

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 REPLY BRIEF

Shané L. Hinson
Bar Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
shinson@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

TABLE OF CONTENTS

TABLE OF CONTENTS.....	II
TABLE OF CITATIONS	III
REPLY ARGUMENT	1
I. The answer brief asserts several arguments that are not properly before this Court due to Mr. Fojo’s failure to file a notice of intent to seek cross-review.....	1
II. The answer brief’s argument does not support imposition of a three- year suspension.....	3
A. Case Law:	3
B. The Standards for Imposing Lawyer Sanctions:	9
C. Alleged Mitigating Factors:	9
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	16
CERTIFICATE OF TYPE SIZE & STYLE.....	16

TABLE OF CITATIONS

Cases

<i>Nealy v. City of West Palm Beach</i> , 442 So. 2d 273 (Fla. 1st DCA 1983)	1
<i>The Florida Bar v. Bosecker</i> , 259 So. 3d 689 (Fla. 2018)	11
<i>The Florida Bar v. Brutus</i> , 216 So. 3d 1286 (Fla. 2017)	4
<i>The Florida Bar v. Corces</i> , 639 So. 2d 604 (Fla. 1994)	6, 7
<i>The Florida Bar v. Cueto</i> , 834 So. 2d 152 (Fla. 2002)	1
<i>The Florida Bar v. Grieco</i> , 389 So. 3d 1257 (Fla. 2024)	4
<i>The Florida Bar v. Johnson</i> , 132 So. 3d 32 (Fla. 2013)	4
<i>The Florida Bar v. MacMillan</i> , 600 So. 2d 457 (Fla. 1992)	8
<i>The Florida Bar v. Mitchell</i> , 645 So. 2d 414 (Fla. 1994)	7
<i>The Florida Bar v. Ratiner</i> , 238 So. 3d 117 (Fla. 2018)	11
<i>The Florida Bar v. Rosenberg</i> , 169 So. 3d 1155 (Fla. 2015)	5
<i>The Florida Bar v. Schiller</i> , 537 So. 2d 992 (Fla. 1989)	8, 9
<i>The Florida Bar v. Tauler</i> , 775 So. 2d 944 (Fla. 2000)	5, 6
<i>The Florida Bar v. Thomas</i> , 698 So. 2d 530 (Fla. 1997)	6
<i>The Florida Bar v. Weiss</i> , 586 So. 2d 1051 (Fla. 1991)	4

Rules Regulating the Florida Bar

Rule 3-4.6	14
Rule 3-7.10	14

Rule 3-7.2	13
Rule 3-7.7	1, 2
Rule 4-3.3	4

Florida's Standards for Imposing Lawyer Sanctions

Standard 3.2	6
Standard 3.3	5, 7, 14
Standard 3.4	7, 12

New Hampshire Rules of Professional Conduct

Rule 1.15	3
Rule 1.3	3
Rule 1.4	3
Rule 1.5	3
Rule 1.6	10
Rule 3.3	3
Rule 8.4	3

REPLY ARGUMENT

I. The answer brief asserts several arguments that are not properly before this Court due to Mr. Fojo's failure to file a notice of intent to seek cross-review.

Before addressing Mr. Fojo's argument asserting that a three-year suspension is appropriate in this case, this brief will first address certain content in the answer brief that has been improperly raised. Mr. Fojo did not file a notice of intent to seek cross review of this reciprocal disciplinary matter pursuant to R. Regulating Fla. Bar 3-7.7(c)(1). Regarding the disciplinary proceedings in New Hampshire, the referee's report at issue in this case explicitly found that "[t]here was no due process defect, respondent did not establish a paucity of evidence, and there was no grave injustice that occurred." (ROR:14). Mr. Fojo did not seek review of this adverse finding.

When an answer brief challenges adverse findings of an order subject to appellate review, such issues have not been properly raised due to the appellee's failure to cross-appeal. *Nealy v. City of West Palm Beach*, 442 So. 2d 273, 273 (Fla. 1st DCA 1983). Mr. Fojo cannot raise arguments on appeal challenging the referee's findings regarding the sufficiency of the evidence and due process afforded in the disciplinary proceeding in New Hampshire. See *The Florida Bar v. Cueto*, 834 So. 2d 152, 155 (Fla. 2002)

(holding that the bar waived its challenge to a referee's recommendation that the respondent did not violate a rule by failing to identify that issue in a petition for review filed under Rule 3-7.7).

