

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT MICHAEL FOJO,

Respondent.

Supreme Court Case No.
SC24-0622

The Florida Bar File No.
2022-00,292(2A)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or the bar. Respondent Robert Michael Fojo is referred to as Mr. Fojo.

Citations to the 610-page electronic record in this case are referred to by "R:" followed by applicable page numbers. Citations to the transcript of the sanction hearing held on October 15, 2024 are referred to by "T:".

Citations to the Amended Report of Referee are referred to by "ROR:".

NATURE OF THE CASE

This is a lawyer disciplinary case seeking reciprocal discipline after respondent was the subject of an order accepting his resignation to resolve a pending disciplinary case in New Hampshire. In that case, a referee's report recommending Mr. Fojo's interim suspension from the practice of law recounted his misappropriation of client funds in three matters. In one matter, Mr. Fojo also lied to his client when asked about the status of her settlement funds. Rather than defend against the disciplinary proceeding, Mr. Fojo submitted an affidavit of resignation stipulating to the material facts in the referee's report and acknowledging that the charges could not be successfully defended.

The referee in this reciprocal case properly relied on the final adjudication of guilt in New Hampshire as conclusive proof of Mr. Fojo's

guilt. However, the referee found that the sanction of disbarment was too severe and recommends a three-year suspension from the practice of law. This brief will assert that the misconduct at issue warrants Mr. Fojo's disbarment from the practice of law.

STATEMENT OF THE CASE AND FACTS

I. Due to a pending disciplinary investigation regarding misappropriation of client funds, Mr. Fojo submitted an affidavit of resignation, which was accepted by the New Hampshire Supreme Court.

A. Background:

The underlying facts serving as the basis for this reciprocal discipline action against Mr. Fojo are summarized in (1) a Referee's Recommendations issued in New Hampshire as part of that state's disciplinary process; and (2) a New Hampshire Supreme Court order imposing an interim suspension on Mr. Fojo's law license. (See generally R:127-48). Following the interim suspension order, Mr. Fojo submitted an Affidavit of Resignation in the New Hampshire disciplinary proceeding, which stated in pertinent part:

I acknowledge that the material facts upon which the petition, the referee's report and recommendations dated January 12, 2022, and this Court's order dated February 25, 2022 are predicated are true.

(R:152). The same affidavit also stated that the resignation was freely and voluntarily rendered, and that the charges under investigation “cannot be successfully defended.” *Id.* Mr. Fojo swore to the truth of these statements “under the pains and penalties of perjury.” (R:153).

The New Hampshire Supreme Court accepted Mr. Fojo’s resignation on May 18, 2022. (R:155). Five months later, the state of Massachusetts imposed reciprocal discipline on Mr. Fojo’s law license in that state by ordering resignation as a disciplinary sanction. (R:156-61). The Florida Bar filed a formal complaint seeking reciprocal discipline against Mr. Fojo on April 26, 2024. (R:5-19). The referee in this proceeding found that the final adjudication in New Hampshire was conclusive proof of the misconduct. (ROR:11). The referee further found that Mr. Fojo’s affidavit of resignation—in which he stipulated to all material facts in the referee’s recommendation and the absence of any valid defense—constituted a waiver of his right to challenge the facts upon which his resignation was predicated. (ROR:14).

B. Mr. Fojo failed to timely pay settlement proceeds to a client, misappropriated the client’s settlement funds, and lied to the client about his receipt of the settlement money.

The referee’s recommendations and the interim suspension order issued in New Hampshire found multiple instances of Mr. Fojo

misappropriating client funds and misrepresenting matters to his clients. (R:141-48). The referee in this case adopted those findings as part of his recommendation that Mr. Fojo be found guilty of misconduct.

