Filing # 186879681 E-Filed 11/28/2023 12:32:36 PM

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CURTIS S. ALVA,

Respondent.

_____/

Supreme Court Case
No. SC21-1564

The Florida Bar File
No. 2018-50,796(15A)

ANSWER BRIEF

Joi Pearsall
Bar Counsel
The Florida Bar
1300 Concord Terrace, Suite 130
Sunrise, FL 33323
jpearsall@floridabar.org
Attorney for The Florida Bar

Patricia Ann Toro Savitz
Mark Lugo Mason
651 E. Jefferson St.
Tallahassee, FL 32399
psavitz@floridabar.org
mmason@floridabar.org
Attorneys for The Florida Bar

Joshua E. Doyle, Esq.
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
jdoyle@floridabar.org
Attorney for The Florida Bar

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PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or the bar. Curtis Alva is referred to as Mr. Alva.

The trial exhibits entered into evidence at final hearing are referred to by TFB-Ex. followed by the exhibit number (e.g., TFB-Ex.1) for the bar's exhibits, and R-Ex. followed by the exhibit number (e.g., R-Ex.1) for the respondent's exhibits. Contemporaneously with this brief, the bar is filing a notice of filing transcripts for the eight hearing transcripts in this case. They are referred to as T1: through T8: followed by the applicable page number(s). The documents comprising the Index of Record are referred to by the applicable tab number (e.g., Tab#1).

The report of referee is referred to as ROR: and the initial brief as IB:, each followed by the applicable page number(s).

NATURE OF THE CASE

This is a lawyer disciplinary proceeding involving Mr. Alva's efforts to retroactively charge a former client an additional $150.00 per attorney hour for legal services previously paid in full by the client. Importantly, this is not an excessive fee case in which the bar is asserting that Mr. Alva overbilled by inflating the number of hours spent on the matter. The misconduct at issue strictly involves Mr. Alva's claim that he was authorized to deviate

from his agreed upon contract rate of $400.00 per hour, increase the amount to $550.00 per hour, and then apply this higher rate to every hour of work he previously dedicated to the case, which added up to $126,650.00. He also increased the hourly rate for paralegal work from $100.00 per hour to $125.00 per hour in the same manner. Then, Mr. Alva withheld the client's $25,000.00 retainer, forcing the client to sue him for return of those funds. The referee recommends a one-year suspension for the misconduct at issue. Mr. Alva argues that the client's failure to timely pay an invoice authorized him to charge his client an additional $126,650.00 after the client paid the invoice in full past the deadline to do so. This brief will assert that Mr. Alva had no such right, and his conduct violated the rules charged in the bar's complaint and warrant a one-year suspension from the practice of law.

STATEMENT OF THE CASE AND FACTS

I. Mr. Alva and his clients executed a written agreement for legal representation, and the clients timely paid all invoices without dispute for an approximate 16-month period.

On September 19, 2016, Mr. Alva's law firm, Alva & Gleizer, PLLC, was retained by Daniel McCool and Dr. ColorChip Corporation. (TFB-Ex.1). The engagement letter states that Mr. Alva's firm will provide legal representation to the clients in a dispute with William McLean at the hourly

rate of $400.00 per hour for attorney time and $100.00 per hour for paralegal time. *Id*. These hourly rates were handwritten into the engagement letter by Mr. Alva; he crossed out the form agreement's typewritten hourly rates of $550.00 and $125.00 per hour and substituted them for the lower hourly rates. (See *id*.; see also T5:62). Mr. McCool explained that he would not have retained Mr. Alva's firm except on the payment arrangement set forth in this engagement letter. (T1:60-61).

The agreement states that the firm will invoice monthly for work performed in the previous month and payment will be due in 10 days. (TFB-Ex.1). It further states that the law firm may apply the $25,000.00 retainer to any invoices unpaid after 10 days, at which point the clients must replenish the retainer. *Id*. There is no other contractual remedy in the engagement letter if the client fails to timely pay an invoice. See *id*. Additionally, it states that the agreement "may not be amended, supplemented, waived or changed orally, but only by a writing signed by all Parties and making specific reference to this Agreement." *Id*.

The legal representation involved a business dispute between two co-owners of Dr. ColorChip Corp. Mr. Alva represented the president and owner, Mr. McCool, in a legal dispute with the vice president, Mr. McLean. (T1:55). He also represented the company itself. (See TFB-Ex.1). The

dispute involved alleged misappropriation of the company's intellectual property, specifically the domain name www.drcolorchip.com. (T4:36). This website processed online orders for paint and was allegedly operated by Mr. McLean without Mr. McCool's knowledge. (T4:35-36).

The legal representation lasted for an approximate period of 16 months, during which time Mr. Alva's firm regularly sent invoices and the clients paid the invoices in ten days or fewer. (T5:83-86). Mr. Alva explained that his standard practice was to send the invoice for legal services rendered the previous month, send the clients a reminder, and the clients always complied. (T6:7). The total amount collected by Mr. Alva's firm totaled $326,084.00. (T3:90-91).

II. A dispute over the amount of a monthly invoice submitted by Mr. Alva ultimately resulted in termination of the attorney client relationship.

The first and only dispute raised by the clients addressed the amount of an invoice dated January 9, 2018. (T1:80). At that point, Mr. Alva had represented the clients for almost 16 months, though the engagement letter indicates that Mr. Alva's legal representation of Mr. McCool also predated the engagement letter. (See TFB-Ex.1). At the time Mr. Alva sent the January 2018 invoice, the clients had paid in full all prior invoices. (T1:80). The invoice was for legal services provided from December 1, 2017

through December 29, 2017. (See TFB-Ex.3). It charged $25,040.00 for 66.8 hours of attorney's fees during this period, and the stated due date for payment on the invoice was January 19, 2018. *Id*.

On February 5, 2018, Mr. Alva sent a reminder e-mail to Mr. McCool stating, "I know that you've been out of the country, so this invoice might still be in processing. It was sent on 1/9/18. Can you tell me the status?" (TFB-Ex.50(B)). Mr. McCool confirmed at trial that he was out of the country when the invoice was sent and did not see it until he returned from his trip. (T1:142). Mr. McCool promptly responded to Mr. Alva's reminder e-mail on the same day, stating that he would review it in detail, and they would need to discuss before incurring any more legal fees. (R-Ex.4).

Mr. McCool testified at trial that he believed Mr. Alva grossly overcharged him from the outset, he did not catch onto the issue until late in the engagement, and he authorized Patricia Shahinian (formerly known as Tricia O'Rourke) to review the invoice and discuss the matter with Mr. Alva to reach an acceptable amount. (T1:121-23, 132).[1] At the time, Ms. O'Rourke served as operations manager for Dr. ColorChip. (T2:111). She also stated to Mr. Alva in an e-mail that Mr. McCool had not seen the

[1] This brief refers to Ms. Shahinian by her former name for the sake of clarity, because the documentary evidence and the referee's report refer to her as Ms. O'Rourke.