Therefore, this reply will not substantively address the bulk of the offered facts in Mr. Fojo's answer brief, which improperly assert a litany of due process arguments and an alleged paucity of proof regarding certain rule violations. Mr. Fojo waived his right to challenge the adverse findings on these issues, and he stipulated that he could not defend against the adverse findings of guilt rendered in New Hampshire. Further, the bar will not substantively address Section II(C)(iii) of the argument section, which asserts that misconduct by the disciplinary office in New Hampshire justifies a lesser sanction. (See AB:43-44). This reply will instead limit its scope to addressing Sections II(A), II(B), and II(C)(i), (ii), and (iv) of the argument section of the answer brief. (See generally AB:35-43). These sections of the brief collectively assert that case law, the three Standards for Imposing Lawyer Sanctions cited in the report of referee, and asserted mitigating factors support the referee's recommendation of a three-year suspension. These are the only arguments in the answer brief that are properly before this Court due to Mr. Fojo's failure to file a notice of intent to seek cross-review of the report of referee.

II. The answer brief's argument does not support imposition of a three-year suspension.

A. Case Law:

The primary reason Mr. Fojo asserts that he should be suspended instead of disbarred is based on the misplaced assertion that his misconduct was negligent and not intentional. The very first page of Mr. Fojo's statement of the case and facts asserts that Mr. Fojo "admitted to making a mistake" regarding his trust account recordkeeping. (AB:1). He reiterates his claim of having made "mistakes" throughout his answer brief. (AB:22, 30). In his summary of argument, Mr. Fojo asserts that his actions were "not intentional misconduct or dishonesty." (AB:30-31).

Mr. Fojo's misconduct was intentional. This is conclusively established by virtue of the affidavit he submitted to obtain the out-of-state disciplinary resignation order. The referee in New Hampshire recommended that Mr. Fojo be found guilty of violating New Hampshire Rules of Professional Conduct 1.3 (diligence), 1.4 (client communications), 1.5 (fees), 1.15 (safekeeping property), 3.3 (candor toward the tribunal), 8.4(a) (violating or attempting to violate the Rules of Professional Conduct) and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). (R:135). Some of these rules, particularly Rules 3.3 and 8.4(c), require a showing of intent. See *The Florida Bar v. Grieco*, 389

So. 3d 1257, 1262 (Fla. 2024) (a violation of Rule 4-8.4(c) requires a showing of intent); *The Florida Bar v. Dupee*, 160 So. 3d 838, 843 (Fla. 2015) (a violation of Rule 4-3.3(a) requires evidence that the lawyer knowingly made a false statement to a tribunal or failed to correct a false statement made to a tribunal).

Mr. Fojo's affidavit of resignation submitted in the New Hampshire Supreme Court acknowledged that the material facts in the referee's recommendations "are true" and "cannot be successfully defended." (R:44). He stipulated to rule violations demonstrating his intent and waived any further right to assert that his conduct was merely negligent. This Court has noted "a clear distinction between cases where the lawyer's conduct is deliberate or intentional and cases where the lawyer acts in a negligent or grossly negligent manner." *The Florida Bar v. Brutus*, 216 So. 3d 1286, 1290 (Fla. 2017) (quoting *The Florida Bar v. Weiss*, 586 So. 2d 1051, 1053 (Fla. 1991)). Mr. Fojo's argument that he falls into the latter category should be rejected. Further, this Court has held that gross negligence in managing a trust account, resulting in misappropriation, warrants disbarment. See *The Florida Bar v. Johnson*, 132 So. 3d 32 (Fla. 2013).

None of the five pieces of case law cited in the answer brief served as a basis for the referee's recommendation of a three-year suspension, as

the referee only cited six comparator cases resulting in disbarment. (Compare AB:35-38 & ROR:17). The five cases cited in the answer brief were decided between 1989 and 2000, and therefore are uniformly distinguishable for the same reason: they predate this Court's more recent practice of imposing stronger sanctions for lawyer misconduct. See *The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). The sanctions imposed in these older cases may not reflect the current views of the Court.

