IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR

Complainant,

vs.

LEONARDO ROTH and
MARK ROUSSO

Respondent.
_____/

Supreme Court Case
No.: SC11-15 and SC11-16

The Florida Bar File No.
2011-70,408(11A)
2011-70,598(11A)

RESPONDENTS, LEONARDO ROTH AND MARK ROUSSO'S, ANSWER BRIEF/CROSS PETITION

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We certify that the font used herein is Times New Roman - 14 point.

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PRELIMINARY STATEMENT

This is a Petition for Review by The Florida Bar ("the Bar") from a Report of Referee recommending a suspension of Leonardo Roth ("Roth") for 15 months and of Mark Rousso ("Rousso") for 12 months. Roth and Rousso will also be referred to collectively as "Respondents." Respondents have also filed a cross-petition for review challenging the Referee's finding of guilt on theories never pleaded by the Bar.

For consistency, Respondents will use the record designations used by the Bar as set forth on page vii of its Initial Brief to cite to the transcripts and exhibits. Specifically "(T1__)" refers to the transcripts of the 2010 emergency suspension hearings; "(T2__)" refers to the first two volumes of final hearing transcripts dated April 20, 2011; and "(T3__)" refers to the final hearing transcript for April 21, 2011.[1] Reference to Respondents' exhibits shall be by the symbol (Ex. __"). Reference to the Appendix filed with this brief shall be by the symbol "(A.__)."

All emphasis is ours unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

[1] T3 was necessitated because the court reporter did not continue to consecutively number the transcript pages from day to day, as was done in the 2010 emergency hearing transcript. Instead, the April 21 transcript, which was the second day of the final hearing, began with page 1.

Introduction

The Bar has not presented the facts in accordance with the proper standard of review. As the Bar did not prevail on the factual issues forming the basis of its Petition, it was required to present them in the light most favorable to upholding the Report of Referee. It could then argue that the Referee's conclusions on that evidence were, nevertheless, clearly erroneous. Instead, the Bar presented the facts as if this Court is going to retry the case *de novo* and has largely ignored the evidence and inferences which contradict, undermine or prove its own supposed evidence flawed (and which supports the findings and recommendations of the Referee).[2]

This Court has stated on countless occasions that if there is any evidence to support a factual finding by a Referee, that finding cannot and will not be disturbed.[3]

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[2] After all, this case began with the Bar's auditor swearing to a trust account deficit of $17.6 million to support the emergency suspension of Respondents. The Bar stipulated at trial to a shortage of $4.38 million. While that figure is still large where trust accounts are to be flawlessly maintained, the disparity is stark and illustrates that the Bar's evidence had to be and was critically analyzed by the Referee.

[3] As this Court recited in *The Florida Bar v. Barrett,* 897 So. 2d 1269, 1275 (Fla. 2005), citing *The Florida Bar v. Spann,* 682 So. 2d 1070, 1073 (Fla. 1996):

> A referee's finding of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. Absent a showing that the referees findings are clearly erroneous or lacking in evidentiary support, this Court is

The Bar is, in fact, asking this Court to do just that; reweigh the evidence. Accordingly, Respondents largely reject the Bar's Statement and offer their own, which presents the evidence through the correct prism. At the end of this presentation – to the extent not addressed before hand – Respondents will specifically identify those instances where the Bar is relying on evidence that was either discredited or contradicted by their own evidence.

The Bar's Complaint

The Bar charged Respondents with misappropriation of millions of dollars of trust account funds. In a word: theft. It further charged them with trust account record keeping violations, which they admitted even before any formal proceedings began, as their trusted office manager for the better part of a decade, Fernando Horigian, turned out to be a thief who did not keep proper records and misled them about the status of the firm's trust account. The Bar also charged Roth with improper conduct in connection with the procurement of a loan from a client who had settlement proceeds in the trust account. The loan was used to repay victims of Horigian's theft.[4]

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precluded from reweighing the evidence and substituting its judgment for that of the referee.

[4] Significantly, the Referee made a finding of violations of Rule 4-8.4(c) based upon Respondents' failure to advise all claimants to the trust account of the thefts and

The Facts

The parties stipulated and the Referee found that Respondents had a trust account imbalance that by the end of 2008 of roughly $4.38 million.[5] (T2, 13.) The Respondents testified that Fernando Horigian, the firm's non-lawyer bookkeeper, embezzled the money. One way Horigian stole trust funds without Respondents' knowledge was by forging checks. (T1 353). Others were to transfer funds to different projects in which he had an interest. (T2 102-3.) The Bar's auditor opined that Horigian "probably" took money. (T1 170).[6] He eventually fled to Argentina in late 2008 and has not been located. (T1 323-4.)

Mr. Roth testified that he hired Mr. Horigian as the firm's bookkeeper in or around 2000. Roth's wife had held that position, but they were getting divorced. She trained Horrigian in appropriate trust account procedures and Roth believed Horigian understood what was required by the Florida Bar. Roth trusted him implicitly. (T2 161-2.)

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what the Referee found to be preferences given to certain creditors over others. That theory was never pleaded by the Bar or tried by consent.

[5] This Court will recall that in procuring Respondents' emergency suspension, the Bar's auditor swore under oath that almost $17.6 million was misappropriated by Respondents. That turned out to be completely untrue; the figure was inflated by over $13 million and the Bar's auditor testified at the final hearing that he has "no evidence that they [Respondents] stole any of this money." (T125.)

[6] This revelation no doubt played a pivotal role in the Referee's recommendation, rejected by this Court, that Respondents be immediately reinstated.

Throughout the relevant time period Horigian gave each lawyer a trust account report for that lawyer's individual clients. (T1. 353.)

Roth testified, "when I received mine, I do … mainly immigration law. I handled a number of clients with their fees and costs, and those accounts would always come back to me without any difficulty whatsoever." (T2. 165).

The firm did not have an independent auditor review the trust account because, as Roth testified, Horigian was, "[a] trusted employee that I felt was doing what he was supposed to be doing for ten years, never had a check that bounced, I didn't anticipate having this kind of problem today." (T2 165) As the Bar pointed out, the firm also held monthly meetings and at no time was any partner put on notice of a trust account problem during those meetings. (T3 49-50.)

When Horigian told Roth of a problem with the trust account in June 2008, Roth "thought it was a short term issue that would be resolved and I didn't have a clear picture as to what the issues were. Maybe, in hindsight, absolutely, yes, I should have put the brakes on. But I didn't want to – my concern was making sure that no client liabilities were unmet . . But my main concern, main obligation, was that no one got hurt." (T2 166-7.) At that time Roth deposited $100,000 of his own funds to cover what he thought was a short term accounting problem with the trust account. (T2 168.) In late 2008, when Rousso was advised that the first trust

account check bounced, Roth and Rousso took the action outlined below, after comprehending the gravity of the problem.

The Referee found, and the undisputed evidence supports, that the Bar did not prove that Respondents were directly involved in the theft. In fact, their conduct after they discovered the theft was consistent with his finding and included:

- filing a police report; (T3 70.)
- notifying their insurance carrier; (T3 72., 90.)
- retaining ethics counsel; (T3 70, 90.)
- contacting the firm accountant to try to reconstruct the trust account records and perform a review to identify missing amounts and victims; (T2 169-70.)
- using large sums of their own and family money to repay victims; (T2 169-70; T3 73.)
- opening a new trust account; (T3 77.)
- calling the Florida Bar Ethics Hotline to seek ethics advice, but being told that since Mr. Horigian was not a lawyer, there was nothing the Bar could do.[7] (T3 69-70.)

