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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 REPLY BRIEF

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STATEMENT OF THE FACTS

The Bar's recitation of the facts is selective and decidedly argumentative, comprising mostly the Bar's continued spin on otherwise undisputed facts. It contains several inaccuracies:

1. The Bar assets that the SEC's 2015 investigation of Mr. Bander's father put Mr. Bander on notice that his firm "was prohibited from receiving commissions *or compensation* in connection with the EB-5 program." Ans. Br. at 3 (emphasis added). That statement is inaccurate. The investigation involved finder's fees, which the SEC asserted were transaction-based commissions that only licensed securities broker-dealers could lawfully accept. It did not involve legal fees or other forms of compensation, much less any and all compensation "in connection with" the EB-5 program. The cease-and-desist order did not bar receipt of legal fees for work performed for EB-5 applicants. *See* Bar's Ex. 4, ex. C, ¶¶ 1, 8, 9 (Order Instituting Cease and Desist Proceedings, distinguishing transaction-based commissions from legal fees). The Bar's insistence on this is nothing more than an effort to paint Mr. Bander guilty by innuendo. It is irrelevant. Either he violated an ethical rule, or he did not.

2. The Bar assets that the SEC in 2017 "reopened" the investigation of the Bander firm "to consider the potential misconduct similar to the misconduct discovered during the 2015 SEC proceedings." Ans. Br. at 5. This is another attempt at guilt by innuendo and is irrelevant. The Bar cites as support an exhibit that was neither offered nor admitted in evidence (Bar's Exhibit 1). The subpoena issued to Mr. Bander referenced "In the Matter of American Life, Inc., HO-12050." Resp't's Ex. 1. The SEC had no contact with Mr. Bander after he provided it with his statement and various documents. 2 Trial Tr. 35:17–36:9.

3. The Bar asserts that "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." Ans. Br. at 4. Nowhere in the cited testimony does Mr. Bander say anything about "reimbursement." He refers to the funds as a "refund," which is consistent with overpayment of legal fees for work performed.

4. The Bar asserts that Mr. Bander "for the most part, did not inform his clients that any reimbursements had been made on their

behalves." Ans. Br. at 4. That is inaccurate. The cited testimony is that Mr. Bander did not *contemporaneously* inform the clients of the Skyrise payments. Mr. Bander informed each of the three clients of the duplicate payments by Skyrise, just not immediately.

5. The Bar asserts that Mr. Bander testified to the SEC that none of the payments he received from MMRC was compensation to him, rather were "reimbursements to his clients for the legal fees his clients had paid." Ans. Br. at 6. In none of the three cited excerpts does Mr. Bander say anything about "reimbursements." He refers to the payments as refunds for which he credited his clients and booked as liabilities—perfectly consistent with overpayments of earned fees.

The Bar nowhere denies that the Referee adopted the Bar's proposed Report of Referee virtually verbatim.

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 Skyrise payments were for earned fees.

The Bar's argument in support of violation of rules 5-1.1(a), 5-1.1(b), and 5-1.1(e) boils down to this:

(1) the Referee's conclusion that the Skyrise payments were reimbursements (and, thus, the clients' property) is a finding of fact, not a conclusion of law; and

(2) that finding is supported by Mr. Bander's testimony to the SEC that the payments were reimbursements to his clients.

In support of the first premise, the Bar cites *Florida Bar v. Frederick*, 756 So. 2d 79 (2000), contending that this Court treated as a finding of fact the referee's conclusion that a portion of $18,000 paid by the lawyer's clients was a cost advance to be deposited in trust. Ans. Br. at 28–29. This Court did no such thing. There was no dispute in *Frederick* that the parties' agreement called

for a portion of the funds to be deposited in trust as a cost advance. The dispute was whether the parties subsequently agreed to modify that requirement. The referee found that they had not—an obvious factual finding.

The Bar cites *Winkler v. Lawyers Title Insurance Corp.*, 41 So. 3d 414 (Fla. 3d DCA 2010), as holding that a determination of whether certain funds were "funds held in trust" was a finding of fact. Ans. Br. at 28. That is a mischaracterization. Whether certain funds were "held in trust" was a *legal* issue—specifically, whether within the meaning of the applicable statute the funds qualified as funds held in trust by a designated agent of a title company. The *factual* issue was whether the party holding the funds had been designated as the title-issuing agent of the title company. The trial court found that it had not. That was the factual finding that the appellate court held was entitled to a presumption of correctness.

Here, there is no factual dispute about the payments' being made, only their *legal* significance—whether they were funds entrusted for a specific purpose (such as advances of fees or costs) or were payments of earned fees for work performed.