All five cases are distinguishable for other reasons as well. In *The Florida Bar v. Tauler*, 775 So. 2d 944, 948 (Fla. 2000), the respondent misappropriated funds as a "result of severe financial hardship brought on by her husband's health problems and bankruptcy." Mr. Fojo failed to establish any similar hardship, nor could he, as he continues to baselessly assert that his misconduct was the result of mere negligence. Further, this Court approved the referee's findings in *Tauler* that the respondent (1) had a positive character and reputation in the community; (2) took responsibility for her actions; and (3) did not engage in a pattern of misconduct. *Id.* Conversely, the referee in this case did not find that Mr. Fojo's character and reputation was a mitigating factor under Standard 3.3(b)(7), likely because Mr. Fojo did not present any character witnesses. The referee

also found as aggravating factors that Mr. Fojo refused to acknowledge the wrongful nature of his conduct under Standard 3.2(b)(7), and he engaged in a pattern of misconduct under Standard 3.2(b)(3). Further, despite the presence of overwhelming mitigation in *Tauler*, this Court suspended the respondent for three years.

Mr. Fojo's reliance on *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997) is similarly misplaced. (See AB:36). The misappropriation in that case only amounted to \$1,900.00 in a single client matter, which is substantially different than the facts of this case. The 90-day suspension imposed in *Thomas* was largely driven by the isolated nature of the misconduct, the relatively low amount of money misappropriated, and the absence of prior discipline. In this case, the only shared fact between *Thomas* and the instant matter is the absence of prior discipline, which is insufficient to overcome the presumption of disbarment applicable in this case.

The answer brief next cites to *The Florida Bar v. Corces*, 639 So. 2d 604 (Fla. 1994), in which a lawyer's misappropriation of client funds resulted in a two-year suspension. (See AB:37). The amount of misappropriation in that case was only \$6,755.83, rendering *Corces* and *Thomas* distinguishable from the instant matter for the exact same reason:

the amount of money misappropriated in those cases was substantially less. Further, the respondent in *Corces* fully paid the debt to his client *before* the bar conducted an audit and discovered the trust account violations, whereas Mr. Fojo claimed ignorance that he had misappropriated client funds for his personal use. Consequently, the referee in this case did not find that Mr. Fojo made a timely good faith effort to make restitution under Standard 3.3(b)(4). The respondent in *Corces* also established that the misappropriation was an isolated incident, no client complained¹, and he was cooperative with the disciplinary investigation. The referee in this case did *not* find that Mr. Fojo engaged in full and free disclosure to the bar or exhibited a cooperative attitude toward the proceedings under Standard 3.3(b)(5). Also, as stated *supra*, the referee did *not* find that Mr. Fojo's misappropriations were isolated occurrences; in fact, the referee found a pattern of misconduct and multiple offenses. (ROR:19).

¹ Conversely, a client of Mr. Fojo's filed a bar complaint against him based on his misappropriation of her funds. However, this factual distinction is immaterial, because Standard 3.4(f) explicitly states that the failure of an injured client to complain is neither aggravating nor mitigating. See also *The Florida Bar v. Mitchell*, 645 So. 2d 414, 416 (Fla. 1994) ("The fact that no client has expressed dissatisfaction with an attorney is irrelevant to whether the attorney has violated trust accounting procedures and therefore cannot serve as a mitigating factor in this context.").

The answer brief next cites to *The Florida Bar v. MacMillan*, 600 So. 2d 457 (Fla. 1992), in which a lawyer's misappropriation of client funds resulted in a two-year suspension. (AB:37). In that case, the respondent admitted to the negligent loss of three pieces of jewelry he was supposed to retain in his capacity as guardian of a decedent's estate, and he intentionally misappropriated \$4,000.00 from a guardianship account to his personal account. The amount of the misappropriation was substantially less than Mr. Fojo's misappropriation, and this Court approved the referee's findings in mitigation that Mr. MacMillan was cooperative in the disciplinary process and made restitution to the client within two weeks of the misconduct. Neither mitigator applies here.