The Referee also found no clear and convincing evidence that Respondents took or had any direct benefit from this $4.38 million. In fact, the Bar's auditor admitted on cross examination that he had no evidence that Respondents stole any of the money. (T2 125.) The Referee further stated that it was "noteworthy" that when deficiencies were discovered, the Respondents endeavored to honor every known client liability for trust account funds.

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[7] This was obviously the wrong advice.

It is also significant that Respondents' professional liability insurer, Liberty Surplus Insurance. Corp., conducted an investigation of the matter and ultimately tendered its full policy limits of $3 million, less defense costs of $150,000. (T1 81). The policy contained an exclusion for intentional, willful or criminal acts of Respondents. (T1 90-91, Ex. A.) Counsel for the law firm representing the malpractice carrier testified that during the two-year investigation he did not come across any information indicating that either Respondent posed a threat to the public. (T1 93). Michael J. McGirney, hired by the insurer to investigate the matter from the insurer's perspective, said the following in his August 31, 2009 letter to Respondents:

> Further, for purposes of this reservation of rights letter, we assume that none of the Firm's partners were involved in the defalcation of funds as it appears there is no evidence at this time to support such an allegation. (Ex. B.)[8]

[8] The Bar references the testimony of attorney David Hartnett and observes that he did not conduct a full investigation when he testified that in the 2 years he was involved, he saw no evidence of wrongdoing by them. That he did not perform a full investigation of his own clients is understandable because he was hired to represent their interests. He was merely observing that after handling several dozen claims against Respondents's trust account, he never saw any evidence that they were involved in the theft. The insurer hired separate counsel , Mr. McGirney, to represent its interests on the coverage issues, and the Bar left out reference to his letter entirely. The Bar has confused the roles of Mr. Hartnett with Mr. McGirney. Mr. Hartnett is paid by the insurer to represent the Respondents; he owes a duty of loyalty to them.

The criminal activity of Horigian went undetected for a significant period of time.[9] In his Amended Order, the Referee found that Respondent Roth first learned of trust account under-funding some time in April of 2008[10] but did not fully comprehend the cause and scope of the problem until a few months later, and that Respondent Rousso came to know of the trust account under-funding some time in December of 2008.

As of the trial, the Referee found that between insurance proceeds, credit lines, personal funds, funds borrowed from family and others and borrowed from client Hattim Kais Yordi ("Yordi"), Respondents paid back – or had made arrangements to pay back[11] – all known creditors of the trust account.

The Referee found that the loan from Yordi was solicited by Respondent Roth and that Yordi traded a portion of his trust account credit for a promissory note

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[9] Roth testified:

> [T]he bookkeeper was reconciling the account as it was coming in, but we weren't being told the whole picture by being aware of the shortages that were occurring, because we were only looking at our individual files that were reconciling. (T2 212.)

[10] In fact, this was error because the undisputed evidence is that Roth first became aware of an issue with the trust account in June 2008. (T2 164.) The April date was when the Bar auditor confirmed the first deficit, of which Respondents were unaware.

[11] The unpaid claims were nominal and have since been retired.

amounting to over $231,000. (T2 171-6.) After making some initial payments, Respondents defaulted on the note and a lawsuit was filed.[12] (*Id*.)

As to the specific Rule violations, the Referee found clear and convincing evidence that Respondents:

- Failed to examine endorsed checks to ensure against possible forgery;
- Failed to prepare and maintain memorandum to support the legitimate disbursement of trust funds to Respondents' interests or business concerns;
- Made disbursements at a time when the account could not cover client liabilities (although he found they were unaware at the time);
- Failed to prepare and maintain a separate file or ledger for each client or matter showing individual receipts, disbursements, or transfers and any unexpended balance; and,
- Failed to cause a monthly reconciliation of the trust account to be made so that it could be compared to the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons therefor.

The Referee, in distinguishing between misappropriation and failure to safeguard against embezzlement, found that emplacement and adherence of minimum standards would have safeguarded against embezzlement because in

[12] Roth has since settled the case and is in the process of a structured payout to Mr. Yordi. That information is not in the record, but if the Court desires to have it in order to complete the picture, Respondents can supply it immediately.

theory, this course of theft would have been exposed and thwarted before damage could extend beyond the second month.

The Referee further found that although Respondents covered trust deficits from the aforementioned sources, those sources were personal to the Respondents and these types of deposits into the trust account amounted to commingling.[13] He noted that the criminal action of the bookkeeper created a dilemma for Respondents and that the decision to fund the trust account with personal funds did not offend the basic principles underlying the commingling proscription.[14] The Referee found in mitigation that the Respondents' decision was grounded on a sense of personal honor to make right the wrong wrought by the bookkeeper and thus there were justifications for funding the trust account from sources that were not directly related to client representation.

The Referee also found that money deposited from new business was used to satisfy past due client liabilities and that Respondents decided when specific trust creditors were paid and from what source. He found that while Respondents decision to disburse monies from the trust account to some clients over others would

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[13] Respondents do not understand this finding. The Referee seems to be saying that repayment of trust funds cannot be made through the same trust account where deficits occurred, but cited no authority. The loans were put into trust for the express purpose of repaying victims of the theft and they were so used.

[14] Frankly, its not commingling at all.

create a conflict of interest, the evidence at the final hearing pertaining to this allegation was "thin."[15]

Nevertheless, the Referee did find that the specter of a conflict of interest existed by Respondents distributing earned trust money to the firm's operating account ahead of clients. He found that the proper avenue was for Respondents to give informed consent to the clients regarding the issue with the trust account theft, but that the evidence submitted showed that every trust account client had received his due or a promissory note in lieu of said trust account client liability.[16] The Referee found this to be a mitigator, stating that "whatever remedial action the Respondents may have taken could have been viewed critically by some."[17]

As to the Yordi loan (Mr. Yordi was a client for whom the firm recovered a real estate deposit), the Referee found that Respondent Roth procured the Yordi loan

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[15] That's because the Bar made no such allegations in its Complaint and thus did not endeavor to prove it.

[16] This finding is confusing because most if not all of the creditors of the trust account were <u>not</u> clients of the firm. They were third parties who were due deposits or payoffs of liens in connection with real estate transactions.

[17] The Referee saw that Respondents' faced a Hobson's choice. Legitimate creditors were breathing down their necks and threatening litigation or worse, so they had to put out the hottest fires first. They also needed to keep their firm operating in order to be in a position to earn money to fund deficits and survive. The Bar claims they should not have done any of this, but should have just shut everything down.

but that both Respondents benefitted. The Referee further found that neither Respondent transmitted in writing that:

- funds from outside sources were needed to cover embezzling from the trust account;
- the measure of trust account imbalance was unknown (the investigation was still ongoing. Respondents covered deficits as they emerged);
- there was a risk that the firm might not survive the calamity, consequently, a risk going to whether the Respondents could even pay back any loan;
- Yordi ought to engage an independent lawyer for legal advice on the transaction; and,
- the loan could not consummate unless the clients gave their informed consent.

On this issue, Roth testified he told Mr. Yordi he needed a personal loan and Mr. Yordi agreed to give it. (T3. 51.) There is no question that Roth was required to advise Yordi to seek separate counsel and did not. At trial, Roth, through counsel, admitted to a violation of Rule 4-1.8(a).[18] (T3 184-6.)