January 2018 invoice until February 5, 2018, which is when Mr. Alva sent the reminder e-mail. (See R-Ex.4).

On February 13, 2018 at 12:07 p.m., Ms. O'Rourke sent an e-mail to Mr. Alva (1) expressing her displeasure with his failure to copy her on his e-mails submitting invoices for the last three months; (2) stating that she needs more time to review the January 2018 invoice to determine the appropriateness of the fees charged; and (3) alternatively offering to pay half of the total amount of the invoice ($12,520.00) rather than engage in such review. (TFB-Ex.50(A)). At 2:09 p.m., Mr. Alva responded that he would not agree to a 50% discount but was "willing to meet and discuss some other arrangement." *Id*. At 3:07 p.m., Ms. O'Rourke informed Mr. Alva that attorney Matthew Nelles will be taking over the Dr. ColorChip case and to please send his final billing. (R-Ex.1).

The next day, February 14, 2018, Ms. O'Rourke followed up with Mr. Alva regarding the unpaid January 2018 invoice. She explained that she was having difficulty evaluating the invoice because he block-billed for tasks without identifying how much time was spent on each item. (R-Ex.1). Mr. Alva responded that he could not provide itemized time records and he

always block-billed on the matter. *Id*.[2] Mr. Alva then sent a follow-up e-mail at 5:03 p.m. offering to discount the January 2018 invoice by 5% to avoid the need for litigation. *Id*. Ms. O'Rourke responded that litigation would not be necessary, she would review the bill and get back to him. *Id*.

III. After some correspondence between Mr. Alva and his former clients regarding the disputed $25,040.00 invoice, Mr. Alva accused his former clients of acting in bad faith and threatened to seek $375,000.00 in damages.

An order approving the substitution of counsel and discharging Mr. Alva's firm of further responsibility was entered on February 15, 2018. (TFB-Ex.38). The next day, Ms. O'Rourke sent a lengthy e-mail to Mr. Alva asking seven questions regarding some of the legal services referenced in the January 2018 invoice and the quantity of time spent on those services. (TFB-Ex.26). She also explained in her e-mail that she needed the additional time to raise these issues because Mr. McCool had been out of town and she was undergoing cancer treatment. *Id*. Most of the questions requested clarification on block-billed time entries. See *id*.

Mr. Alva did not initially answer all seven questions posed. Instead, he sent a preliminary response providing his calculation of the total value of

[2] This statement is an accurate one. For example, a prior bill included an 18.5 hour time entry for October 25, 2016, followed by another 15.10 hour time entry the following day. (TFB-Ex.44, B.S.6).

the disputed portion of the bill and demanded immediate payment for the alleged undisputed portion. (See R-Ex.7). Specifically, based on his interpretation of the clients' concerns, Mr. Alva valued the total amount in dispute at $6,800.00, though even this e-mail notes that it does not factor in all the legal work subject to dispute. *Id*. Mr. Alva subtracted that amount from the invoice total and stated his belief that the remaining $18,240.00 of his bill was undisputed and should be paid immediately and before he would answer Ms. O'Rourke's questions. *Id*. At trial, Mr. Alva clarified that although he valued the undisputed portion of the bill at $18,240.00, his e-mail was intended to "say it's actually whatever amount they're not disputing" that should be paid immediately. (T5:41). Ms. O'Rourke sent an e-mail eleven minutes later stating that she was willing to accept $18,240.00 and that Mr. Alva could pick up the check on the next business day. (R-Ex.7).

Less than an hour later, Ms. O'Rourke sent an additional e-mail expressing her and Mr. McCool's subsequent confusion over the pending $18,240.00 payment and requesting clarification. See *id*. Specifically, she interpreted Mr. Alva's e-mail to mean that he would accept this amount as payment in full for the January 2018 invoice. *Id*. However, Mr. McCool interpreted the e-mail to mean that this payment may only constitute a

partial payment of the January 2018 invoice while they continued to dispute over Mr. Alva's right to the additional $6,800.00. *Id*. Ms. O'Rourke asked Mr. Alva to "[p]lease clarify who is correct so we can make a determination." *Id*. Mr. Alva did not provide the sought after clarification in his e-mail response, and he instead asked about a final invoice he had recently submitted for services rendered in January and February 2018. *Id*. Ms. O'Rourke stated that this other invoice would be paid in full, and she again reiterated her need for clarification regarding the pending $18,240.00 payment. *Id*.

On February 21, 2018, Ms. O'Rourke—apparently without having received the clarification she sought five days prior—sent a follow-up e-mail asking Mr. Alva if he would be providing answers to her seven questions. (R-Ex.2). Mr. Alva responded to the e-mail as follows:

> I am happy to answer your 7 questions, if they are being asked in a good faith attempt to move the ball forward. In other words, we find out how much of the December bill is actually subject to good faith dispute. It appears that we have that number, $6,800. Dr. ColorChip then pays in full the amount that is not subject to dispute, $18,240, and I answer all of your 7 questions about the $6,800, to see if that narrows the dispute to a number we can agree upon. I understand from your email that Trish may not agree with that proposal. The letter doesn't say what Dan feels about it. However, if Dr. ColorChip does not pay in full the undisputed amount $18,240, then I will not believe that your questions are being asked in good faith.

Id. Mr. Alva's e-mail also stated that if Mr. McCool and Ms. O'Rourke did not agree with his unilateral determination as to the undisputed portion of the bill and immediately pay him $18,240.00, then he would "send a formal notice of breach of contract and demand payment in full in 3 days." (TFB-Ex.25). He further stated that such notice would either seek (1) the full $25,040.00 sought in the January 2018 invoice; or (2) punitive damages totaling $375,000.00. *Id*.

Mr. Alva's factual and legal basis for his claimed right to seek $375,000.00 based on an unpaid invoice of approximately 15% of that amount warrants scrutiny by this Court. See *id*. Mr. Alva explained that if there was no contract for legal services in which the parties agreed to his discounted rate of $400.00 per attorney hour, then he would have been paid at his standard rate of $550.00 per attorney hour. *Id*. When additionally factoring in the standard rate for paralegal hours of $125.00—rather than the discounted rate of $100.00—this would have resulted in an additional amount of approximately $125,000.00 paid to his firm over the course of the legal representation. *Id*. Further, since he believed the client failed to pay the January 2018 invoice in bad faith, he would seek treble damages, thereby turning a dispute over a $25,040.00 bill into a $375,000.00 claim. *Id*.