In support of the second premise, the Bar relies on labels and terminology applied to the payments by Mr. Bander and his accountant, some of which were drawn from the QuickBooks menu of terms. The Bar does not address, much less dispute, the validity of Florida Bar Professional Ethics Committee Opinion 93-2 and its rejection of labels as determinative. The Bar does not dispute that the Skyrise payments were generated on account of legal work performed by Mr. Bander.

But for work performed by Mr. Bander, there would have been no billings and no payments. As the Bar's own expert testified, "it doesn't matter what Mr. Bander calls the funds"—"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. Regardless of noncontrolling labels, the payments were for fees earned for work performed. The Referee's conclusion to the contrary is erroneous as a matter of law.

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

The Bar denies the inconsistency of the Referee's conclusions that Mr. Bander (1) improperly received compensation from a third party and (2) failed to treat those payments as entrusted funds. Ans. Br. at 37–39. The Bar's reasoning defies logic. The Skyrise payments were either entrusted funds or earned fees. They cannot be both. The Bar cites the requirement in Rule 5-1.1(b) that entrusted funds include "advances for fees, costs, and expenses." Ans. Br. at 39. That highlights the very distinction at issue here: the payments were not advances—they were for earned fees.

The Bar cites *Florida Bar v. Mirk*, 64 So. 3d 1180 (Fla. 2011), in which this Court rejected the respondent's claim that he was entitled to use funds entrusted to him on one matter to pay his fee on an unrelated matter. *Mirk* is not remotely instructive. Mr. Bander never has claimed that he was entitled to apply the overpayments to fees earned on other matters, rather always treated the overpayments as subject to refunds.

The Referee's inconsistent conclusions (authored by the Bar itself) cannot be reconciled. Either both conclusions should be rejected, or a new trial should be ordered.

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.

The Bar argues that Mr. Bander's Exhibit 9 reflects how Skyrise viewed payments made to investors in 2018, not payments made to investors earlier. Ans. Br. at 35–36. That is sheer spin. The document itself refers to payment of the investor's legal fees, period:

> Following the proper request to withdraw the investment in the Company, the Company will return the Capital Contribution and Administrative Fee, if any amount remains after payment of Investing Member's legal fees and/or agent's fees, within 15 days of receiving the Investor Consent Letter to such Investing Member.

Resp't's Ex. 9, Addendum at 3; Resp't's Initial Br. App. at 12. The addendum does not say fees "to be paid." It does not exclude fees previously paid. The obligation to return the capital contribution within 15 days strongly suggests otherwise—why would Skyrise offer an investor the opportunity to withdraw his or her investment and pay the investor's legal fees in the meantime? The Investor Consent Letter itself confirms this:

> Further, I understand I may not receive a refund of all or any of the Administrative Fee if same *was* utilized to pay for my legal fees and/or agent's fee.

Resp't's Ex. 9, Investor Consent Letter; Resp't's Initial Br. App. at 14 (emphasis added). The past tense ("was") indicates past payments—fees previously paid. Given the history of the project, it is obvious that Skyrise already had paid its investors' legal fees, as in the case of Mr. Bander's three clients. It is ironic that the Bar relies so heavily on Mr. Bander's testimony to the SEC in a different context four years prior to trial but says that a formal legal document prepared two or three years after the payments it describes is unworthy of consideration.

The Bar argues that the exhibit is incomplete because it is the fifth "modification" and because there is nothing in the record "to indicate which of the terms, including the characterization of payments for legal fees, was changed, added, or deleted" from previous addenda. Ans. Br. at 36. That is nonsense. Legal fees are legal fees. The Fifth Addendum and the Investor Consent Letter refer to payment of legal fees. That is how Skyrise characterized those payments. It is obvious from the document that the only

modification was granting the investors an opportunity to withdraw their investments.

The Bar in a footnote contends that the exclusion of Exhibit 9, if error, was harmless. Ans. Br. at 37 n.4. Citing *Florida Bar v. Germain*, 957 So. 2d 613 (Fla. 2007), it asserts that the error was harmless because competent substantial evidence supports the Referee's conclusion that the Skyrise payments were entrusted funds. That is not the test of whether an error is harmless. The test, as pronounced by this Court seven years after *Germain*, is whether there is "no reasonable possibility" that the error contributed to the result. *Special v. West Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). The party benefitting from the error bears the burden of demonstrating this. *Id.*

Exhibit 9 reflects the payor's intent and purpose of the payments at issue—an essential question in the case on which the Bar relied and emphasized in final argument. The Bar has not demonstrated that there was no reasonable possibility that the exclusion of Exhibit 9 affected the outcome. The Referee abused his discretion in excluding this crucial piece of relevant evidence.

III.

