substantial evidence supports that conclusion. The uncontroverted evidence is that Mr. Bander considered the payments as overpayments to be refunded to his clients and carried

the payments on his firm's books as liabilities. He did, in fact, inform the clients of those payments, just not promptly. Likewise, no evidence supports the supposition that the clients had no way of knowing of the payments through the exercise of due diligence—they knew through their investment relationship with Skyrise that Skyrise had promised to pay their lawyer's fees, and they simply could have inquired when billed. Regardless, the offenses here were essentially victimless: the clients received the full benefit of the Skyrise payments. The Court should find that this factor does not apply.

Substantial experience in the practice of law. Mr. Bander has been practicing law since 1999. This factor, however, should be accorded limited weight, because the payment of a client's fees by a third-party EB-5 entity was an unusual circumstance and a new occurrence for Mr. Bander.

3. *Mitigating Factors*

Absence of a prior disciplinary record. Mr. Bander has no prior disciplinary record.

Absence of a selfish or dishonest motive. This factor applies. As noted in the discussion of aggravating factors, Mr. Bander's actions did not arise from a selfish or dishonest motive. He at worst simply was mistaken about how to treat the Skyrise payments. It was an honest mistake.

Personal or emotional problems. The Bar conceded and the Referee found that this factor applies, and his conclusion is supported by competent substantial evidence. During the relevant time period, Mr. Bander was dealing both with significant personal health issues and with the stresses of his partner-father's illness and related family dynamics.

Timely good-faith effort to make restitution or to rectify the consequences of misconduct. The Bar conceded and the Referee found that this factor applies. Mr. Bander fully refunded the overpayments to his clients.

Full and free disclosure to the Bar and cooperative attitude toward the proceedings. The Referee declined to apply this factor, stating that it does not apply when "the respondent makes misrepresentations in the disciplinary proceedings." Report at 30.

The Referee does not identify any such misrepresentations. It is undisputed that leading up to the final hearing, Mr. Bander made full and free disclosure to the Bar and exhibited a cooperative attitude toward the proceedings. One presumes that the Referee is referring to Mr. Bander's testimony at trial. For the reasons discussed regarding submission of false evidence under "Aggravating Factors" above, the Referee's rejection of this mitigating factor is clearly erroneous.

Character or reputation. The Referee does not address this factor. The Court should find that it applies. Mr. Bander's long-time accountant, Elaine Naughton Allen, testified at the final hearing to examples of Mr. Bander's good character. (2 Trial Tr. 14:6–15:17.) Additional evidence of Mr. Bander's good character and reputation was shown by the many expressions of admiration and appreciation by clients. *See* Resp't's Ex. 18.

Physical or mental disability or impairment. The Referee rejected this factor, saying that Mr. Bander presented insufficient evidence to support it. Report at 30–31. The Referee cites *Florida Bar v. Horowitz*, 697 So. 2d 78 (Fla. 1997). *Horowitz* is distinguishable.

Horowitz testified that he was depressed as a result of being sued for malpractice. *Id.* at 83. That was the sum total of Horowitz's evidence of mental-health issues. Mr. Bander's evidence was far more comprehensive and based on a diagnosed medical condition. During the relevant time period, Mr. Bander was enduring as-yet uncontrolled symptoms of Graves' Disease, including mental fog, chronic fatigue, heat sensitivity, irritability, anxiety, and tremors. 2 Trial Tr. at 34:19–35:12. The Court should find that this factor applies.

Unreasonable delay in the proceedings. The Referee rejected this factor. Report at 31–32. The record shows the following:

- The Bar opened its file in this matter in response to a letter from a representative of the SEC dated July 27, 2017.
- The Bar initially notified Mr. Bander of this matter by inquiry letter dated August 31, 2017.
- Mr. Bander responded to the Bar's inquiry letter by letter dated October 6, 2017.
- Mr. Duarte submitted his written report on or about April 13, 2020.