One day after sending this e-mail threatening a $375,000.00 lawsuit over a single unpaid invoice that was a small fraction of that amount, Mr. Alva suggested that it was the former clients—and not himself—who were trying to gain an unlawful advantage in the dispute over the invoice. (See TFB-Ex.30). In the e-mail, he cautioned Mr. McCool and Ms. O'Rourke that if they were attempting to obtain a discount on the bill in exchange for not contacting The Florida Bar, they should seek "advice about not committing extortion." (TFB-Ex.30).[3] He further claimed that they were not asking questions in good faith, so he was tracking his time spent answering questions regarding the legal bill so it could be added to his damages claim. (TFB-Ex.30).

IV. Mr. Alva attempted to unilaterally increase the established contract rate for his legal services, retroactively applied this increased rate to every hour previously billed on the matter, and he refused to refund the client's $25,000.00 retainer.

On February 26, 2018, Mr. Alva submitted an invoice to Mr. McCool charging $126,650.00 for 806.7 hours of attorney work and 226.8 hours of paralegal work. (TFB-Ex.5). The invoice imposed a three-day deadline to submit payment. *Id*. Mr. Alva charged a rate of $150.00 per hour for his

[3] Mr. Alva's own engagement letter authorized both parties to submit any dispute over fees to The Florida Bar's Fee Arbitration Program. (See TFB-Ex.1).

services and $25.00 per hour for his paralegal's services. *Id*. The invoice contained no description of the work performed. *Id*. He explained at trial that this invoice followed through on his earlier threat to charge his former clients his firm's standard rates backdated to the beginning of the legal representation. (T5:73-77; T6:46). As a result of Mr. Alva's threats of legal action and treble damages, Mr. McCool decided to pay the $25,040.00 invoice in full just to be done with the matter. (T1:105). He e-mailed Mr. Alva on February 27, 2018 stating that he had issued the full payment of the $25,040.00 invoice. (R-Ex.2).

Mr. Alva sent a response thanking Mr. McCool "for sending it so promptly." *Id*. He also confirmed at trial that he received payment in full for the January 2018 invoice on either February 28th or 29th, 2018. (T6:32).[4] Nevertheless, a few weeks later he drafted a statement of account applying the $25,000.00 retainer in his trust account to the claimed overdue balance. (TFB-Ex.6). On the same date he drafted this statement of account—March 10, 2018—Mr. Alva transferred the retainer from his trust account to his operating account. (T4:95). Mr. McCool requested a return of the full

[4] Since 2018 was not a leap year, the payment would have been received on February 28th or March 1st. The initial brief claims that the payment was received March 7, 2018, but this new claim is only based on the date of an e-mail from Mr. Alva in which he acknowledged his prior receipt of payment. (See IB:12).

retainer, but Mr. Alva refused and demanded payment of the claimed overdue balance exceeding $100,000.00. (TFB-Ex.29). Mr. Alva then testified that he took the funds from his operating account and put the money back in a trust account since ownership of the funds was now disputed. (T4:97).

Mr. McCool and Dr. ColorChip later filed suit against Mr. Alva and his firm. (T1:113). The circuit court entered an order granting the plaintiff's motion for summary judgment seeking return of the retainer. (TFB-Ex.45). The order found that all invoices had been paid, and the purported quantum meruit invoice charging the former clients a higher rate "does not, as a matter of law, negate the evidence that all bills were paid." *Id*. The court later entered a final judgment against Mr. Alva and his firm in the amount of $25,000.00. The judgment was *per curiam* affirmed by the Fourth District Court of Appeal on November 2, 2023, which was one day after Mr. Alva submitted his second amended initial brief in this matter. See *Alva v. Dr. ColorChip, Corp.*, Case No. 4D2022-1996 (Fla. 4th DCA Nov. 2, 2023).

V. The report of referee recommends findings of guilt on all violations charged and Mr. Alva's one-year suspension from the practice of law.

The bar's complaint charged Mr. Alva with violating Rules 3-4.3 (acting unlawful or contrary to honesty and justice), 4-1.4(b) (failure to explain a mater to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), 4-1.5(a) (charging or collecting an illegal, prohibited, or clearly excessive fee or cost), and 4-8.4(a) (attempting to violate the Rules of Professional Conduct). (Tab#1). The referee's report determined that competent substantial evidence established clearly and convincingly that Mr. Alva violated the above rules. (ROR:13).

The referee recommends that this Court suspend Mr. Alva from the practice of law for a one-year period. (ROR:25). The report also recommends an order requiring Mr. Alva to pay Dr. ColorChip $25,000.00 "regardless of what happens with the appeal in the civil case." *Id*. Mr. Alva sought review of the referee's recommendations as to guilt and the discipline to be imposed.

SUMMARY OF THE ARGUMENT

A $25,040.00 legal bill paid a little over a month passed its original due date based on a bona fide dispute by the clients does not morph into either a $126,650.00 debt or a $375,000.00 bad faith claim. Mr. Alva knew the client did not initially see the bill when it was submitted and knew the

client wanted to review the bill before paying in full. Mr. Alva's argument is that an overlooked e-mail sent to Mr. McCool resulted in a willful breach of the engagement letter because the client then disputed a portion of the bill. Based on this claimed willful breach, Mr. Alva asserts that he was untethered from the terms of the engagement letter and authorized to submit a $126,650.00 legal bill to his former client, which was based on a standard hourly rate Mr. Alva feels he should have been paid from the outset.

These arguments failed in circuit court and on appeal, failed before the referee, and should fail again in this Court. A lawyer cannot attempt to penalize a longstanding, paying client via a surprise bill arbitrarily increasing the hourly rate in violation of the engagement letter. Even if the client did not timely pay an invoice, as alleged by Mr. Alva, this relief is not available under Florida law. Mr. Alva's practice of charging the client twice for the same legal services constituted an excessive fee. He then engaged in further misconduct by unlawfully withholding his client's $25,000.00 retainer even though the client had a zero balance.

This is not a matter of some new or novel legal theory advocated by a creative lawyer attempting to expand existing law. Mr. Alva's theory that he could nullify the contract due to a material, willful breach by the client and

thereafter pursue quantum meruit relief was completely unsupported by the facts or the law. These legal arguments do not stand up to even a modest amount of scrutiny. Given Mr. Alva's substantial experience in the practice of law, he knew or should have known that his argument was untenable. But he continues to advocate this position, which would allow a lawyer to nullify representation agreements and then pursue relief outside the terms of the contract rather than simply seek relief for a breach of contract. Given the egregious nature of the misconduct and the harm caused to Mr. Alva's client, this Court should suspend Mr. Alva from the practice of law for a one-year period.

THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW

This is an original proceeding filed under this Court's exclusive jurisdiction "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const. Standards of review used to evaluate a trial court's final judgment do not apply here.

1. Findings of Fact

As this Court explained in *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016): "This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial

evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)." *See also The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); *The Florida Bar v. Parrish*, 241 So. 3d 66, 72 (Fla. 2018); *The Florida Bar v. Vining*, 721 So. 2d 1164, 1167 (Fla. 1998); *The Florida Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla. 1998); *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996). In reaching findings of fact, the referee has a heightened role in determining issues of credibility, which are important in this particular review. This Court has long held, "The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *The Florida Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006) (quoting *The Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991)).

2. Recommendation of Discipline

The Referee's recommendation of discipline is subjected to greater review by this Court because of this Court's ultimate responsibility to make that decision:

> 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, ultimately, it is the Court's responsibility to order the appropriate sanction. *See The Florida*

> *Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). At the same time, this Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the standards. *See The Florida Bar v. Alters*, 260 So. 3d 72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008).

The Florida Bar v. Altman, 294 So. 3d 844, 847 (Fla. 2020).

It is also important to consider that this Court has given notice to the members of the Bar that it is moving toward stronger sanctions than in the past. *See The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). As a result, case law prior to 2015 needs to be examined carefully to make certain that the application of sanctions in these earlier cases comports with current standards.

3. Consideration of Mitigating and Aggravating Factors

A referee's findings on mitigating and aggravating factors are treated essentially like any other finding of fact:

> [A] referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See The Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). This standard applies in reviewing a referee's findings of mitigation and aggravation. *See, e.g., The Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001); *The Florida Bar v. Hecker*, 475 So. 2d 1240, 1242 (Fla. 1985).

The Florida Bar v. Arcia, 848 So. 2d 296, 299 (Fla. 2003).

"[A] referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record." *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). The burden of demonstrating that the findings in aggravation or mitigation are clearly erroneous lies with the party challenging the findings. *See The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997) (holding that the burden of disproving a referee's findings of fact or recommendations as to guilt is upon the party challenging those findings).

Once the factors of mitigation and aggravation are found to exist, they are applied to "justify" an increase or a reduction in the "degree of discipline to be imposed." *Florida Standards 3.2(a), 3.3(a)*. This process of balancing the positive and negative factors is a mixed question of fact and law. It is part of the ultimate decision to impose a sanction.

ARGUMENT

I. Mr. Alva violated Rule 4-1.5(a) by charging the client a clearly excessive fee of an additional $150.00 per hour, backdated to the beginning of the representation period.

Regarding the violation of Rule 4-1.5(a), the referee found that Mr. Alva charged the clients twice for the same work and baselessly refused to refund the clients' $25,000.00 retainer even though all legitimate legal

invoices had been paid in full. (ROR:17-18). The referee rejected Mr. Alva's contention that the clients were asking questions about the invoice in bad faith, and instead found that the time taken to review the invoice was reasonable, and it was "more than reasonable for the clients to ask questions about the charges." (ROR:18-19). The referee further rejected the contention that Mr. Alva could increase the explicit rate in the contract based on the legal concept of quantum meruit. *Id*. Instead, the referee found that Mr. Alva's attempt to change the contract rate and retroactively apply a higher rate to all previous charges was not "any different than a person attempting to commit grand theft on their client." *Id*.

Mr. Alva's brief argues that his fee of $550.00 per hour was reasonable, and he did not violate Rule 4-1.5(a) based on the mere fact that the rate exceeded the hourly rates set forth in the engagement letter. (IB:29-30). But the rule prohibits a lawyer from "enter[ing] into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost." Rule 4-1.5(a). Mr. Alva charged the clients twice for the same services. He charged them $400.00 per attorney hour and $100.00 per paralegal hour, and his firm was timely paid throughout a 16-month period of representation without issue. Mr. Alva's attempt to then charge his clients an additional $126,650.00 for services previously rendered and paid

for in full was a blatant effort to collect a clearly excessive fee greater than the agreed upon rate. Whether Mr. Alva personally valued the worth of his legal services at a higher rate is irrelevant. He agreed to represent the clients for $400.00 per hour. He knew he was paid in full for all prior invoices, but nevertheless charged the clients an additional fee *after* he had already been paid in full. Mr. McCool testified that he relied on the lower rate in retaining Mr. Alva as counsel. (T1:60-61). The clients never agreed to Mr. Alva's claimed standard rate of $550.00 per hour. Mr. Alva violated Rule 4-1.5(a) by charging that rate after the fact.

A. Quantum meruit does not authorize Mr. Alva to unilaterally increase his hourly rate and retroactively charge his client for over 800 hours of attorney work previously paid in full.

Mr. Alva had no legal remedy to seek payment beyond what he was owed pursuant to the express contract between the parties. Quantum meruit is a "legal doctrine which, in the absence of an express agreement, imposes legal liability on a contract that the law implies from facts where one receives goods or services where a reasonable person receiving such benefit would ordinarily expect to pay for it." *Daake v. Decks N Such Marine, Inc.*, 201 So. 3d 179, 180-81 (Fla. 1st DCA 2016) (quoting *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297, 305 (Fla. 1st DCA 1999)). Quantum meruit is premised on the absence of

an express and enforceable agreement, and therefore the existence of such an agreement between the parties "necessarily precludes the doctrine's application." *Id*. at 181.

"[T]he law will not imply a contract where a valid express one exists." *Quayside Associates, Ltd. v. Triefler*, 506 So. 2d 6, 7 (Fla. 3d DCA 1987). Conversely, a contract may be inferred where an express contract fails for lack of proof. *Id*. But there is no such allegation here. The contract was express in establishing the rate to be paid, and it was enforceable. It was Mr. Alva's own form engagement letter with two handwritten changes *by him* regarding the hourly rates for the attorney and the paralegal. Any legal right or remedy sought by Mr. Alva would be based on the parties' obligations under the engagement letter, not under an implied contract theory. Further, the client was not unjustly enriched; the client paid Mr. Alva in full for every hour of work at the agreed upon rate.