Specifically, the Referee's Recommendations state that Paula Dewey retained Mr. Fojo in October 2017 regarding a personal injury matter. (R:128). The case settled on December 14, 2020, and the defendant's insurer issued a \$40,000.00 check to Mr. Fojo, as the attorney for Ms. Dewey. *Id.* The check was deposited into Mr. Fojo's trust account on December 23, 2020. *Id.* Mr. Fojo was entitled to one-third, or \$13,333.33, of the settlement. *Id.*

From the date of deposit through February 5, 2021, Mr. Fojo issued a series of payments to himself in the Dewey matter totaling \$12,000.00. *Id.* On February 14, 2021—two months after settlement—Ms. Dewey requested an update on the status of her settlement via e-mail. *Id.* She received an automatic reply from Mr. Fojo stating that he was out of office traveling through February 24, 2021. *Id.* Mr. Fojo sent no further response, causing Ms. Dewey to send another e-mail in early May 2021 stating as follows:

I've been waiting for quite a long time, without you responding. Like I said before, I drive by that location daily reminding me of the pain I endured. You are "hoping for a response" ????. Could this have anything to do with you not following up on the case in

a timely fashion. You told me in December it would be maybe 2 weeks before I would receive my settlement. Now add 4 months. And still you know nothing regarding this matter.

(R:128). Mr. Fojo responded by falsely stating, “For whatever reason, the carrier didn’t issue the check or it wasn’t sent out. They are going to re-issue the check. Thanks for your patience.” *Id.*

Ms. Dewey sent another demand for her settlement money a month and a half later, and Mr. Fojo responded, “I have reached out and am determining what happened.” (R:128-29). After receiving no sufficient response from her attorney regarding the matter, in July 2021, Ms. Dewey contacted the defendant’s insurer and learned the settlement check had cleared in December 2020. (R:129). She filed a grievance with the state bar, and Mr. Fojo’s response to the grievance denied misappropriation of settlement funds. *Id.* Instead, he claimed that a new part-time assistant deposited the check and he overlooked the fact that the funds were in his trust account. *Id.* Mr. Fojo provided bank statements to the disciplinary office in New Hampshire, though he stated he did not have monthly reconciliations accounting for every transaction, and he did not keep client ledger cards. (R:130). Consequently, the attorney discipline office recreated a receipt and disbursement journal and client ledger cards detailing transactions from June 2019 through October 2021. *Id.*

Mr. Fojo claimed he would issue his client a check after confirming a purported lien on the funds, and at the attorney discipline office's urging, he issued his client a partial payment of \$12,000.00 while reserving the remainder to cover the lien. *Id.* He enclosed an invoice with the check detailing his fee, medical expenses, and court filing fees totaling \$20,098.67. *Id.* This figure did not include the amount of the purported lien, as Mr. Fojo claimed he was "still awaiting word ... concerning the amount of the lien" and "will continue to keep you posted." *Id.*

On November 16, 2021, the disciplinary office issued a subpoena to the bank seeking records related to Mr. Fojo's trust account and operating account. *Id.* Despite his earlier assurance that he "will continue to keep you posted," Mr. Fojo informed the disciplinary office for the first time that he had closed his trust account nearly three weeks before issuance of the subpoena due to suspicious activity with respect to the account. (R:130-31). Mr. Fojo asserted to the disciplinary office that the only remaining funds held in the trust account were fees for other clients. (R:131). When asked about the remaining funds that should be held in trust for Ms. Dewey to cover the purported lien, Mr. Fojo provided the following answer:

Regarding the funds you are attributing to Ms. Dewey, I did not say I was holding funds for her. Rather, at my meeting with Attorney Cornell [of the ADO] on September 27, I explained that there was a large DHHS lien that has not been confirmed yet,

and the remaining funds (the \$7,901.33 figure you mention below) from the settlement will have to be allocated to satisfy that lien. I also mentioned that I likely distributed more money to Ms. Dewey than I should have.

Id. The rest of his response asserted that he had made unsuccessful efforts to confirm the amount of the lien. *Id.*