- The Bar referred this matter to the grievance committee on April 14, 2020.
- The Bar had no written communication with Mr. Bander between its receiving his October 6, 2017, response and its referral to the grievance committee on April 14, 2020—a period of two-and-one-half years.
- The grievance committee found probable cause for formal disciplinary proceedings on May 27, 2020.
- The Complaint in this action was filed with the Court on January 5, 2021—more than seven months after the grievance committee found probable cause.

Resp't's Ex. 16 (admissions).

This delay is patently unreasonable. Its magnitude is demonstrated by aspirational goals adopted by the Bar's Board of Governors for purposes of measuring performance of the disciplinary system:

- Absent unusual circumstances, staff-level investigations should be concluded within 90 days from the date a disciplinary file is opened. *See* Fla. Bar Standing Bd.

Policy 15.56(a), *available at* <https://www-media.floridabar.org/uploads/2018/12/2019_06_14-DEC-SBPs.pdf>, p. 68.

- Absent unusual circumstances, a formal complaint should be filed with the Supreme Court of Florida within 45 days from the date on which probable cause is found. *See* Fla. Bar Standing Bd. Policy 15.56(c), *available at id.*

The Referee suggests that Mr. Bander contributed to the delay by requesting "several continuances." Report at 31. Even if that were true, it accounts for none of the three-plus years of delay preceding the commencement of this action. Furthermore, but for the Bar's delay, Mr. Bander would not have needed the postponements. Mr. Bander's first request, filed May 7, 2021, was prompted by this Court's revision of the summary-judgment rule on April 29, 2021, effective May 1, 2021, which retroactively imposed upon Mr. Bander a deadline that already had passed because of a May 12, 2021, deadline for pretrial motions and the June 1, 2021, date for the final hearing. R. at 29. As a result, the final hearing was rescheduled to September 23, 2021. That would not have been

an issue had the Bar diligently pursued this matter—the final hearing would have been scheduled long before the Court amended the rule. Mr. Bander's second request, filed September 2, 2021, followed a spike in the Delta variant of COVID-19, as a result of which in-person court proceedings once again were being curtailed. R. at 51. As a result, the final hearing was rescheduled to November 23, 2021. If the Bar had diligently pursued this matter, the proceedings before the Referee would have been concluded before COVID-19 became a factor. Mr. Bander did not substantially contribute to this delay.

The Referee further found that Mr. Bander was not prejudiced by the Bar's lack of diligence. The passage of time without communication from the Bar led Mr. Bander reasonably to believe that the matter had been closed within a few months of his October 2017 response. Sanctions Tr. at 78:20–79:18. Mr. Bander's father died in September 2018. He likely would have been a material witness regarding the earlier dealings with the SEC. Had Mr. Bander known that this matter remained open, he could have preserved his ill father's testimony by declaration or deposition.

Because of the Bar's lack of diligence, one cannot know the extent to which that testimony would have been probative or persuasive. In addition, a delay of the magnitude that occurred here is inherently prejudicial—memories fade, documents are destroyed, plans are made. To hold otherwise—to overlook so long an unexplained delay because a respondent cannot identify a discrete form of prejudice—is to grant the Bar a blank permission to ignore its Board of Governors' own standing policies and shirk its reasonable prosecutorial obligations in total disregard for the possible effects on a respondent. In *Florida Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006), this Court found that this mitigating factor applied for an 11-month delay in filing the complaint without delineating specific prejudice.

The Bar demands strict adherence by its members to the Rules of Professional Conduct. It should be held equally accountable for not following its own rules and policies. The Court should find that this mitigating factor applies.