The initial brief asserts that Mr. Alva had a good faith—if mistaken—belief that his quantum meruit theory justified both his $126,650.00 invoice and his retention of the $25,000.00 retainer after the clients paid all other invoices in full. But this is not a matter of creative lawyering falling into a gray area. Mr. Alva's argument is not a new or novel theory offered in good faith. In asserting otherwise, Mr. Alva claims he became untethered from

the terms of the contract based on a willful breach by the clients, his subsequent nullification of the contract, and his pursuit of relief under a quantum meruit theory. This argument has thus far been rejected by the referee, the circuit court in civil litigation between Mr. Alva and his former clients, and recently by the Fourth District Court of Appeal. The circuit court found that all invoices had been paid and the purported "quantum meruit invoice" seeking the backdated charges did not change that fact. (TFB-Ex.45). A referee in a bar disciplinary proceeding may "properly rely upon facts established in orders and decisions of other tribunals to support his or her findings of fact." *The Florida Bar v. Gwynn*, 94 So. 3d 425, 430 (Fla. 2012). The referee relied upon *Gwynn* as additional support for the finding that the clients had a zero balance after the $25,040.00 invoice was paid. (ROR:17-18). This was also the testimony of the bar's expert witness, Gary Betensky, to the extent expert testimony was even necessary to prove that an invoice paid in full results in a zero balance. (See T3:26).

Even if Mr. Alva genuinely believed he could nullify the contract and pursue quantum meruit relief, he offers no explanation on how he could seek such relief for prior invoices paid in full pursuant to an express contract. The client was not unjustly enriched for these services, even

under Mr. Alva's failed legal theory. In fact, the more hours billed by Mr. Alva and paid in full by the client over the course of the representation, the larger the subsequent debt incurred by the client. By retroactively billing the client a higher hourly rate, Mr. Alva's claimed quantum meruit damages would increase for every billable hour previously paid in full on the case. This essentially penalizes a client for timely paying large legal bills over an extended period in the event of a later breach of contract. Further, according to Mr. Alva, he can resort to this remedy without any notice to the client that such a penalty could flow from a late payment, regardless of whether the client had legitimate questions regarding a bill or merely overlooked an e-mail enclosing an invoice.

Mr. Alva's quantum meruit theory is in violation of the plain language in the contract and legally indefensible. This Court explained the three-fold purpose of lawyer discipline as follows:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyers as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. Behm, 41 So. 3d 136, 150 (Fla. 2010) (quoting *The Florida Bar v. Barrett*, 897 So. 2d 1269, 1275-76 (Fla. 2005)).

While Mr. Alva's empty threat failed in compelling the additional "quantum meruit" payment, it succeeded in compelling the client's full payment of the contested invoice. But the public should be able to rely on the plain language of an engagement letter in determining their financial obligations when hiring an attorney. A client should be allowed to request clarification on a lawyer's billing without fear that the lawyer will threaten a bad faith action and treble damages. Lawyers should be deterred from strong arming a client into paying a contested legal bill via a threat to retroactively bill the client at a higher rate, based solely on the lawyer's personal determination that he or she is worth more than the contract rate. In *The Florida Bar v. Rakusin*, SC21-1182 (Fla. May 8, 2023), this Court approved a referee's report finding that the lawyer violated bar rules by including a provision in a retainer agreement authorizing the lawyer to dismiss the client's case in the event of an unpaid invoice. The referee held that this term was outrageous, unconscionable, it placed the lawyer's financial interests above the client's interests, and it would reflect poorly on the legal profession to allow a lawyer to include such a provision in a retainer agreement. A finding of guilt on Rule 4-1.5(a) and an appropriate

punishment is necessary to both protect the public and deter others tempted to commit like violations.

B. Mr. Alva's clients did not commit a willful, material breach of contract by questioning charges on a legal invoice and negotiating the amount of the invoice.

The first breach doctrine does not apply in this case. Mr. Alva relies on case law stating, "Having committed the first breach, the general rule is that a material breach of the Agreement allows the non-breaching party to treat the breach as a discharge of his contract liability." *Bradley v. Health Coalition, Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997) (quoting *Matter of Thomas*, 51 B.R. 653, 654 (Bankr. M.D. Fla. 1985)). Mr. Alva argues that this doctrine allowed him to nullify the contract due to the clients' alleged "willful" breach. Setting aside for the moment that this case law would only allow Mr. Alva to withdraw from the case and seek recourse for the single unpaid invoice, the referee did not err in finding that the alleged late payment was not a willful breach. The course of performance regarding payment of these invoices was standard; Mr. Alva testified that he would send an invoice, he would later send a reminder e-mail, and then the client would pay. This was the same process followed regarding the January 2018 invoice, except this time after the client received a reminder e-mail, the client had questions and concerns.

The parties were negotiating an agreed upon amount and the client asked reasonable questions about the work performed. On February 16, 2018, Mr. Alva refused to answer all questions asked unless the client paid him $18,240.00. Mr. Alva's demand of $18,240.00 admitted that he did not discount the labor performed on tax issues—which was one of the main subjects of the clients' stated concerns—and the client could add on "whatever number, if any, you assign to the general tax issue." (R-Ex.8). But the client was trying to gather information sufficient to review the appropriateness of the charges, and Mr. Alva only offered this vague response even though only he had actual knowledge of the amount of time spent on the tax issue. On February 26, 2018, Mr. McCool sent a lengthy e-mail explaining his issues with the overall billing in the case and stated, "Lets [sic] agree to a number and I will get you a check this week." (R-Ex.8). The next day, Mr. McCool stated that he approved payment for the full invoice, in response to Mr. Alva's bad faith demand for an additional $126,650.00. This was the factual basis for the referee's conclusion that the eventual payment by the client was timely.

The initial brief dedicates an almost singular focus to the fact that the legal bill was submitted on January 9, 2018 and not paid within ten days. According to Mr. Alva, it does not matter that Mr. McCool overlooked an e-

mail while out of the country, that Ms. O'Rourke was undergoing cancer treatment, that he stopped including her on e-mailed invoices, that she explicitly told him she needed additional time to review the invoice, or that both Mr. McCool and Ms. O'Rourke had reasonable concerns about some of his block-billed time entries. (See IB:10, 19). Instead, the only salient fact for Mr. Alva is that he submitted an invoice on January 9, 2018, and the client did not timely pay it by January 19, 2018. (IB:21-22).

Florida law recognizes an implied covenant of good faith and fair dealing in every contract. *QBE Ins. Corp. v. Chalfonte Condominium Apartment Ass'n, Inc.*, 94 So. 3d 541, 548 (Fla. 2012). The consistent history of timely payments by the clients over the course of the 16-month attorney client relationship frustrates Mr. Alva's assertions that the clients' questions and delay in submitting payment were in bad faith. The record is replete with good faith efforts by the client to try and determine the appropriateness of the charges, and it is replete with instances of Mr. Alva's obstinance in response to these efforts. Further, Mr. Alva sometimes asked for payment of his invoices early, and the client complied. In turn, the client told Mr. Alva that additional time was needed to review the invoice. But Mr. Alva now claims that the failure of the client to

explicitly request an extension of time for payment of the invoice results in a willful breach. (See IB:10, 19).