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[18] This Rule requires that when a lawyer enters into a business transaction with a client, the terms must be fair and reasonable to the client; the client must be advised in writing of the desirability to seek independent counsel; and the client must give informed consent in writing. The Referee used this violation to distinguish the discipline as between Roth and Rousso, with Roth getting an additional 3 months, presumably relying on *The Florida Bar v. Black*, 602 So. 2d 1298 (Fla. 1992), which was cited by Roth. That case reduced a recommendation of 91 days to 60 days for a similar violation.

As for the allegation that Respondents engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation pursuant to Rule 4-8.4(c), the Referee found that because of the conflict of interest accusations, Respondents breached an affirmative duty to disclose true conditions and attempt to obtain informed consent from creditors of their trust account.[19] He held that the failure of Respondents to disclose true conditions was tantamount to a Rule 4-8.4(c) misconduct, in that the breach gave clients a false impression that all was alright, but that this type of misconduct is subsumed under the conflict of interest counts and the Rule 4-8.4(c) misconduct does not apply with respect to the trust account shortages. As noted earlier, the Bar never pleaded this theory and it was not tried by consent.

The Referee found that the bookkeeper alone caused the trust deficits and further found that Rule 4-8.4(c) does not apply to the trust account commingling accusation or to the accusation that Respondents fell short of minimum standards with respect to record keeping and procedures to insure that trust accounts remain in balance.

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What he appears to be suggesting is that they should have filed for bankruptcy or done some sort of assignment for the benefit of creditors. But the Referee also understood that, 'there was no way to please everyone equally. Whatever remedial action taken the Respondents may have taken could have been viewed critically by some."

The Referee also found that it was dishonest, fraudulent, deceitful, and a type of misrepresentation, for Respondents to continue representing clients, and to continue to take their money into the trust account, at a time that Respondents knew that the trust account was seriously under funded. He also found that it was Rule 4-8.4(c) misconduct for Respondents to take new money into the trust account to pay older client liabilities and to engage in business transactions with a client at a time when there was a possibility - a possibility that was realized - that it would be difficult.

Overall, the Referee concluded that it was not enough that Respondents trusted their bookkeeper, but considered their acts of omission "much more benign than an act of commission." He found that Respondents have "extended themselves to financial ruin in an effort to make right the wrong done by the bookkeeper" and considered that a mitigator.

As a result, the Referee recommended Mr. Roth be suspended from the practice of law for a period of 15 months and Mr. Rousso for 12 months, both suspensions relating back to November 8th, 2010, when Respondents were suspended pursuant to Supreme Court Orders of Emergency Suspension. The Referee further recommended that as a condition for reinstatement the Respondents

must show evidence of full satisfaction and release of Yordi's claim, with each Respondent responsible for half the claim.[20]

The Referee exercised his discretion in ordering an amount of costs to be paid divided 50/50 between Respondents. He also cut in half the Bar's request for accountant costs. Respondents argued in support of a reduction because the exorbitant expense of over $61,000 was (1) not actually a cost incurred by the Bar because Mr. Ruga was a salaried employee and (2) he spent most of the time trying to prove misappropriation, but the Bar failed in that endeavor.

Turning now to the Bar's theory of the case, it still maintains even in the face of its abject lack of proof – and its own auditors admission to the contrary – that Respondents are guilty of misappropriation. It relies upon exhibits which were discredited – if not proven out and out wrong – and some inconclusive testimony of its auditor, Carlos Ruga, which was fully examined and rejected by the Referee. In fact, when pressed Mr. Ruga properly conceded that he had no idea whether Respondents stole any money and that he had no evidence that they did. (T2 124-5.)

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The original Report recommended a 30 month suspension for each Respondent. That has been reduced because upon reconsideration the Referee realized that the $600,000 loan from Roberto Ferraciolli did not amount to an ethical violation under the rules as he (1) was not a client at the time and (2) had the benefit of independent counsel and was provided security for the loan. The Referee ordered a differential of sanction (15 months for Respondent Roth and 12 for Rousso) due to the fact that Roth solicited and procured the Yordi loan for which both Roth and Rousso benefitted.

All he could point to was the obvious fact – with which no one disagrees – that Respondents' transfers of funds for legitimate fees or expenses while a deficit existed in trust was technically a transfer of someone else's money to satisfy a firm obligation. But that is far short of the kind of knowing misappropriation with which Respondents were charged.

To be sure, Mr. Ruga admitted on cross examination that all of the transfers to the firm's operating account were "proper," meaning the fees were earned, but became improper because of the shortages in the trust account.[21] The following question and answer seals this point:

> Q. But you are still saying that you have no evidence that they [Roth and Rousso] stole any of this money?
>
> A. None that I know of.
>
> Q. You are not giving any testimony on whether the money that was transferred from trust to operating was actually earned legal fees?

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21 In responding to a direct question from the Referee, Mr. Ruga testified:

> Now, when you have an overdraft, Your Honor, any money that comes after an overdraft are being used for somebody else. You get new money coming in and those monies –

The Referee then said, "I think the response [sic] would agree with that. They agree with that, and they call it Horigian." (T2. 67.)

A. Most of them probably were. (T2 125.)[22]

It is also important to note that the first trust account check returned for insufficient funds was in late 2008. (T2 132.) The large one in December was the event that caused Respondents to realize the gravity of the problem and take all of the actions outlined above.

Bar Facts Contradicted by Other Evidence[23]

On page 4 the Bar claims that Respondents did not provide all records subpoenaed by the Bar or a workable receipt and disbursement journal. Roth testified that he fully cooperated with the Bar and that his bookkeeper, Ingrid Russell, assembled and delivered more than 10 boxes of documents of trust records to the Bar. (T2. 238-241.) Rather than picking up the phone and asking for the records in a different format – a persistent problem in this case with regard to other issues as well – the Bar would rather just say Respondents didn't comply and leave it at that. Ultimately, the two sides spoke the same language and all documents in the

[22] Mr. Ruga also testified that the transfers from trust to operating were appropriate. "Most of them were, apparently, for many, many times. It appears to be proper." In fairness, he then testified at the end "is when it started to get fuzzy," (T2 119-120.), but the Bar never proved the point.

[23] A large part of the problem with the Bar's presentation is that it relies on supposed evidence and exhibits introduced at the emergency hearing where Respondents sought reinstatement, much of which was discredited either at that hearing or at the ultimate trial. It also ignores the Respondents' response to its presentation. The standard of review does not permit this.

format requested by the Bar were delivered. (Id.) The issue was one of presentation, not absence of production.

Also on page 4 the Bar claims that the records were "completely doctored" and contained numerous irregularities. But even the Bar's auditor, Carlos Ruga, agreed that it was Horigian who "probably took the money." (T1 170) Moreover, this is a gross exaggeration. Mr. Ruga agreed that not all records were unreliable. (T2 122-123.) In any case, Horigian, not Respondents, kept the books. (T1 322, 379-80.)

Among the most outlandish of the Bar's supposed facts was its reference in footnote 1 to Exhibit 2 at the emergency suspension hearing. It was a list compiled by Mr. Ruga, using sunbiz.org on the web, of business entities in which Horigian and Respondents were joint owners. That exhibit was almost entirely discredited, (T2 184-236), yet the Bar wishes to erase the counter-evidence from the record.[24]

On page 6 the Bar recites the alleged results of its non-expert, Mr. Ruga's, supposed "investigation" that he chronicled at the hearing on reinstatement. It glosses over, however, that at that same emergency hearing on reinstatement, Mr. Ruga was dead wrong on the amount of the shortage; he testified to $17.6 million, when the Bar later agreed it was $4.38 million. It then goes on to claim that it presented evidence that Respondents "had misappropriated client funds to satisfy

[24]Respondents did have an interest in some of the businesses.

personal and other clients' liabilities, in a manner similar to a Ponzi scheme." First, the Referee rejected the Ponzi scheme theory, and properly so. Second, at the trial the Referee continued to press Mr. Ruga for any evidence that Respondents used client funds to satisfy personal obligations.