The disciplinary office ultimately concluded that when Mr. Fojo sent Ms. Dewey the \$12,000.00 check on August 9, 2021, as a partial payment of her settlement, he was not holding sufficient funds in trust for her to cover the payment. *Id.* On July 20, 2021—after the \$40,000.00 settlement was deposited and before issuance of the \$12,000.00 partial payment to the client—the trust account only had a balance of \$300.00. *Id.* The \$12,000.00 check to Ms. Dewey nevertheless cleared, because in the weeks prior to issuance of the check, several deposits were made into the trust account with respect to other clients. *Id.* Mr. Fojo misappropriated other client funds to cover his partial payment to Ms. Dewey, whose funds he had already misappropriated. *Id.* On December 13, 2021—over four months after issuance of the partial payment—Mr. Fojo opened a new trust account which only contained \$100.00 of his own money. (R:132). At that point, Mr. Fojo’s trust account should have been holding \$14,666.67 for Ms. Dewey alone (\$40,000.00 settlement less Mr. Fojo’s \$13,333.33 fee and the \$12,000.00 partial payment). *Id.*

C. As a result of the audit conducted as part of the bar investigation in New Hampshire, the disciplinary office uncovered more discrepancies in Mr. Fojo's trust accounting with respect to two other clients.

Mr. Fojo represented Shantanu and Satish Jha in a contract dispute with a former employer. (R:132). The matter settled for \$500,000.00, and the hybrid contingency fee agreement entitled Mr. Fojo to \$150,000.00, which was 30% of the recovery, plus a \$12,000.00 flat fee, totaling \$162,000.00. *Id.*

The \$500,000.00 settlement was deposited into Mr. Fojo's trust account on January 13, 2020. *Id.* Mr. Fojo then overpaid himself a total of \$195,020.00 from the settlement funds, in addition to the \$12,000.00 flat fee he had already received. *Id.* In doing so, Mr. Fojo received a total of \$207,020.00 as earned attorney's fees, which constituted an overpayment to himself in the amount of \$45,020.00.

After this overpayment, \$304,980.00 of client funds from the \$500,000.00 settlement remained in trust. On January 28, 2020, Mr. Fojo transferred \$288,000.00 to the Jhas, leaving a balance of \$16,980.00 in trust. *Id.* After this transfer, the clients were still owed an additional \$62,000.00 (the \$45,020.00 overpayment plus the \$16,980.00 remaining in trust). Months later, Mr. Fojo wire transferred \$67,000.00 to the Jhas, and

the referee in New Hampshire determined that he used other client funds to make this payment. *Id.*

Mr. Fojo also represented Curtis Pedearé in a personal injury matter. (R:132). Under the fee agreement, Mr. Fojo was entitled to a third of any recovery. *Id.* He deposited a \$50,000.00 check from Geico General Insurance into his trust account on August 6, 2020. (R:132-33). Mr. Fojo distributed \$33,584.00 to his client and the remainder to himself. *Id.* However, he again misappropriated client funds when he received an additional \$50,000.00 check from the insurer related to his client's underinsured motorist coverage. *Id.* Rather than distributing the funds in the same manner as the first \$50,000.00 check, Mr. Fojo instead paid himself a total of \$39,000.00, even though his earned contingency fee for this second check could not have exceeded \$16,666.67. (R:133). This represented an overpayment of attorney's fees in the amount of \$22,333.33.

After the attorney discipline office requested documents related to the Pedearé matter, Mr. Fojo and his client entered into an addendum to the original engagement letter. *Id.* The addendum generically stated that remaining funds were paid to Mr. Fojo's firm as compensation for services rendered. *Id.* The addendum does not state the amount of the remaining

funds. When the attorney disciplinary office asked Mr. Fojo to describe any other legal matter that he handled for Mr. Pedearé, Mr. Fojo declined to answer, claiming attorney client privilege. *Id.* The referee concluded that Mr. Fojo overpaid himself in this matter and was “out of trust” by approximately \$33,333.33 (representing the \$22,333.33 overpayment of earned attorney’s fees plus the remaining \$11,000.00 of client funds owed to Mr. Pedearé from the second settlement check). *Id.*

II. The referee in this reciprocal discipline proceeding rejected Mr. Fojo’s arguments seeking dismissal but nevertheless recommends a lesser sanction of a three-year suspension rather than disbarment.