Finally, the answer brief cites to *The Florida Bar v. Schiller*, 537 So. 2d 992 (Fla. 1989) in which a lawyer's misappropriation of client funds resulted in a three-year suspension. (See AB:38). In that case, the respondent disclosed deficits in his trust account following notification that a grievance had been filed against him. Though the amount of the misappropriations was initially unknown, an audit revealed deficits of over \$29,000.00. The respondent borrowed money to cover the shortage, which the Court considered to be substantial mitigation. Further, the respondent expressed remorse—unlike Mr. Fojo's refusal to acknowledge

wrongdoing.² (ROR:19) Perhaps most importantly, a dissenting opinion found that the respondent in *Schiller* should be disbarred based on his theft of client funds and lying to the bar to cover this theft. Given this Court's more recent practice of imposing stronger sanctions, the dissenting opinion likely reflects the current views of this Court.

B. The Standards for Imposing Lawyer Sanctions:

The answer brief merely quotes the three standards cited in the referee's report, prefacing these quotations with the conclusory assertion that "[a]ll three standards support the recommendation of a three-year suspension." (AB:38-39). As the answer brief offers no argument in support of this assertion, the bar defers to its initial brief on this issue.

C. Alleged Mitigating Factors:

Before arguing the presence of additional mitigating factors not found by the referee, the answer brief prefaces its argument with assertions that Mr. Fojo's misconduct was merely negligent. (AB:40). As stated *supra*, this argument should be rejected.

² The answer brief asserts that "Schiller cooperated with the investigation" as an additional mitigating factor. (AB:38). However, there is no explicit finding in the opinion regarding the applicability of this mitigating factor.

- i. The answer brief's claims of Mr. Fojo's cooperation, lack of harm to clients, and remedial actions:

Mr. Fojo asserts that he fully cooperated with the disciplinary office in New Hampshire from the outset, admitted to record-keeping errors, provided documentation, sought guidance, and worked to reconcile his trust account. (AB:41). He made these same arguments in New Hampshire, and the referee's written recommendations in that state plainly stated, "I am not persuaded." (R:136). Specifically, the recommendations found that "Fojo's conduct was not merely a series of unintentional bookkeeping errors." *Id.* The referee found that initial efforts by Mr. Fojo to make restitution to clients consisted of "rebates" using other clients' funds. (R:137). He refused to disclose information about certain matters to the disciplinary office, even though New Hampshire Rule of Professional Conduct 1.6(b)(3) expressly authorized him to reveal the information to the extent necessary to respond to allegations in the disciplinary proceeding. (R:138). Regarding Mr. Fojo's alleged cooperation with the investigation, the referee stated that "the evidence demonstrates that his cooperation was, at best, less than complete." (R:139). Mr. Fojo also asserts that no client suffered financial harm. (AB:42). A plain reading of the referee's recommendations conclusively refutes that baseless assertion with no need for additional argument by the bar on that issue.

In his affidavit of resignation submitted to the New Hampshire Supreme Court, Mr. Fojo stipulated to all material facts in the referee's recommendations as true. (R:44). In this reciprocal discipline proceeding, the referee in Florida was not compelled to make an adverse determination on these issues, and the referee reasonably did not do so. Findings of mitigation and aggravation carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Ratiner*, 238 So. 3d 117, 123 (Fla. 2018). A referee's determination that an aggravating factor or mitigating factor does not apply is due the same deference. *The Florida Bar v. Bosecker*, 259 So. 3d 689, 700 (Fla. 2018).

Further, Mr. Fojo failed to seek cross-review regarding these additional mitigating factors not found by the referee. His argument should not be considered on the merits given his failure to properly raise these issues on appeal.

ii. The answer brief's claim that the misconduct was isolated:

Despite misappropriating client funds from multiple clients, and despite the ongoing mismanagement of his trust account, Mr. Fojo nevertheless asserts that his misconduct was isolated and not a pattern. (AB:42-43). This assertion is based on the fact that "other clients the ADO

accused him of wronging never filed grievances.” (AB:43). As stated *supra*, the failure of a client to complain is neither aggravating nor mitigating. See Standard 3.4(f).