The Referee's legal conclusion that Mr. Bander engaged in 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 and is unsupported by the Bar's pleadings.

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

For the first time—on appeal—the Bar rests its claimed violation of rule 4-1.7 on Mr. Bander's failure to obtain his clients' prior written consent to accepting compensation from a third party. Ans. Br. at 44–46 (citing R. 4-1.7 cmt. [10th para.], incorporating rule 4-1.8(f)). The Bar does not claim that Mr. Bander engaged in any other material-limitation conflict. It instead argues that Skyrise's offer to pay Mr. Bander's legal fees if his clients invested in Skyrise rather than another EB-5 project "gave Mr. Bander a personal financial interest in having his clients invest [in Skyrise]." Ans. Br. at 45. That is absurd. Mr. Bander had every expectation to be paid by his clients, regardless of which EB-5 project his clients selected. In fact, he informed the clients of other projects in which

possibly to invest. 2 Trial Tr. 41:11–25. Their choice made no difference to him. 2 Trial Tr. 42:1–3.

Furthermore, the failure to obtain client consent to third-party payments does not per se create a substantial risk that the lawyer's representation will be materially limited. If that were true, no lawyer could ever accept payments from a third party such as an insurer, an employer, a parent, or a spouse. The Bar presented no evidence, and the Referee did not find, that Mr. Bander's accepting payments from Skyrise in any way risked impairing his ability to consider, recommend, or carry out an appropriate course of action for his clients. *Cf.* R. 4-1.7 cmt. para. [4]. The Referee's conclusion that Mr. Bander violated rule 4-1.7 is unsupported by the evidence and contrary to law.

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

Mr. Bander concedes that he did not obtain his clients' prior consent to accepting Skyrise's fee payments, as required by rule 4-1.8(f) (although they consented after the fact). The Bar, however, did not plead that failure. It pleaded that Mr. Bander misused those payments but not that he failed to obtain his clients'

consent to accepting them. Accordingly, the Bar failed to plead facts supporting a violation of rule 4-1.8(f) or by reference rule 4-1.7.

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." A respondent must be given reasonable notice of the charges that he or she faces before a hearing on those charges. *In re Ruffalo*, 390 U.S. 544, 550–51, 88 S. Ct. 1222, 1226 (1968); *Fla. Bar v. Batista*, 846 So. 2d 479, 484 (Fla. 2003). 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).[1]

[1] 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.

The Bar asserts the following as evidence of deliberate and knowing acts of dishonesty by Mr. Bander:

1. Mr. Bander "repeatedly" testified to the SEC [four years before trial in a different context] that he understood that the Skyrise payments were funds belonging to his clients and not compensation belonging to him and nonetheless used those funds for his firm's benefit. Ans. Br. at 43. The Bar's assertion does not reflect deliberate and knowing misrepresentation or concealment, merely (at worst) misapplication of the funds. In addition, the Referee did not base his conclusion on that testimony. *See* Report at 18.

2. Mr. Bander testified to the SEC "that he intentionally kept his expected receipt, invoicing, actual receipt, and use of the MMRC [Skyrise] Payment funds secret from his clients." Ans. Br. at 43. That assertion patently is false. Nowhere in the cited excerpt does

Mr. Bander say that he intentionally kept his billing and receipt of the Skyrise payments "secret" from his clients. The Bar's assertion is nothing more than spin. In addition, the Referee did not base his conclusion on any such testimony. *See* Report at 18.

3. Mr. Bander did not disclose or refund most of the payments to his clients until after he received the SEC subpoena. (This is the basis of the Referee's conclusion, *see* Report at 18.) That hardly rises to the level of deliberate and knowing misrepresentation or concealment. At best it supports an inference of concealment, which can stand only if inconsistent with any reasonable hypothesis of innocence. *Fla. Bar v. Marable*, 645 So. 2d 438, 443 (Fla. 1994). Mr. Bander explained both to the SEC and at trial the reasons for the delay. Bar's Ex. 3, at 55:9–57:7 (SEC testimony); 2 Trial Tr. 72:16–74:15. None of those reasons suggests active concealment. The timing of Mr. Bander's disclosure to his clients is consistent with his explanation both to the SEC and at trial that he refunded the overpayments to avoid the risk of the SEC's requiring their disgorgement and the resulting loss to the clients. Bar's Ex. 3, at 209:15–210:17 (SEC testimony); 2 Trial Tr. 74:16–76:2.

The record is devoid of competent, substantial evidence of deliberate and knowing acts of dishonesty by Mr. Bander.

V.

The Referee's legal 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.

The Bar asserts that Mr. Bander ignores the express language of rule 4-1.4, then itself does that very thing. It would have this Court stretch the scope and purpose of the rule beyond its plain meaning and all applicable jurisprudence.