F. Summary and Conclusion

The purposes of lawyer discipline are (1) to protect the public from unethical conduct without denying the public the services of a qualified lawyer through undue harshness in imposing a penalty, (2) to be fair to the respondent, being sufficient to punish ethical misconduct while encouraging reformation and rehabilitation, and (3) to deter other lawyers from engaging in similar misconduct. *Fla. Bar v. Dupee*, 160 So. 3d 838, 853 (Fla. 2015); *Fla. Bar v. Feinberg*, 760 So. 2d 933, 939 (Fla. 2000); *see also* Fla. Std. Imposing Law. Sancs. 1.1 cmt.

Here, no need to protect the public from unethical conduct exists. The alleged misconduct was limited in nature and scope and occurred more than five years ago. The Bar let the matter sit for two-and-a-half years without action, thus demonstrating a lack of urgency to protect the public. Mr. Bander's mishandling of the Skyrise payments was at worst a technical mistake—and a reasonable mistake at that, given the fairly debatable nature of those payments and the teachings of Opinion 93-2. It is a mistake that will not be repeated.

In addition, Mr. Bander practices in a highly specialized area of law and is highly regarded by his clients. *See* Resp't's Ex. 18. Disbarring him—even suspending him for a substantial period of time—needlessly denies the public the services of a qualified specialist and denies his current clients and potential future clients their counsel of choice. But for the alleged mishandling of funds in a unique situation that at the very least is subject to varying interpretations of legal significance, Mr. Bander has been a credit to the profession, and there is every reason to believe that he will continue to be. This is not a case where rehabilitation is so improbable as to warrant the professional death penalty. *Cf. Fla. Bar v. Kassier*, 711 So. 2d 515, 517 (Fla. 1998) (holding that extreme sanction of disbarment reserved for those cases in which rehabilitation highly improbable).

Under the Standards, applicable case law, and the unique circumstances of this case, disbarment is unduly harsh and inappropriate.

CONCLUSION

The Referee's conclusion that the Skyrise payments constituted entrusted funds is not supported by competent substantial evidence and is contrary to law. The Court should reject that conclusion and find Mr. Bander not guilty of violations of rules 5-1.1(a), 5-1.1(b), and 5-1.1(e).

The Referee abused his discretion in excluding Respondent's Exhibit 9 from evidence. If this Court does not reject the Referee's recommendation of guilt on rules 5-1.1(a), 5-1.1(b), and 5-1.1(e), the Court should order a new trial, to provide Mr. Bander with the opportunity to fully present his defense.

The Referee's factual findings are legally insufficient to support his conclusion that Mr. Bander's receipt and use of the Skyrise payments constituted a conflict of interest. The Court should reject that conclusion and find Mr. Bander not guilty of violating rules 4-1.7 and 4-1.8.

The Referee's factual findings are legally insufficient to support his conclusion that Mr. Bander's not informing his clients of the Skyrise billings and payments constituted dishonesty in violation of

rule 4-8.4(c). The Court should reject that conclusion and find Mr. Bander not guilty of violating that rule.

The Referee's factual findings are legally insufficient to support his conclusion that Mr. Bander's not promptly informing his clients of the Skyrise billings and payments violated his communication obligations under rule 4-1.4. The Court should reject that conclusion and find Mr. Bander not guilty of violating that rule.

Disbarment is a disproportionate sanction under the unique circumstances and mitigating factors in this case. If the Court approves the Referee's recommendation of guilt on any of the charges, it should impose a far less harsh sanction.

[*Continued on following page.*]

If the Court orders a new trial, it should direct that a new referee be appointed, to ensure the application of independent judicial deliberation and decision—in short, to ensure that Mr. Bander receives a fair trial that was denied him by the Referee's verbatim adoption of the Bar's proposed report of referee.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and with the word-count limits of Florida Rule of Appellate Procedure 9.200(a)(2)B).

/s/ D. Culver Smith III

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CERTIFICATE OF SERVICE

I certify that on August 3, 2022, an electronic copy of this document was filed with the Florida Courts E-Filing Portal and served via the Portal on counsel identified below.

/s/ *D. Culver Smith III*

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