> Referee: I haven't heard of anything here thus far that speaks to this ... where these funds went to satisfy just a personal obligation of Mr. Rousso or Mr. Roth.
>
> I don't know if Mr. Ruga knows that these funds went for personal obligations. If he does, I would like to hear about that and have some specifics. (T2. 65.)

The Referee never heard such evidence because it does not exist and, in fact, Mr. Ruga testified he had no evidence that Respondents stole any money. (T2. 125.)

On the bottom of page 6 the Bar states that fund were transferred to operating which created trust account shortages. What the Bar fails to address, because it had no evidence, is the issue of scienter or knowledge by Respondents that the transfers created shortages. In fact, Respondents were busy plugging holes to make sure – so they thought – that there would not be shortages. They just did not grasp the gravity of the problem until, as the Referee found, late 2008 when the trust checks were first returned for insufficient funds.

On page 7 Mr. Ruga refers to using a line of credit to satisfy client liabilities. No evidence was presented of any line of credit and if there was one, so what?

Respondents are personally obligated to repay it and obviously tapped all sources to repay victims.

On page 11 the Bar reprints one of its charts of alleged loans. The Referee commented that, "Mr. Ruga can only say that upon his review of client ledger cards, this stands for an item that was coded as a loan. It doesn't mean it was a loan." (T2.59-60.) In fact, right after that comment, Mr. Ruga began testifying about the Ferracioli $600,000 secured loan procured by Respondents to cover a mortgage payoff. He said, "[a]ctually, it wasn't even coded as a loan, except he [Horigian] decided to put another code on that one." (T2. 62.) He thus proved the Referee's point exactly.

To be sure, many of the items on that chart – which continues on to page 12 of the brief – were admitted by Respondents to be loans to cover trust account shortages. Certainly it contains some of their personal loans as well as the Yordi loan and several others admitted to be such. There was also no evidence – other than non-expert opinion of Ruga– that La Estancia was just a "front" to keep track of loans used to satisfy business or personal obligations. First, Respondents have already addressed the personal obligation issue. Second, Respondents did not make the entries, Horigian did. Roth testified that La Estancia is an Argentine restaurant/supermarket in which he had an investment interest as did Mr. Horigian.

(T1 393.) It signed the note to Mr. Yordi to give him additional comfort and security. (T2 173-5.) Third, the Referee rejected the Bar's effort to introduce that exhibit to show that the funds were used to satisfy person obligations of the Respondents. In fact, the Referee, in referring to the chart, stated, "It does not show me that these funds went to satisfy personal obligations of the respondents." (T2 80.) The Bar was permitted to offer a redacted version. (T2 81.) The document does not advance the Bar's case.

On page 13, the Bar next alludes to an unverified Ferracioli complaint against Respondents. What the Bar fails to disclose is that Mr. Ferracioli was represented by two sets of lawyers in the transaction and that the loan was collateralized, (T2 177-8), as found by the Referee.

On page 16 the Bar refers to a complaint filed by Commonwealth Land Title. What the Bar fails to disclose is that claim – which was to inspect records – became moot after Liberty Surplus paid off the mortgage and other obligations arising under the title policies. (T1 408-9.)

On page 17, the Bar thinks it odd that after learning of the shortages, Respondents charged Horigian with investigating the matter. What the Bar fails to grasp is that Respondents did not yet know he was a thief. (T1 405.)

SUMMARY OF THE ARGUMENT

The Referee's findings of fact are supported by substantial competent evidence and therefore cannot be disturbed. The Bar failed to prove by clear and convincing evidence that Respondents misappropriated trust account funds in violation of Rule 5-1.1. In fact, the Bar's auditor admitted he had no evidence that they did; that it was probably their bookkeeper. To undermine this finding the Bar is asking this Court to reweigh the evidence, which is not permitted.

Rule 4-5.3 (Responsibilities Regarding Nonlawyer Assistants) provides a safe harbor for Respondents so long as the were unaware of the theft when it was occurring and did not ratify it when they found out. Neither exception applies to undercut Respondents' safe harbor protection.

The Referee did find Respondents guilty of trust account record keeping violations (Rule 5-1.2), for their negligent failure to have sufficient safeguards in place to check on their bookkeeper. They admitted it and that they mistakenly relied on Horigian's supposed honesty, when he turned out to be a thief who did not keep proper records in order to hide his embezzlement.

In the end, Respondents are less concerned with the violation they are found to have committed than with the discipline. One recent case, *The Florida Bar v Stanton* slip op. No. SC06-408 (Fla. 2006) (A.15-27) , was approved by this Court on stipulation and found a similar embezzlement by a controller to be a violation of

Rule 5-1.1, but the referee used Rule 4-5.3 to mete out discipline in the form of a public reprimand which this Court further reduced to an admonishment.

Next, the Bar's argument on costs assessed against Respondents should be rejected because he did not abuse his broad discretion. Most of the auditor's time was spent trying to prove misappropriation by Respondents and he admitted at trial that he had no evidence that they stole anything. It was thus no abuse to cut that cost in half.

On the issue of discipline, the Bar relies on those cases of clear misappropriation, for which there is a presumption of disbarment. That is not the case here. The cases controlling this fact pattern have meted out discipline ranging from an admonishment – *Stanton* – to a one year suspension, depending on the facts.

Finally, on the cross-petition, the Referee erred in finding violations of Rule 4-8.4(c) for matters not pled or argued by the Bar. Due process requires that Respondents be given fair notice of the charges against them and as to these findings they were not. The Referee did this on his own. The purpose for raising this issue is only to ensure that the discipline is not increased because of these violations.

In sum, the Report of Referee should be adopted (save for the Rule 4-8.4(c) violations), and his recommended discipline be accepted and ordered, except that portion which requires Respondents to pay back Yordi in full as a condition of reinstatement. The ultimate settlement of that matter – which is not in the record –

calls for several lump sum payments and a 24 month payout that extends beyond the recommended suspension periods. So long as Respondents are adhering to the payment schedule, remaining money owed to Yordi should not bar reinstatement.

ARGUMENT

I. THE REFEREES'S FINDINGS OF FACT ARE SUPPORTED BY THE RECORD AND HIS FINDING OF NO RULE 5-1.1 VIOLATION WAS NOT CLEARLY ERRONEOUS

The Bar's theory under Rule 5-1.1 (Trust Accounts) is that Respondents intentionally mishandled trust funds and, in fact, misappropriated them. It also seek to have intent presumed from Respondents' negligent oversight of the trust account. The problem for the Bar is that after hearing the better part of 4 days of testimony and receiving reams of documentary evidence, the Referee made findings and recommendations against the Bar on, at best, conflicting evidence.

"A referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support."*The Florida Bar v. Stalnaker*, 485 So. 2d 815, 816 (Fla. 1986). If there is a conflict of evidence and the referee's findings have support in evidence then the court will not disturb those findings. *Id.* At 816.