The Bar relies on subsections (a)(1) and (a)(2) of the rule. Ans. Br. at 48–49. Rule 4-1.4(a)(1) requires a lawyer promptly to inform the client of "any decision or circumstance with respect to which the client's informed consent … is required." The Bar asserts that Mr. Bander's "financial arrangement with MMRC" was a circumstance in which the clients' informed consent was required by rules 4-1.7(b) and 4-1.8(f) and that Mr. Bander violated the rule by not informing his clients of Skyrise's offer to pay their legal fees. Ans. Br. at 48.

This argument rests on a faulty premise. The "financial arrangement" was between Skyrise and the clients, not between

Skyrise and Mr. Bander. Skyrise agreed with its investors to pay their immigration lawyers' fees as an inducement to invest in the project. The only "arrangement" between Skyrise and Mr. Bander concerned the process for obtaining those payments.[2]

Rule 4-1.4(a)(2) requires a lawyer to consult with the client about the *means* by which the client's objectives are to be accomplished. The Bar assets that "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." Ans. Br. at 48–49.

The clients' objectives were to obtain EB-5 visas. One way to qualify for an EB-5 visa was to invest in an approved EB-5 project—*any* approved EB-5 project. The *means* for obtaining an EB-5 visa was to file an I-526 petition with the USCIS. The clients' choice of

[2] The Bar's contention that rule 4-1.8(f) required the clients' consent is inconsistent with its contention that the payments were entrusted funds. Rule 4-1.8(f) applies to compensation, not entrusted funds.

an EB-5 project in which to invest made no difference for purposes of the petition—for ultimately obtaining the visa.

Furthermore, Mr. Bander himself had obtained no such agreement. 2 Trial Tr. 42:14–16. In fact, Skyrise rejected his effort to do so. Bar's Ex. 3, at 99:5–100:5 (SEC testimony). The agreement was between Skyrise and the clients. Mr. Bander simply followed up on how that agreement would be implemented.

Accepting the Bar's arguments would expand the application of rule 4-1.4 beyond existing jurisprudence. For example:

- In *Florida Bar v. Whitney*, 132 So. 3d 1095 (Fla. 2013), the lawyer violated rule 4-1.4 by failing to explain what procedures needed to be followed to resolve the client's immigration matter.
- In *Florida Bar v. Nunes*, 679 So. 2d 744 (Fla. 1996), the lawyer violated rule 4-1.4 by not informing his immigration clients that their son's deportation for cocaine possession absolutely precluded him from obtaining permanent residency.
- In *Florida Bar v. Kane*, 202 So. 3d 11 (Fla. 2016), the lawyer violated rule 4-1.4 by failing adequately to explain to the clients the terms of a settlement, including the total amount, the

apportionment among the clients, the waiver of certain other claims, and the amount of attorney's fees.

- In *Florida Bar v. Gass*, 153 So. 3d 886 (Fla. 2014), the lawyer violated rule 4-1.4 by repeatedly failing to inform his clients of hearings and orders in their case.

- In *Florida Bar v. Shankman*, 41 So. 3d 166 (Fla. 2010), the lawyer violated rule 4-1.4 by not discussing with the client the value of her case.

If Mr. Bander had failed to explain to his clients the requirements for obtaining an EB-5 visa or had failed to inform them of the length of time involved in the USCIS's processing of their I-526 petitions, that might support a violation of rule 4-1.4. Those failures would involve the means by which the clients' objectives—obtaining EB-5 visas—would be achieved. While investing in an EB-5 project furthers that objective, the *selection* of one EB-5 project versus another in and of itself does not.

VI.

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

Mr. Bander stands on his Initial Brief on this issue.[3]

Mr. Bander allegedly mishandled funds in a unique situation that at the very least is subject to varying interpretations of legal significance. But for that discrete circumstance, 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.

[3] Mr. Bander filed a Notice of Supplemental Authority on September 12, 2022.

CONCLUSION

The Referee's conclusions that Mr. Bander violated rules 5-1.1(a), 5-1.1(b), 5-1.1(e), 4-1.7, 4-8.4(c), and 4-1.4 are unsupported by competent substantial evidence, are founded on legally insufficient factual findings, or are contrary to law. The Court should reject those conclusions and find Mr. Bander not guilty of violating those rules.

The Bar did not plead sufficient facts to support a violation of rules 4-1.7 and 4-1.8(f). The Court should dismiss those charges.

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.

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.

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—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 9.210(a)(2)B).

/s/ D. Culver Smith III

D. Culver Smith III

CERTIFICATE OF SERVICE

I certify that on October 24, 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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