As stated *supra*, Mr. Fojo’s affidavit of resignation acknowledged that the material facts in the referee’s report are true, his misconduct under investigation could not be successfully defended, and his affidavit of resignation was freely and voluntarily rendered. (See R:152). Nevertheless, Mr. Fojo argued in this reciprocal case that the referee should not impose discipline on his law license in Florida. Specifically, the referee’s report in this case notes that Mr. Fojo argued a denial of due process in New Hampshire, a paucity of proof leading to his disciplinary resignation, and that reciprocal discipline in Florida would constitute a grave injustice. (ROR:11-12). The referee rejected all three arguments, finding that (1) Mr. Fojo was given notice and an opportunity to be heard in the New

Hampshire disciplinary proceeding; (2) Mr. Fojo's disagreement about what the evidence means or what should happen did not constitute a paucity of proof; and (3) there was no evidence of any grave injustice, as Mr. Fojo only offered "unconvincing" argument that his disciplinary resignation was the product of a conspiracy against him. (ROR:12-14). The referee further found as follows:

Even if the undersigned is wrong about every single one of those exceptions, respondent waived his right to challenge those when his third affidavit of resignation was accepted by the New Hampshire Supreme Court. At that point, it doesn't matter what happened before that. He voluntarily resigned from the practice of law in New Hampshire.

(R:116).

Despite rejecting Mr. Fojo's defenses, the referee found that the requested sanction of disbarment is too severe, and the evidence and argument supported a sanction of a three-year suspension. (ROR:15). The bar thereafter filed a notice of intent to seek review of the report of referee regarding the recommended sanction only.

SUMMARY OF ARGUMENT

Mr. Fojo's affidavit of resignation stipulated to the facts stated in a referee's report regarding his misappropriation of client funds, failure to pay settlement proceeds timely, and misrepresentation to a client about the status of her funds. The New Hampshire Supreme Court accepted his

resignation, and Massachusetts imposed a similar disciplinary sanction. In this reciprocal disciplinary proceeding, the final adjudication in New Hampshire constitutes conclusive proof of guilt. The referee accepted the findings of fact as true and properly rejected Mr. Fojo's arguments that this Court should not impose discipline based on some infirmity in the disciplinary process in New Hampshire.

However, the referee's report recommends a less severe sanction than disbarment. This Court has repeatedly stated that the presumptive sanction for misappropriation of client funds is disbarment, notwithstanding the presence of significant mitigating circumstances. In this case, there are no significant mitigating circumstances. The referee's recommendation of a three-year suspension rather than disbarment lacks a sufficient basis in law. The severity and pattern of the misconduct, the multiple aggravating factors, and the minimal mitigation fail to overcome the presumption of disbarment as the appropriate sanction. The bar asserts that Mr. Fojo's case presents no exceptional circumstances warranting a deviation from the presumptive sanction, and Mr. Fojo should be disbarred.

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.

A. Findings of Fact

The procedural posture of this case is different than a more typical lawyer disciplinary proceeding. When a foreign jurisdiction imposes discipline on a lawyer licensed in this state, this Court retains jurisdiction to discipline the lawyer for the same conduct. Rule 3-4.6(a). In a typical disciplinary proceeding, a review of a referee's findings of fact is limited and will not be reweighed if supported by competent, substantial evidence in the record. *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016). In reciprocal proceedings, a final adjudication by another jurisdiction "makes such a foreign judgment of guilt conclusive proof of such misconduct in a disciplinary proceeding in this state." *The Florida Bar v. Wilkes*, 179 So. 2d 193, 197 (Fla. 1965).

This Court has held that "[p]roof of guilt of the acts of misconduct adjudicated in the sister state is accomplished by simply proving the entry of the foreign judgment." *Wilkes*, 179 So. 2d at 197. Such action "eliminates

any necessity to retry the bare issue of guilt and makes unnecessary the production in Florida of testimony and evidence on this issue.” *Id.*

The referee did not conduct a final hearing on guilt, because Mr. Fojo’s guilt was already conclusively proven. A foreign judgment imposing discipline is conclusive unless the respondent meets the burden of showing one of three deficiencies in the foreign judgment:

- (1) The attorney had no notice or opportunity to be heard;
- (2) There was such an infirmity or paucity of proof that the court could not accept the judgment as final; or
- (3) Some other grave injustice would result in relying on the foreign judgment as conclusive proof of guilt.