The court will not reweigh the evidence and substitute its own judgment. *The Florida Bar v. Maurice*, 955 So. 2d 535, 539 (Fla. 2007). "[A] party does not meet the burden of showing that a referee's findings are erroneous simply by pointing to contradictory evidence where there also is competent, substantial evidence in the record that supports the referee's findings." *The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997).

The Bar is certainly persistent in continuing to argue that its evidence was better than Respondents', but that was for the Referee to decide; and he did. So many times the shoe is on the other foot and the respondent touts his or her own evidence and claims that the referee's findings were erroneous. On all of those occasions the Bar correctly argues that it is not the role of this Court to reweigh the evidence if any supports the findings of the referee. This is just one of those times where the Respondents are entitled to the same black letter presumptions as the Bar enjoys in many, many other cases.

On the issue of witness credibility, Carlos Ruga swore under oath in support of the Bar's petition for emergency suspension that there was a shortage of over $17.6 million from Respondents trust account and that they misappropriated untold sums. He didn't say, "based on the records currently in his possession it appears

that there is a shortage of $17.6 million." He was unequivocal and this Court relied on his testimony in taking extraordinary action against Respondents.[25]

Yet, at the final hearing, on the recommendation of Mr. Ruga, the Bar stipulated that $4.38 (not $17.6 million) was ultimately missing from trust; he had no evidence that Respondents took it; that the bookkeeper probably did steal the money; and that the withdrawals by Respondents were probably for earned fees and proper expense reimbursement. Was the Referee not entitled to discredit Mr. Ruga's other testimony about phantom loans, alleged joint ownership with Horigian of assets (the basis for this testimony was a sunbiz.org review by Mr. Ruga), and indirect benefits to Respondents from the Horigian theft in view of his erroneous conflation of two separate accounts into one and his backtracking from his affidavit?[26]

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[25] In fact, what Mr. Ruga did not know – because the Bar refused a meeting with Mr. Rousso and his lawyer upon their request so they could explain things to him – is that the firm's bookkeeping department kept records of funds in escrow at other banks in order to have a handle on funds to be credited to buyers at numerous future closings. The records were kept in a way that confused Mr. Ruga into thinking the money should have been in trust with Respondents. It was coded as a different account number which Mr. Ruga did not pick up on. His erroneous assumption accounts for most if not all of the inflated figure contained in Mr. Ruga's original affidavit.

[26] The indirect benefits were transfers from trust to operating of earned fees. (T2. 115-16.) In fact, the Referee asked Mr. Ruga if it would be proper to make such transfers if the trust account were in order and he said "sure." (T2. 119.) But the

point is that until December 24, 2009 (T2. 105.), no trust check was returned for insufficient funds and the Referee believed Respondents that they did not know of any theft until then. It is improper for the Bar to ignore the evidence that supports the Referee's findings.

Of course he was, especially where Respondents testified and produced evidence to undermine Mr. Ruga's wild theories and conclusions.[27]

And the Bar's weak case went well beyond issues of credibility. When pressed each time by the Referee and Respondents' counsel to identify where Respondents benefitted, all he could point to was the transfers of trust to operating at a time when the trust account was not in balance. But the Referee made a specific finding, based upon the evidence, that Respondents did not appreciate the extent of any problem until late in 2008. Everyone agrees that once a trust account is out of balance money earmarked for Peter is going to be used to satisfy Paul. That does not prove intentional misappropriation if Respondents had no reason to believe their office manager was stealing or the account was out of balance and remained so.[28]

Time and again the Referee urged the Bar to supply some evidence that Respondents used trust money for personal or business use. Each time the answer was non-existent, evasive or dissembling. Here is a sampling of his urging:

> THE COURT: I haven't heard of anything here so far that speaks to this 5784.011 code or 2545.005 code that

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[27] And Respondents also seasonably objected to his testimony because he was neither designated before trial nor offered at trial as an expert. Roth went right down Mr. Ruga's list and proved Mr. Ruga's "sunbiz.org" analysis to be seriously flawed.

[28] The Respondents put their own money in the account and until everything blew up in late 2008, did not have any idea about the extent of the shortage.

> went – where these funds somehow went to satisfy just a personal obligation of Mr. Rousso or Mr. Roth. (T2. 65.)
>
> THE COURT: Roth and Rousso, I haven't heard, used it to pay off their own mortgage or pay their Lexus bill or, you know, fly to Buenos Aires to look for Horigian. (T2. 76.)

In denying admission of a summary that Bar tried to use to prove personal use of funds, the Referee said:

> It does not show me that these funds went to satisfy personal obligations of the respondents. (T2. 80.)
>
> THE COURT: You are saying [it] was deposited in the account for a specific purpose, were used to satisfy unrelated personal and business obligations. I haven't seen that at all. (T2. 85-6.)

On the issue of using funds for business use, the Referee commented:

> What we have here is clear that respondents and the petitioners understand that there was some agency by Horigian. Obviously, balances weren't there for proper distributions because Horigian, unbeknownst and without knowledge, there was no evidence of fraudulent intent for distributions by Roth and Rousso, but, apparently, there is a lot of evidence that someone was making distributions. (T2. 133.)

When the Bar tried to argue that Horigian was gone in late 2008 – inferring that immediately thereafter Respondents should have discovered the problem – the Referee responded appropriately as follows:

> Horigian is there, okay. The respondents think the funding is there.

> It's surreptitiously taken away and there are false books. The funding that is recorded has to be paired with proper payees who have earned the distribution. It's possible that there be a time lag, after Horigian goes to Argentina, when these things start materializing. In fact, it's more than possible. That's exactly how it would happen. They become due months down the road. (T2. 134.)

This Court is well aware that it is the Bar's burden to prove its case by clear and convincing evidence. Even the Bar's auditor admitted the matter was "fuzzy" at the late stages whether or not Respondents knew they could withdraw earned funds for their operating account to pay, rent, salaries and other business expenses. (T2 120.)

"Fuzzy" is the antithesis of clear and convincing.

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitancy, as to the truth of the allegation sought to be established.

State v. Mischler, 488 So. 2d 523, 525 (Fla. 1986)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

The Bar's case on this issue was anything but clear and convincing. It was not credible and was incomplete, disjointed and most of all, discredited by

evidence that was sufficient to persuade the Referee. Accordingly, the Referee's findings that Respondents did not misappropriate trust funds should not be disturbed.[29]

To be sure, the Referee did find violations of Rule 5-1.2 (Trust Accounting Records and Procedures) and meted out serious discipline because he concluded that had Respondents payed closer attention to the reconciliations, Mr. Horigian could not have succeeded past the second month. It is not as if Respondents have not been harshly disciplined for their inattentiveness to trust account procedures. Its just that the Referee categorized their conduct as omission rather than commission, and referred to it as more "benign."

Moreover, Respondents argued to the Referee that Rule 4-5.3 titled, "Responsibilities Regarding Nonlawyer Assistants" governs this matter. It provides that a lawyer is only responsible for the conduct of non-lawyers in certain circumstances. As the referee in *The Florida Bar v Stanton* No. SC06-408 (Fla. Jul. 17, 2007), pointed out, "Rule 4-5.3(b)(3)(B) requires that the lawyer

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In footnote 18 on page 29, the Bar makes the dissembling argument that as a result of shortages, "Respondents failed to return monies owed to clients and other individuals, such as Yordi and Ferracioli, upon demand." Does the Bar still not understand the difference between trust funds and separate loans procured by Respondents to pay off trust account liabilities? Yordi and Ferracioli loaned money to Respondents which enabled them to repay some of the victims. Their loans were not put into trust for the benefit of Yordi and Ferracioli. This comment is patently ridiculous and shows the Bar's lack of understanding of its own case.

supervising the non-lawyer [is responsible if he] knew of the non-lawyer's improper conduct at a time when the consequences of that conduct could have been avoided or mitigated but failed to take reasonable action to remedy the situation." *Id.* at * 7. (A. 21.) In *Stanton*, which will be discussed in Section III relating to discipline, a lawyer, too, was robbed by his trusted controller. About $1.2 million was stolen from trust and operating. He was given an admonishment. As there, neither Roth nor Rousso was aware of Horigian's thefts at the time they were occurring. However, as soon as they discovered and understood the gravity of the problem, they took remedial action.