iii. The answer brief’s claim that misrepresentations and overreach by the disciplinary office in New Hampshire justify a lesser sanction:

The answer brief asserts that infirmities in the New Hampshire disciplinary process should constitute mitigation. (AB:43-44). As stated *supra*, Mr. Fojo’s argument regarding misrepresentations and overreach in New Hampshire were rejected by the referee, and Mr. Fojo did not seek cross-review of this finding. This argument is not properly before this Court.

iv. The answer brief’s claim that Mr. Fojo has already undergone a de facto suspension:

Mr. Fojo next argues that he has not practiced law in Florida since early 2022 and has already endured significant professional and financial consequences. (AB:44). Specifically, this argument impliedly requests that this Court backdate the effective date of his suspension to account for time he has already spent out of practice. *Id.*

It is entirely Mr. Fojo’s fault that this action was not brought sooner. In asserting otherwise, Mr. Fojo’s statement of facts makes the following claim:

Mr. Fojo – through the ADO – notified the Florida Bar of the disciplinary action above on or about May 20, 2022. Bar

counsel appeared to believe that Mr. Fojo had failed to notify the Florida Bar; that was inaccurate.

The Florida Bar waited *over two years – until April 26, 2024* – to file a Formal Complaint for Reciprocal Discipline.

(AB:24-25 (internal citations omitted)).

His claim that he timely notified The Florida Bar is based on his testimony at the sanction hearing. Specifically, bar counsel asked Mr. Fojo to admit that he failed to notify the Executive Director of The Florida Bar of the orders of resignation in both New Hampshire and Massachusetts. Mr. Fojo denied having failed to notify the bar, explaining as follows:

We conferred with the Attorney Discipline Office, they indicated that they would notify the authorities in Florida, and I consented to that. And I believe they did so.

(T:25).

As an attorney licensed in Florida, Mr. Fojo had an obligation to notify the Executive Director of The Florida Bar of the disciplinary actions against him in New Hampshire and Massachusetts. See Rule 3-7.2(m). His testimony was nothing more than a circuitous admission that he did not personally fulfil this obligation and instead relied on the disciplinary office in New Hampshire to do so. Mr. Fojo cannot delegate his professional obligations to unnamed others, then claim that his mere *belief* that

someone else fulfilled his obligation is conclusive proof that The Florida Bar was on notice of this matter since May 2022.

The answer brief asserts that Mr. Fojo has been unable to practice for over three years, such that a disbarment order at this time would be “excessively punitive.” (AB:44). He has not been unable to practice for three years; his law license in Florida was unaffected, rendering him eligible to practice law in Florida at all times. A disbarment order at this time is not “excessively punitive” as asserted in the answer brief; it is the presumptive sanction when a lawyer misappropriates client funds. Mr. Fojo does not demonstrate mitigation by arguing that The Florida Bar pursued this reciprocal disciplinary proceeding two years after he was effectively disbarred in New Hampshire. Any delay in this matter is directly attributable to Mr. Fojo’s failure to timely notify The Florida Bar of the out-of-state discipline against his professional license in two other states.

Further, Mr. Fojo asserts that a suspension will “allow[] him a path to eventual reinstatement.” (AB:44). This assertion is predicated on the false assumption that he has no path to eventual reinstatement or readmission if he is disbarred. The referee in this case did not recommend that Mr. Fojo be permanently disbarred from the practice of law. Mr. Fojo has a “path to eventual reinstatement” if this Court approves the referee’s disbarment

recommendation. Unless otherwise specified in a disbarment order, a disbarred lawyer can seek readmission to the practice of law five years after the effective date of disbarment. See Rule 3-7.10(n)(1).

Finally, the referee did not find as mitigation the imposition of other penalties or sanctions under Standard 3.3(b)(11), and Mr. Fojo did not seek cross-review on this matter. (ROR:19). The bar is not suggesting that this Court needs to blind itself to the fact that Mr. Fojo has been effectively disbarred in two states already. However, such sanctions are a given in reciprocal discipline matters under Rule 3-4.6. These other sanctions are not significant mitigation warranting a departure from the presumptive sanction of disbarment when a lawyer misappropriates client funds.

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 4th day of April, 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 3,222 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