The referee explicitly found that the clients' concerns were "more than reasonable." (ROR:19). Mr. Alva repeatedly states in his initial brief that he is not disputing any finding of fact in this case. (IB:1, 7, 16). But he contests this finding by the referee when he asserts that the clients were acting in bad faith by willfully breaching the contract. This contention by Mr. Alva necessarily disputes a finding of fact. See *Riggs v. Cain*, 406 So. 2d 1202, 1204 (Fla. 4th DCA 1981) (holding that a dispute over whether someone acted in good or bad faith precluded summary final judgment).

The referee had competent substantial evidence for finding that the clients' concerns were "more than reasonable." The clients' first and only dispute over a legal bill in January 2018 was largely due to Mr. Alva's standard practice of block billing, which carries a substantial risk of creating reasonable client concerns that a lawyer is overbilling. In this case, a client who is billed over $25,000.00 in a single month—with some time entries spanning an entire workday—might have legitimate questions about the work performed. The questions asked by Ms. O'Rourke and her attempts to negotiate the amount of the invoice were clearly seeking a revised invoice lowering the outstanding balance. This would have resulted in a

new deadline for payment. The clients' failure to immediately pay a contested bill is not a willful breach of the contract given their good faith efforts to timely resolve the dispute. Mr. Alva's response to these efforts was to amplify this bona fide dispute over a legal bill—later paid in full—into an *additional* $126,650.00 debt. (See ROR:19). His assertion that he did so due to a willful breach by the client is baseless; Mr. Alva's actions were nothing more than retaliation against his clients for questioning his billing practices.

Further, even if the supposed late payment was considered a willful breach, it was not a material one. Mr. Alva was not materially harmed by the clients' delay in paying the January 2018 invoice at any point. Specifically, the engagement letter protected Mr. Alva in the event of an untimely paid invoice; his express contractual remedy was to apply the $25,000.00 retainer to the unpaid amount due. (See TFB-Ex.1). This recourse would have left a remaining balance due of only $40.00. This was the entire extent of his firm's exposure if the clients refused to pay any portion of the bill. Even at his "discounted" rate of $400.00 per hour, Mr. Alva could recover that remaining balance with six minutes of billable work.

But Mr. Alva did not apply the retainer to the unpaid January 2018 invoice. He explained that he did not do so because the clients would have

needed to replenish the retainer anyway. (T4:84-85). This excuse lacks merit. Mr. Alva was fired by his client on February 13, 2018, and he was removed as counsel of record two days later. There was not going to be any need for the clients to replenish the $25,000.00 retainer in Mr. Alva's trust account after these events. Further, Mr. Alva explained that he required timely payment because he owned a very small firm and his partner was not generating much income. (T6:17). But this is not a case in which a large client's bad faith refusal to pay a legitimate debt was jeopardizing a small law firm's ability to cover its operating expenses. If Mr. McCool's failure to immediately pay the $25,040.00 invoice posed such a risk, then Mr. Alva's application of the $25,000.00 retainer to the unpaid invoice would resolve it. But Mr. Alva instead baselessly threatened his clients with a $375,000.00 lawsuit. His firm did not suffer hundreds of thousands of dollars in damages because the clients wanted some questions answered before paying a large legal bill.

Mr. Alva additionally claimed that he did not apply the retainer because by the time he had learned of the clients' concerns with the January 2018 invoice, he had already performed additional work and more money was owed by then. (T4:84-85). This excuse also lacks merit. Mr. Alva asked for assurances that his final invoice for work performed in

January and February 2018 would be paid, and the client informed him within 21 minutes of the question being asked that this final invoice was reasonable and would be paid timely. (R-Ex.7). This assurance was provided on February 16, 2018, which was five days before Mr. Alva threatened a $375,000.00 lawsuit against his clients *and* while he held a retainer he could apply to cover almost the entirety of the unpaid balance in dispute. Much like Mr. Alva's attempt to intensify a disagreement with his clients into a $375,000.00 bad faith claim, Mr. Alva's initial brief exaggerates the "harm" caused by his clients' alleged failure to timely pay the bill. If the clients' failure to pay the invoice until February or early March 2018—as opposed to January 19, 2018—constituted a breach of contract, it was not a material one.

C. Mr. Alva aggravated his violation of Rule 4-1.5(a) by withholding a $25,000.00 retainer pursuant to an express contract and applying it to a contrived "quantum meruit invoice."

Mr. Alva's retention of the clients' $25,000.00 held in trust also violated Rule 4-1.5(a). When he eventually transferred the retainer to his operating account, the clients had a zero balance. Mr. Alva refused to return the funds to the client and instead applied it to a contrived invoice. Importantly, Mr. Alva's refusal happened after he purportedly "nullified" the contract. But he received the $25,000.00 retainer pursuant to an express

contract, and he could only apply it to his fees and costs as authorized in the contract. Even under Mr. Alva's quantum meruit theory, he would have no remaining right to those client funds when he opted to pursue quantum meruit relief based on the absence of an express contract. The initial brief conflates the quantum meruit relief sought by Mr. Alva with the application of the $25,000.00 retainer, stating "Respondent used the $25,000 retainer that the Clients had in trust to pay a portion of the restitution demand." (IB:25). Those funds were not held in trust to pay a restitution demand; they were held in trust so that they could be applied to unpaid invoices and out of pocket costs. (See TFB-Ex.1). He did not have a contractual right to those funds, either because the balance was zero or because he nullified the contract. In either case, there was no bona fide dispute regarding his retention of those funds, and Mr. Alva's initial brief offers nothing other than a conclusory assertion that he should be allowed to retain the funds in trust until the dispute was resolved. (IB:24).

Mr. Alva cannot simultaneously assert that there is no contract while withholding client funds he was only authorized to retain pursuant to the contract. His legal theories that he can pursue quantum meruit based on the absence of a contract while continuing to withhold a retainer pursuant to a contract are contradictory and irreconcilable. Mr. Alva cannot have it

both ways. In *The Florida Bar v. Samaha*, 407 So. 2d 906 (Fla. 1981), this Court publicly reprimanded an attorney who unlawfully retained $5,000.00 from a workers' compensation claim owed to the client, despite the lawyer maintaining his right to the fee. Mr. Alva's actions toward his clients in this matter demonstrate Mr. Alva's results-based approach in pursuit of his own financial benefit.