Wilkes, 179 So. 2d at 198. “It is not enough for the opposing party merely to assert that an issue does exist.” *The Florida Bar v. Mogil*, 763 So. 2d 303, 307 (Fla. 2000) (quoting *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979)). Mr. Fojo did not seek review of the findings in the report of referee that he failed to establish any of these deficiencies in the foreign judgment.

B. Recommendation of Discipline

In reciprocal discipline proceedings, this Court may impose more severe punishment than the punishment imposed by the sister state. *The Florida Bar v. Hagendorf*, 921 So. 2d 611 (Fla. 2006). 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. See *The Florida Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020).

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.

C. Consideration of Mitigating and Aggravating Factors

A referee's findings on mitigating and aggravating factors carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Arcia*, 848 So. 2d 296, 299 (Fla. 2003).

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. **Based on the violations at issue, the Standards for Imposing Lawyer Sanctions, and relevant case law, this Court should reject the referee's recommendation of a 3-year suspension and instead impose disbarment.**

- A. The applicable standards:

The referee found that the final adjudication in New Hampshire was conclusive proof of the misconduct under R. Regulating Fla. Bar 3-4.6. (ROR:11). The referee found that Mr. Fojo failed to establish a legal basis for this Court to decline to impose reciprocal discipline. Therefore, the only remaining issue was the recommended sanction. 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 justifying a departure from the sanction to be imposed. The referee's report cited to four separate standards that either supported suspension or disbarment. (ROR:15-16). The report quoted each standard without specifying whether Mr. Fojo's conduct warranted disbarment or suspension under each applicable standard. However, based on the circumstances of Mr. Fojo's misconduct, all four standards support disbarment.

Under Standard 4.1(a) (failure to preserve the client's property), disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury. Conversely, under subpart (b), 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. Application of Standard 4.1 supports Mr. Fojo's disbarment, because he knowingly converted client settlement funds. His correspondence with Ms. Dewey demonstrates his intentional stall tactics used to avoid paying his client money that he already misappropriated. Mr. Fojo falsely claimed that the money had not been paid by the insurer yet, but the insurer was "going to re-issue the check." (R:128). Later, he asserted to the attorney disciplinary office in New Hampshire that a part time assistant deposited the settlement check, he did not know about it, and that caused him to believe the insurer had not paid the settlement yet. (R:129). But that explanation did not comport with his e-mail to the client claiming the insurer was going to re-issue the check, which necessarily implied that he contacted the insurer and tentatively resolved the issue.

Further, Mr. Fojo's late payments of settlement funds established a pattern of waiting to pay a client (whose funds had already been

misappropriated) until his trust account was replenished with funds from other client matters. In this way, Mr. Fojo's delayed payments avoided an overdraft of his trust account, which would have likely triggered a grievance by a client when a settlement check was returned due to insufficient funds. This evidence further demonstrated Mr. Fojo's knowing misappropriation of client funds.

Under Standard 4.6(a) (lack of candor), 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 injury to the client. Conversely, under subpart (b), suspension is appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to the client. The only difference between the two subparts hinges on whether the lawyer's deception was for the intent to benefit the lawyer. On this issue, Mr. Fojo lied to his client, Ms. Dewey, regarding her settlement funds to conceal his misappropriation. Since this intentional deceit was for the benefit of Mr. Fojo, the standard supports his disbarment.

Under Standard 5.1(a) (failure to maintain personal integrity), disbarment is appropriate when a lawyer engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. Conversely, under

subpart (b), suspension is appropriate when a lawyer knowingly engages in certain criminal conduct or other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. The main difference between the two subparts hinges on whether the dishonesty, fraud, deceit, or misrepresentations was the result of "intentional conduct." In this case, Mr. Fojo intentionally lied to his client in stating that the insurer was "going to re-issue the check." That check had already been deposited in his trust account. This was intentional conduct involving dishonesty, fraud, deceit, or misrepresentation. It also seriously adversely reflects on Mr. Fojo's fitness to practice law, as this Court has held that fundamental dishonesty "cannot be tolerated by a profession that relies on the truthfulness of its members." *The Florida Bar v. Mirabal*, 390 So. 3d 1172, 1188 (Fla. 2024) (quoting *The Florida Bar v. Berthiaume*, 78 So. 3d 503, 510 (Fla. 2011)). The standard again supports Mr. Fojo's disbarment from the practice of law.