In the end, since it is undisputed that trust account violations occurred, whether they were under Rule 5-1.1 or 5-1.2 is less important than the discipline to be given. Certainly in *Stanton* the referee held the lawyer to strict liability under Rule 5-1.1 even though the lawyer was unaware of the improper applications of trust funds, but accommodated for it through the mild discipline recommended (public reprimand) which was actually reduced by this Court to an admonishment. (A.15-27.) Respondents believe that the safe harbor of Rule 4-5.3 should have resulted in a not guilty for that violation, but it does not appear that Stanton challenged that finding.

Again, at this point the discipline to be ordered is far more important to Respondents than on what rule the Referee hung his hat. The thrust of this response is that the Bar did not prove misappropriation as a matter of fact or law. If the Court believes that Rule 4-5.3 is not a safe harbor for trust account violations, then a technical violation of Rule 5-1.1 occurred, but the effect of Rule 4-5.3 should be taken into account on the discipline side and the Referee's recommendation adopted, as argued in Section III.

II. THE REFEREE DID NOT ABUSE HIS WIDE DISCRETION IN AWARDING COSTS AGAINST RESPONDENTS

The Bar's position here is overkill. Respondents are each bankrupt. The Referee found that their efforts to repay the trust funds helped render them insolvent. Respondents are aware of the Bar's case law, but when is enough enough?[30]

Respondents' principal argument against taxing costs in full was two fold. First, the Bar's auditing costs were fixed because Mr. Ruga is a salaried employee. "Costs" as traditionally defined, are out of pocket expenditures. All respondents

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One case authorized a payout rather than a denial of costs of less than $2,000. *The Florida Bar v. Lechtner*, 666 So. 2d 892, 895 (Fla. 1996). As a matter of policy, Respondents could see why a complete denial of costs there was not appropriate. But the facts here are far different.

already pay a fixed administrative fee when any discipline is given, which should cover this "cost."[31]

Second, and far more important, Bar auditor costs in excess of $61,000 is a huge sum. In their first responses to Bar inquiries, Respondents admitted that their office manager stole trust funds. It didn't take $61,000 of auditing effort to confirm what they already admitted. Rather, that effort was designed to prove theft by Respondents and the Bar failed in that endeavor. Given the huge sum and the fact that the Bar did not prove misappropriation – which was obviously the centerpiece of its efforts and investigation – the Referee was well within the bounds of his discretion to equitably adjust that figure in half.

As for the reduction of deposition costs alluded to by the Bar in footnote 19, Respondents pointed out to the Referee that the Bar did not use the depositions for impeachment and did not read any portions during the trial.

The notion advanced by the Bar that costs should not be at all tied to success on particular issues or the utility of the expenditure is absolutely wrong and draws no

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While Rule 5-1.2(f) provides that costs of an audit shall be paid by the attorney audited, that (1) is not in the context of a formal bar proceeding and (2) does not define "costs." It could be that the Bar has in the past hired non-salaried accountants to audit trust accounts. It is hard to see where taxation of $61,000 is appropriate where no money changes hands between the Bar and the auditor above his salary.

support from case law.[32] That is why this Court vests referees with broad discretion in this area and this Referee acted well within the bounds of that discretion. While it may have been difficult for Respondents to challenge full taxation as an abuse of discretion (subject to the other legal arguments, above), that does not mean that the Referee had any less discretion to cut this item in half. He did and it was not an abuse of discretion.

III. THE REFEREE'S RECOMMENDATION OF 15 MONTHS FOR ROTH AND 12 MONTHS FOR ROUSSO HAS SUPPORT IN CASE LAW AND SHOULD BE ACCEPTED.

The Bar persists in relying upon a factual landscape that was rejected by the Referee. It keeps pointing to where its evidence may show this or that, but ignores that there was substantial competent evidence which told a different story altogether. As the Bar has argued on countless occasions, where there is substantial competent evidence to support the findings of the Referee, this Court is not free to reweigh the evidence or reject the Referee's factual findings.[33]

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[32] Cases holding it not an abuse of discretion for a referee to tax costs in full even where the Bar fails to prove all of its allegations do not help the Bar here. They merely serve as examples of the wide latitude given to referees in this area.

[33] As this Court recited in *The Florida Bar v. Barrett,* 897 So.2d 1269, 1275 (Fla. 2005), citing *The Florida Bar v. Spann,* 682 So.2d 1070, 1073 (Fla. 1996):

> A referee's finding of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without

In a nutshell, the Referee found that this is not a case of misappropriation. It is a case of theft by a trusted employee coupled with negligence by Respondents. There is a wealth of record evidence to support that conclusion, especially where the

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support in the record. Absent a showing that the referees findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.

Bar auditor conceded that he did not believe that Respondents stole or intended to steal any trust funds.

In support of its argument for permanent disbarment, the Bar relies upon those cases involving out and out lawyer theft and misappropriation that was intentional; not the case here. The cases applicable to these facts – which Respondents will fastidiously outline – carry a discipline in line with that recommended by the Referee for each of the Respondents (15 months for Roth and 12 for Rousso).

This Court has held countless times that generally, it "will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and he Florida Standards for Imposing Lawyer Sanctions." *The Florida Bar v. Smith*, 866 So. 2d 41 (Fla. 2004); *The Florida Bar v. Temmer*, 753 So. 2d 555, 558 (Fla. 1999). It should not do so here. Respondents will first distinguish the Bar's cases and then discuss those cases which support the Referee's recommended discipline

The Bar's cases have one common thread; they all involved active misappropriation or theft by the lawyers and in many cases lots of other deleterious baggage as well. That is not the case here.

The first case cited by the Bar, *The Florida Bar v. Graham*, 605 So. 2d 53 (Fla. 1992), is an extreme case of attorney misconduct. Graham intentionally stole

client settlement funds, made affirmative false representations to the bar, made false representations under oath, failed to follow orders from a trial court, allowed his wife to access his operating account as a signatory, and committed various trust account violations. *Id.* at 53-54.

The Bar tries to rely upon a legal fiction to draw a link with *Graham*, by pointing to Respondents' transfer of what they thought (and what Mr. Ruga confirmed) were otherwise appropriate transfers from trust to operating accounts at a time when the trust account was in serious shortage. However, the Referee found that until late 2008 Respondents did not know of the gravity of the problem. They had no reason to believe that the funds they were transferring were adding to a shortfall in their trust account. All they believed they were transferring were earned fees or reimbursed costs.

Respondents' conduct is not remotely equivalent to that in *Graham*, where the lawyer flat out stole settlement funds for personal use. Respondents stole no funds. It was their bookkeeper, Horigian, who did. *Graham* is inapposite.

The Bar next relies on *The Florida Bar v. Brownstein*, 953, So. 2d 502 (Fla. 2007), where the lawyer misappropriated funds for his own personal use and covered up the misuse through a process known as "check kiting." In addition, he admitted that he did not have any form of client ledger cards or journals.