Given Mr. Alva's baseless retention of the funds, the referee recommended restitution in the amount of $25,000.00 to Mr. McCool, regardless of the outcome of the appeal in the civil case. (ROR:25). The initial brief takes issue with this recommendation, stating that it could amount to a double recovery for his clients if he is unsuccessful in his appeal. Setting aside the hypocrisy of that argument given Mr. Alva's effort to charge twice for the same legal work, the issue of restitution is a moot point. Since the filing of the initial brief, Mr. Alva lost his appeal in a *per curiam* affirmed decision. Without a written opinion, Mr. Alva cannot seek further appellate review in that case. See *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 989-990 (Fla. 2004). The holding in that appeal will become final before this Court issues an order in this case, and presumably Mr. Alva will abide by the ruling and refund the retainer. To address Mr. Alva's concern, this Court could order Mr. Alva to refund

$25,000.00 to the clients if he has not already done so in compliance with the decision rendered in *Alva v. Dr. ColorChip, Corp.*, Case No. 4D2022-1996 (Fla. 4th DCA Nov. 2, 2023).

II. Mr. Alva violated Rules 4-1.4(b) and 4-8.4(a) by failing to explain to his clients that he would increase his fee and retroactively bill his clients for services previously rendered in the event of a late payment.

Regarding the violation of Rule 4-1.4(b), the referee found that the engagement letter placed the clients on notice of the rates to be charged. (ROR:15). Mr. Alva failed to put the clients on notice at the start of the representation that in the event of a breach, the client would owe higher hourly rates, which would be retroactively applied to the start of the representation. (ROR:15-16). Since the clients never agreed to this term, Mr. Alva's e-mail threatening to unilaterally increase his hourly rate was insufficient notice under Rule 4-1.4(b), because it was sent over a year after the clients signed the engagement letter and after the due date for the January 2018 invoice had already lapsed. (ROR:16).

The initial brief asserts that since Mr. Alva's threat to increase his hourly rate occurred after his clients had fired him and were no longer clients, he could not have violated a duty to explain matters to a client. (IB:34-35). This logic is backwards. It is his failure to disclose this to the client at the outset—not his late disclosure of such—that formed the basis

for the rule violation. The first communication to the client explaining Mr. Alva's intent to increase his hourly rate, backdated to the beginning of the legal representation, was on February 21, 2018. (TFB-Ex.25). This was six days after an order substituting counsel relieved Mr. Alva of further responsibility in the litigation. (TFB-Ex.38). It was an attempt to rewrite the fee agreement and exact more money from a former client, though couched in bad faith legalese falsely asserting the engagement letter was nullified.

Nowhere in the engagement letter does it state that the rate of $400.00 per hour is a discounted rate. Nowhere in the engagement letter does it state that failure to pay an invoice within ten days may result in an increased $550.00 hourly rate, which will also be retroactively applied to the beginning of the representation. If Mr. Alva was going to seek this relief, the clients should have been placed on notice of that fact. But the engagement letter only contemplates that Mr. Alva's firm may apply the $25,000.00 retainer to any invoices unpaid after 10 days, or that either party could submit a dispute over fees to The Florida Bar's Fee Arbitration Program. (See TFB-Ex.1). The client was placed on notice of these two remedies, but Mr. Alva violated Rule 4-1.4(b) by attempting to create a new contract term revising his rate of pay as a result of an unpaid invoice.

Further, due to Mr. Alva's violations of Rules 4-1.4(b) and 4-1.5(a), the referee also found that Mr. Alva violated Rule 4-8.4(a), which prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct set forth in Chapter 4 of the Rules Regulating The Florida Bar.

III. Based on the violations at issue, the actual or potential injury caused by the violations, and the aggravating factors, a one-year suspension is warranted in this matter.

A. The applicable standards:

The Standards for Imposing Lawyer Sanctions provide a baseline for determining the appropriate sanction for a lawyer's misconduct before consideration of aggravating or mitigating circumstances. The referee found that under Standard 7.1(b), suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. (ROR:23). The report of referee also references subsection (c), which supports a public reprimand when negligent conduct causes injury or potential injury, and subsection (d), which supports admonishment when negligent conduct causes little or no actual or potential injury.

Mr. Alva knowingly engaged in misconduct; his actions were not the result of negligence. Further, he caused injury to the client, who had to sue

Mr. Alva and litigate the matter in circuit court and the Fourth District Court of Appeal, because Mr. Alva refused to refund the retainer. Therefore, Standard 7.1(b) is the most applicable standard in this case, and it supports imposition of a suspension.

B. The aggravating and mitigating circumstances:

Under Standard 3.2(b), the referee found that four aggravating factors supported an upward departure from the baseline discipline to be imposed.

- Dishonest or selfish motive under Standard 3.2(b)(2);
- Refusal to acknowledge the wrongful nature of the conduct under Standard 3.2(b)(7);
- Substantial experience in the practice of law under Standard 3.2(b)(9); and
- Indifference to making restitution under Standard 3.2(b)(10).

(ROR:26). Though three of the aggravating factors required no further explanation, the referee noted that Mr. Alva had substantial experience in the law, because he has practiced in Florida since 1988 and Delaware before that. *Id*. Mr. Alva provided extensive testimony regarding his specialization in complex corporate law matters, in which he described his work for preeminent law firms on teams of lawyers litigating over billions of

dollars representing Fortune 100 clients. (See generally T4:26-32). His position in this case that he can unilaterally increase his agreed upon contractual rate to what he feels he is worth is particularly troubling given his substantial experience in complex business litigation.

Mr. Alva's argument that none of the other aggravating factors found by the referee apply is predicated on the assertion that his legal positions in this case were based on an honest understanding of the law. (IB:43-44). As stated *supra*, they were not, and even a cursory review of case law addressing quantum meruit relief demonstrates this fact.

The referee also found the following mitigating factors in this case:

- Absence of a prior disciplinary record under Standard 3.3(b)(1);
- Full and free disclosure to the bar or cooperative attitude toward the proceedings under Standard 3.3(b)(5); and
- Character or reputation under Standard 3.3(b)(7).

(ROR:26). The initial brief argues that the referee overlooked other mitigating factors, particularly the lack of actual harm caused by his retention of the $25,000.00 retainer to satisfy his contrived legal invoice. But a client should not have to sue their former attorney to compel the return of a retainer when the legal bill has been paid in full. Had Mr. Alva informed the client of his intent to keep the retainer, the client would have

had the option to send an additional check for $40.00 in full payment of the January 2018 invoice. But Mr. Alva waited until he received payment, then submitted his quantum meruit invoice, which applied the $25,000.00 retainer to the contrived debt. The referee did not err in declining to find that the lack of actual harm constituted a mitigating factor.