Under Standard 7.1(a) (violation of other duties owed as a professional), disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious

or potentially serious injury to a client, the public, or the legal system.¹

Conversely, under subpart (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. Like Standard 4.6 (lack of candor), the difference between the appropriateness of disbarment and suspension in applying this standard hinges on whether the conduct was intended to obtain a benefit for the lawyer. As stated *supra*, Mr. Fojo's unprofessional conduct in his representation of Ms. Dewey involved him misappropriating client funds and lying to his client about his receipt and misappropriation of her money. This misconduct was clearly intended to benefit Mr. Fojo by concealing his theft of client funds.

B. The aggravating and mitigating circumstances:

The presence of aggravating and mitigating circumstances may warrant either an upward or downward adjustment in the sanction to be imposed. The referee found five aggravating factors present in this case:

- Dishonest or selfish motive under Standard 3.2(b)(2);

¹ The referee's report contains a scrivener's error citing to Standard 7.0, which does not exist. (See ROR:16-17). The excerpt quoted in the referee's report originates from Standard 7.1 instead.

- Pattern of misconduct under Standard 3.2(b)(3);
- Multiple offenses under Standard 3.2(b)(4);
- Refusal to acknowledge the wrongful nature of the conduct under Standard 3.2(b)(7); and
- Substantial experience in the practice of law under Standard 3.2(b)(9).

(R:121). The only mitigating factor found by the referee was the absence of a prior disciplinary record under Standard 3.3(b)(1). *Id.* Consideration of all aggravating and mitigating factors provides no sufficient basis to reduce the baseline sanction of disbarment. More simply, the bad outweighs the good.

C. Case Law

The misuse of client funds “is one of the most serious offenses a lawyer can commit.” *The Florida Bar v. Schiller*, 537 So. 2d 992, 993 (Fla. 1989). The presumptive sanction for intentionally misappropriating client funds is disbarment. *The Florida Bar v. Alters*, 260 So. 3d 72, 84 (Fla. 2018). This holds true even in the presence of significant mitigation. *The Florida Bar re Untracht*, 923 So. 2d 457, 459 (Fla. 2006) (“While mitigating factors such as cooperation, restitution, and the absence of a previous disciplinary history should be taken into account, they are insufficient to overcome the presumption of disbarment for misusing client funds.”). The

“overwhelming majority of cases involving the misuse of trust funds has resulted in disbarment, regardless of mitigation.” *The Florida Bar v. Alters*, 260 So. 3d 72, 84 (Fla. 2018).

Even without evidence that the attorney received a direct benefit from a misappropriation, this court has disbarred attorneys for gross negligence in maintaining a trust account. *Alters*, 260 So. 3d at 84-85 (citing *The Florida Bar v. Rousso*, 117 So. 3d 756 (Fla. 2013), and *The Florida Bar v. Johnson*, 132 So. 3d 32 (Fla. 2013)).

While the amount of the misappropriation in this case is not as severe as *Alters*, in *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333 (Fla. 2008), this Court addressed misappropriation of between \$31,415.61 and \$51,291.41. This Court disbarred the respondent despite her substance abuse, personal problems, and rehabilitation. *Id.* at 338. As this Court previously stated, even significant mitigation is generally insufficient to overcome the presumption of disbarment, because “stealing from a client, which is what the taking of trust account funds plainly is, cannot be overcome merely because the attorney has committed prior good works and has no prior discipline history.” *The Florida Bar v. Travis*, 765 So. 2d 689, 691 (Fla. 2000).

In this case, the referee found a single mitigating factor: the absence of prior discipline. Neither the referee's ruling at hearing nor the referee's report references any other mitigating factor. The referee's finding that the sanction of disbarment is too severe is unsupported by existing law. The recommendation is solely predicated on a mitigating factor that this Court has expressly stated in *Travis* and *Untracht* is insufficient to overcome the presumption of disbarment, even when additional mitigating factors are present. The referee offered no other reason either at the sanction hearing or in the referee's report regarding the basis for this downward departure from the presumptive sanction. (See ROR:15; T:106-07).