Unlike *Brownstein*, Respondents did not misappropriate trust funds Importantly, the Referee found that the funds placed into the trust account were placed there out of a sense of responsibility on the part of the Respondents to repay victims. This is absolutely at odds with *Brownstein* where the lawyer's deposits were for the purpose of kiting checks to cover up his theft. *Id.* at 508. This distinction is critical as *Brownstein* involved a lawyer's dishonest or selfish motive. *Id.* at 512. The Referee in this case did not find any dishonest or selfish motivation on the part of the Respondents.

The Bar also makes a passing comment here and earlier when discussing *Graham*, that Respondents did not cooperate with the Bar in its investigation by not producing all trust records. That issue was clarified at trial by Mr. Roth who produced in excess of 10 banker's boxes of records, but apparently not in the format the Bar wanted. Ultimately, the Bar received the records in the format requested.[34]

The Bar next relies upon *The Florida Bar v. Martinez-Genova*, 959 So. 2d 241 (Fla. 2007). The lawyer there personally misappropriated client funds and spent them on personal expenses. In addition, she was charged three times with possession

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Part of the problem is the Bar's seeming obsession with avoiding any meaningful interaction with respondents. Both Respondents here offered to meet with Bar counsel and auditor to explain things, but were rebuked.

of cocaine. *Id.* at 244-245. Here, Respondents did not personally misappropriate any funds, as the Bar's auditor confirmed.

The Bar next cites *The Florida Bar v. Mechlowitz*, 238 So. 2d 643 (Fla. 1970) for the proposition that an attorney who misappropriated "a mere" $17,000 may be disbarred. The attorney there took trust funds from a client and simply absconded with it. He refused to even defend himself in the Bar proceeding and moved to New York. Respondents agree that the amount taken is less important than the lawyer's motivation and intent.

The Bar's reliance on *The Florida Bar v. Massfeller*, 170 So. 2d 834 (Fla. 1964) is equally misplaced. Massfeller (1) misappropriated the client's funds (2) for his own benefit and (3) failed to make anything more than token restitution to his client. As previously noted, these three factors make this case along with all the other cases cited by the Bar inapposite. The Referee here found that Respondents "extended themselves to financial ruin" to right the wrong committed by their bookkeeper.[35]

A case much more befitting this matter is *The Florida Bar v. Stanton*, No. SC06-408 (Fla. Jul. 17, 2007). (A. 15-27.) In *Stanton*, the referee

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The Bar has cited several more cases as well, but to distinguish them one by one would be too repetitive. Suffice it to say, they all involve classic misappropriation.

recommended a public reprimand and two years probation. This Court reduced the discipline to an admonishment. The facts in *Stanton* are in many respects striking to the facts here.

In *Stanton*, his controller provided trust account reports and reconciliations that were falsified. Here, the bookkeeper falsified records and failed to keep accurate records to cover up his theft. In fact, he presented reconciliations to the Respondents by client that always checked out.

In *Stanton*, the controller stole approximately $1.2 million. The bookkeeper here stole $4.38 million.

In *Stanton* once the theft was discovered, Stanton sought advice from an attorney practicing in the area of lawyer ethics. Here, Rousso called the Bar's Ethics Hotline (but was given bad advice), the theft was reported to the Aventura police, the firm's insurer was notified, the firm's CPA was called in to identify victims, Rousso retained ethics counsel and the firm opened a new trust account, although it disbanded shortly thereafter.

Stanton immediately replaced the missing funds. Here, Respondents used hundreds of thousands of dollars of their own money and took out loans to repay victims. They were also fortunate that their malpractice carrier paid $2,85 million because it was satisfied that Respondents were not involved in any wrongdoing.

In *Stanton*, no client was harmed or prejudiced. Here, ultimately the same, but repayment took longer because of the amount stolen and the financial limitations of Respondents.

Stanton had no knowledge his employee was stealing, but once he found out he took appropriate remedial action. The same here once Respondents understood the gravity of the problem.

Finally, Stanton had no dishonest or selfish motive, acted in good faith to timely make restitution or to rectify the consequences of any misconduct and made full and free disclosure to the Bar. The same here, where the Referee found that Respondents did not participate in, benefit from, or know about the theft when it was occurring and took remedial action once they discovered it.

This case is also very similar to *The Florida Bar v. Moore*, Case No. SC10-1826 (Fla. Mar. 22, 2011), where a referee recommended a public reprimand to an attorney whose office manager stole over $2 million from the lawyer's trust account. (A. 28-33.) This Court accepted that recommendation. (A.34.) The referee found that the lawyer was misled by his office manager who, like Horigian here, engaged in fraudulent activity to hide his thefts from the lawyer. Like here, significant funds passed through the trust account of the real estate firm. The referee there commented that the $2 million stolen was less than 1/3 of 1% of all

transactions. Here, the $4.38 million constitutes a little over 1% of the over $340 million dollars passing through the trust account in a two year period during which the thefts occurred.

The referee in *Moore* found that the criminal activity of the office manager was the cause of the loss. He used Standard for Imposing Lawyer Sanctions Standard 7.3 – public reprimand is appropriate when a lawyer negligently 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. Respondents would also point out Standard 4.13, which provides that a public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Other cases as well support the Referee's recommended discipline. In *The Florida Bar v. Neu*, 597 So. 2d 266 (Fla. 1992), the lawyer was suspended 6 months for negligent commingling of personal and trust funds. In acknowledging that the misuse of client funds is one of the most serious offenses a lawyer can commit, the Court nevertheless drew, "a distinction between cases where the lawyer's conduct is intentional and deliberate and cases where the lawyer acts in a negligent or grossly negligent manner." *Id. at* 269.

So, too, in *The Florida Bar v. Smith*, 866 So. 2d 41 (Fla. 2004), this Court reduced a recommended 2 year suspension to 1 year for an attorney's mismanagement of trust funds and a pattern of misconduct. There, the trust account mismanagement was, "the product of extraordinary sloppiness and negligence in bookkeeping, rather than misappropriation or an intent to deceive her clients." *Id. at* 47. The Referee's findings here can easily be reconciled with the "sloppy" and "negligence in bookkeeping" conclusion in *Smith* to justify accepting the Referee's recommended discipline.

To be sure, in *The Florida Bar v. Weiss*, 586 So.2d 1051 (Fla. 1991)(6 month suspension), and *The Florida Bar v. Wolf*, 930 So.2d 574 (Fla. 2006)(2 year suspension), this Court drew a sharp line of demarcation between intentional misappropriation and negligent oversight of an employee/bookkeeper.[36] The former warrants disbarment, the latter does not.

In sum, this case does not fall into the category of cases relied upon by the Bar. It does, however, fit neatly within the cases cited by Respondents which have

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36 *Wolf's* 2 year suspension is not comparable to the facts here because he had prior discipline that served as an aggravating factor. The other cited cases, which did not involve such aggravating conduct, all meted out discipline in line with what the Referee recommended here.

meted out discipline as low as an admonishment – *Stanton* – to as high as one year – *Smith* – for similar transgressions.

Finally, Roth was given an additional 3 months over Rousso because of his active procurement of the Yordi loan. Roth admitted to failing to advise Yordi in writing of the conflict in procuring a loan from a client and failed to encourage him to seek separate counsel. In *The Florida Bar v. Black*, 602 So. 2d 1298 (Fla. 1992), this Court reduced a recommendation of a 91 day suspension to 60 days for a similar violation. Certainly, the Referee here opted for the higher discipline because he also felt that Yordi should have been advised of the purpose for the loan, viz: to cover trust account shortages. Although Roth strenuously disagrees since he advised Yordi the loan was personal and he did not mislead Yordi in any way, he accepts the additional 3 months over the discipline received by Rousso.