Mr. Alva further argues that the referee should have found the absence of a dishonest or selfish motive. (IB:45). The bar will not belabor the point in explaining why this mitigating factor does not apply. Finally, Mr. Alva argues as an additional mitigating factor that the clients still had an excellent result. *Id*. The clients disputed the "excellent result" obtained by Mr. Alva through the collective testimony of Mr. McCool and Ms. O'Rourke. The clients' dissatisfaction with the representation is also readily apparent through a cursory glance at the e-mails in evidence. The referee's finding that an aggravating or mitigating factor does not apply is entitled to a presumption of correctness unless clearly erroneous or without support in the record. *The Florida Bar v. Bosecker*, 259 So. 3d 689, 700 (Fla. 2018). Given the competing viewpoints, the referee did not err on this issue.

C. <u>The case law:</u>

As a starting point in addressing relevant case law, the referee cited to *The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015), in

which this Court stated that it is moving toward imposing stronger sanctions for unethical and unprofessional conduct. Some of the most relevant case law predates this more recent trend, and while these cases are still relevant in other respects, the discipline imposed may not reflect the current views of this Court. The referee's report discusses eight pieces of case law in support of the referee's recommendation of Mr. Alva's one-year suspension from the practice of law. (See generally ROR:23-25). The bar will limit its brief to the most relevant cases supporting the recommended discipline, as well as more recent opinions of this Court involving excessive fees.

In *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005), the lawyer entered into a contingency agreement entitling him to recover 40% of any recovery, but he arbitrarily awarded himself 53% of the recovery. This Court rejected argument that the contractual fee provision was modified by an implied amendment to the agreement. While imposing a public reprimand based on mitigating circumstances, this Court cautioned that "lawyers who charge excessive fees are guilty of serious ethical breaches that diminish public confidence in the legal profession." *Id*. at 94.

Other older case law has generally held that a rehabilitative suspension of 91 days is appropriate when a lawyer charges an excessive fee. In *The Florida Bar v. Carlon*, 820 So. 2d 891 (Fla. 2002), this Court

imposed a 91-day suspension against a lawyer who charged a client $3,340.10 for an initial consultation and for sending form letters to lawyers licensed in Arizona asking for assistance in securing an asset in Arizona improperly allocated to the client's ex-husband under an Arizona divorce decree. In *The Florida Bar v. Forrester*, 656 So. 2d 1273 (Fla. 1995), the respondent received $195,000.00 as an advance to represent an estate, but only earned $46,725.00. She failed to return the excess funds because she allegedly did not have the funds to do so. This Court suspended the respondent for a period of 91 days based on the violation of Rule 4-1.5(a). This same discipline was imposed in *The Florida Bar v. Richardson*, 574 So. 2d 60 (Fla. 1990), in which an attorney handling an uncomplicated estate matter consisting of one piece of real property valued at $22,000.00 charged the client $10,550.99. The referee determined that a reasonable fee for the services rendered was $2,500.00. *Id*. at 61. The respondent also overcharged the same clients for the preparation of their wills. This Court stated that an excessive cost of legal services would deter laymen from utilizing the legal system in protection of their rights, and the misconduct therefore warranted a 91-day suspension. *Id*. at 63.

The bar sought a stronger sanction in this case than in *Carlon*, *Forrester*, and *Richardson*, because Mr. Alva did not merely spend more

time on a task than he should have spent and unreasonably refuse to make restitution. His conduct was far more culpable because he knew he was paid in full for his legal services, but knowingly tried to collect an additional $126,650.00 from the client anyway. The referee correctly found that this was no different than attempting to commit grand theft on a client. Mr. Alva's misconduct is much more egregious than a more typical excessive fee case and therefore warrants a stronger sanction.

Further, the discipline imposed in excessive fee cases has been stronger in recent decisions. In *The Florida Bar v. Bander*, 361 So. 3d 808 (Fla. 2023), the lawyer received a double payment of legal fees: one payment from his clients, and another payment from a third party who paid reimbursements of legal fees. The lawyer retained both fees, and he only refunded his clients in response to a bar complaint. This Court imposed disbarment. Though this discipline was likely due to the lawyer's misappropriation of client funds for his own personal use, which is not an allegation here, Mr. Alva similarly tried to be paid twice for the exact same service.

In *The Florida Bar v. Rush*, 361 So. 3d 796 (Fla. 2023), this Court suspended a lawyer for three years for seeking approximately $1.73 million in attorney fees under a statute governing attorney fees in eminent domain

cases, even though the lawyer never established a statutory right to such fees. The respondent in *Rush* threatened his clients with a baseless claim of legal fees and costs totaling between $300,000.00 and $1,000,000.00 in the event the client fired him, which appeared to be a calculation of what he would have earned as a statutory fee if the litigation was successful. The respondent's actions initially dissuaded the clients from terminating representation, but when this action was eventually taken, the respondent sued his former clients and attempted to undo a negotiated settlement.

The misconduct in *Rush* was more egregious than Mr. Alva's, but it does bear similarities. This Court determined that it was "patently unreasonable" for Mr. Rush to seek compensation based on benefits never obtained. *Id*. at 803. Similarly, it was patently unreasonable for Mr. Alva to unilaterally increase his hourly rate and retroactively bill his client for prior work paid in full. Given this Court's trend of imposing stronger sanctions, which is reflected in more recent case law in *Bander* and *Rush*, the referee's recommendation of a one-year suspension from the practice of law is an appropriate sanction.

CONCLUSION

For the above stated reasons, The Florida Bar asks this Court to enter an order approving the referee's findings of fact and find Mr. Alva guilty of

violating Rules 3-4.3, 4-1.4(b), 4-1.5(a), and 4-8.4(a). The bar additionally asks this Court to approve the referee's recommendation as to the appropriate sanction and suspend Mr. Alva from the practice of law for one year. The bar also asks that this Court approve the referee's recommended restitution and order Mr. Alva to pay his former clients $25,000.00 if he has not already done so, and to impose the bar's costs recommended by the referee.

Respectfully submitted,

/s/ Mark Lugo Mason
Mark Lugo Mason, Esq.
FL Bar No: 98013
651 E. Jefferson St.
Tallahassee, FL 32399
The Florida Bar
mmason@floridabar.org

CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 28th day of November, 2023, and a true and correct copy of the foregoing has been furnished via e-service to Curtis Alva, 200 E 13th Street, Rivera Beach, FL 33404, at curtis@alvalaw.com and assistant@alvalaw.com.

Mark Lugo Mason, Bar Counsel

CERTIFICATE OF TYPE SIZE & STYLE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Arial. The word count is 10,513 words. It has been calculated by the word-processing system, and it excludes the content authorized to be excluded under the rule, but it includes any footnote.

Mark Lugo Mason, Bar Counsel