This Court recently held:

This presumption has been overcome in very limited situations on "a showing of substantial mitigating circumstances." For example, the presumption of disbarment may be overcome by a showing that the trust funds were not intentionally misappropriated and not for personal use, or the misconduct occurred during a period of extreme personal or emotional distress or was due to substantially impaired judgment.

The Florida Bar v. Bander, 361 So. 3d 808, 818 (Fla. 2023) (internal citations omitted). This Court stated in *Alters* that a downward departure from the presumptive sanction of disbarment is reserved for "exceptional" cases involving "relatively isolated instances of misconduct made in the face of dire circumstances." *Alters*, 260 So. 3d at 84. Mr. Fojo's case is not

exceptional. He misappropriated client funds, lied to his client, then later used other client money to pay clients whose funds he had already misappropriated. The disciplinary office in New Hampshire discovered three instances of Mr. Fojo misappropriating client funds. He also attempted to conceal his intentional misconduct during the disciplinary investigation in New Hampshire. Mr. Fojo's conduct was not isolated, and he offered no dire circumstances that caused him to steal money from his clients.

Given that the referee also found five aggravating factors (weighed against the single mitigating factor), the recommendation of a sanction less severe than disbarment is inappropriate. The report of referee states that ten pieces of case law were considered prior to recommending discipline. (ROR:17-18). Of those ten cases, the first six cases were comparator cases involving similar misconduct by other respondents, while the latter four cases addressed issues of law in reciprocal discipline cases. The six comparator cases all resulted in opinions of this Court disbarring those respondents. See *Alters*, 260 So. 3d 72 (Fla. 2018) (disbarring respondent for intentional misappropriation of trust funds); *The Florida Bar v. Rousso*, 117 So. 3d 756 (Fla. 2013) (disbarring two respondents for abdicating their duties to manage trust account funds to a bookkeeper, resulting in theft of

client money); *The Florida Bar v. Spear*, 887 So. 2d 1242 (Fla. 2004) (disbarring respondent for misusing client funds despite the absence of a prior disciplinary record and the respondent's good faith effort to make restitution); *The Florida Bar v. Massari*, 832 So. 2d 701 (Fla. 2002) (disbarring respondent for fraudulently obtaining client funds, misappropriation, and committing fraud to conceal misconduct); *The Florida Bar v. Eberhart*, 631 So. 2d 1098 (Fla. 1994) (disbarring respondent who resigned from the Connecticut Bar rather than defend against four pending disciplinary actions in that state); *The Florida Bar v. Tillman*, 682 So. 2d 542 (Fla. 1996) (disbarring respondent for misappropriation of client funds despite the absence of a prior disciplinary record and inexperience in the practice of law).

As this Court stated in *The Florida Bar re Sanders*, 580 So. 2d 594, 594 (Fla. 1991), "We should not allow the practice of law in Florida of one disbarred in his home state." New Hampshire effectively disbarred Mr. Fojo by accepting his affidavit of resignation. (R:155). Massachusetts did the same by entering an order of resignation as a disciplinary sanction. (R:156). This Court's case law has established and reiterated the presumptive sanction of disbarment for the conduct at issue. The four applicable Standards for Imposing Lawyer Sanctions uniformly support

disbarment. The five aggravating circumstances weighed against a single mitigating factor do not warrant a downward departure from this presumptive sanction. The report of referee also does not cite to a single comparator case which would support a sanction less severe than disbarment. This Court should disbar Mr. Fojo.

CONCLUSION

For the above stated reasons, The Florida Bar asks this Court to accept the referee's findings of guilt, reject the referee's recommendation that Mr. Fojo be suspended from the practice of law for three years and instead impose disbarment. The bar also requests that this Court impose the costs recommended by the referee.

Respectfully submitted,



Mark Lugo Mason, Bar Counsel

CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 11th day of February, 2025, and a true and correct copy of the foregoing has been furnished via e-service to Robert Michael Fojo, Respondent, at rfojo@fojolaw.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 Rules of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Arial. The word count is 5,462 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