In one respect, Respondents take issue with the Referee's recommended condition for reinstatement, namely, repayment of the Yordi loan. Following trial, Roth settled with Yordi. That settlement is not part of the record, but required substantial initial payments followed by a 24 month payout. The payout extends beyond the recommended discipline. Respondents request that so long as they adhere to the payment schedule, full retirement of the Yordi loan not be a condition

for reinstatement. They are willing to supplement the record with that settlement agreement along with proof of repayment so far, if requested by the Court.

COUNTER-PETITION

IV. THE REFEREE ERRED IN FINDING THAT RESPONDENTS VIOLATED RULE 4-8.4(c) BASED UPON CONDUCT NEVER CHARGED BY THE BAR

This issue is being raised protectively to ensure that this Court does not in any way use this violation to increase the recommended discipline. There are three instances where Respondents contend that the Referee went beyond the pleaded claims to find a violation.

First, the Referee spent considerable space in his Report wrestling with the fact that Respondents did not notify all clients of the trust account problems before making a decision whom should be paid first. He then found that their failure to do so was a violation of Rule 4-1.7(b)(4)(conflict of interest) which he then turned into a Rule 4-8.4(c) violation for not disclosing the true conditions of the trust account to clients. The problem is that the Bar never pled, presented evidence on or argued this theory against Respondents. Accordingly, this was error.

Second is with respect to the Yordi loan as to Roth. There is no question that Roth violated Rule 4-1.8(a)(transactions with clients) because he did not inform

Yordi of the conflict or to seek separate counsel. But the Referee also found this to be a violation of Rule 4-8.4(c) even though no fair reading of the pleading would suggest the Bar was charging Roth with a violation of Rule 4-8.4 for this conduct. Rather 4-8.4(c) was clearly alleged by the Bar to address the allegations of misappropriation – which was never proven.

Third, the Referee found a Rule 4-8.4(c) violation for continuing to take money in trust with knowledge of a shortage. This theory was never pled and the Referee's finding that (1) Respondents were unaware of the seriousness of the problem until late 2008 undercuts any "mens rea" conclusion and (2) they put money into the trust account to repay victims, undercuts this finding entirely.

To begin, the owners of deposited funds were never proven to be those of clients of the firm. In fact, they were not, except for Yordi which is treated separately. Thus, even if the evidence of record could be used to support a violation, it fell woefully short under any standard, but certainly clear and convincing of a conflict of interest with present clients violation.

Next, it is a settled principle of law that the charges against an attorney during a disciplinary proceeding must be clear, specific, and stated with particularity. *Gould v. State*, 127 So. 309 (Fla. 1930). These principles are fundamental and have been recognized as necessary by the United States Supreme Court due to the

quasi-criminal nature of bar proceedings. *See In re Ruffalo*, 390 U.S. 544, 548 (1968).

During bar proceedings, an attorney is entitled to procedural due process, which includes fair notice of a charge so that any opportunity is afforded to him to form an explanation and defense. *Id.* at 1226. To comport with notions of fairness and due process, any finding by the referee must clearly fall within the scope of the Bar's accusations and the accused attorney must be clearly notified of the nature and extent of the charges pending against him. *The Florida Bar v. Nowacki*, 697 So. 2d 828, 832 (Fla. 1997).

Here, the Bar's Complaint did not allege any conflict of interest between Respondents and current clients, excluding Hattim Kais Yordi, The Referee's finding, therefore, that they had a conflict of interest with all of their then current clients was unfair surprise and deprived Respondents of their procedural due process rights. In fact, it was beyond unfair because the Bar never even argued the issue at trial. This was a post-trial issue and determination raised by and ruled upon unilaterally by the Referee.

So, too, with respect to the Yordi loan and Rule 4-8.4(c). At no time was Roth put on notice that any rules beyond 4-1.8(a) (transaction with client) were

involved in the Yordi transaction. No fair reading of the Complaint can suggest otherwise.

The same holds true for the theory that a Rule 4-8.4(c) violation occurred when Respondents continued to accept trust money when the account was short. In addition, the Referee's finding that Respondents were not aware of the gravity of the problem until late 2008 when the first checks bounced undercuts this conclusion anyway. And the evidence after they found out was admitted to be "sketchy" by both the Referee and the Bar's auditor, which hardly meets the "clear and convincing" test, as argued in Section I.

In *The Florida Bar v. Vernell*, 721 So. 2d 705 (Fla. 1998), this Court rejected a referee's recommendation of guilt regarding a violation of a bar rule because the attorney did not have fair notice of the charge to be brought against him. The bar charged Vernell with multiple rules violations. During the proceedings before the referee, allegations of new misconduct arose that were not mentioned in the initial complaint.

Here, the Bar made multiple allegations of rule violations against Respondents based upon a pleaded fact pattern which did not include any claim that they had a conflict of interest with current clients due to a failure to inform them of the status of their trust account or any claim that there was a conflict due to the

potential desire to pay clients in a different order. The Bar also made no allegations that Rule 4-8.4 was implicated with respect to the Yordi loan. Yet, the Referee found that they were guilty of those violations. As stated in *Vernell*, "[t]he absence of fair notice as to the reach of [a bar proceeding] deprives the attorney of due process." *Id.* at 707.

The facts here are also similar to those in *The Florida Bar v. Batista*, 846 So. 2d 479 (Fla. 2003). Batista was charged with multiple violations of bar rules, mainly concerning the competence of his communication with clients and his failure to complete his work. During the hearing, further allegations were raised that Batista had committed a violation not charged in the bar's complaint. The referee made findings of fact confirming those violations. This Court held that the findings of fact could not support a consideration of a new rule violation because it was not contained within the bar's complaint. *Id.* at 484.

The situation here is even more egregious because the Bar never even raised the issues at trial; it was purely a post-trial decision by the Referee. Certainly the issue was not tried by consent because the facts presented were relevant to the pleaded charges.[37] So, too, the fact that the rules pleaded may have encompassed

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Amending pleadings to conform to the evidence does not lie "merely because evidence which is competent and material upon the issues created by the pleadings

the conduct found by the Referee is of no legal moment, for the same reason that trial by consent did not occur.[38]

Accordingly, the Rule 4-8.4(c) violations should be vacated as beyond the scope of the pleadings.

CONCLUSION

The Report of Referee should be approved except for the 4-8.4(c) findings of misconduct. In addition, the Referee's recommendation that reinstatement be conditioned upon full repayment of the Yordi loan should be modified to permit reinstatement so long as Respondents are performing in accordance with the settlement agreement with Mr. Yordi.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this _____ day of November, 2011 to: Daniela Rosetta, Bar Counsel, The Florida Bar, Rivergate Plaza - Suite M - 100, 444 Brickell Avenue, Miami, Florida 33131-2404, Kenneth Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson

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incidentally tends to prove another fact not within the issues of the case." *Fearing v. De Lugar Neuvo*, 106 So.2d 873, 874 (Fla. 2d DCA 1958).

[38] In fact, most view Rule 4-8.4 as a "catch all" rule that is routinely applied to many varied settings. If it can be held to apply to any evidence introduced at a bar trial, there would be little need for pleadings; there would also be serious due process violations.

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