IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs.

MARK ENRIQUE ROUSSO and LEONARDO ADRIAN ROTH,

Respondents.
_____/

Supreme Court Case Nos. SC11-15 and SC11-16

The Florida Bar File Nos. 2011-70,598(11A) and 2011-70,408(11A)

ON PETITION FOR REVIEW

ANSWER AND REPLY BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

SYMBOLS AND REFERENCES

For the purposes of this Brief, Mark Enrique Rousso will be referred to as "Rousso", Leonardo Adrian Roth will be referred to as "Roth", and jointly, the two will be referred to as "Respondents". The Florida Bar will be referred to as "The Florida Bar" or "The Bar", and the referee will be referred to as the "Referee". Additionally, the Rules Regulating The Florida Bar will be referred to as the "Rules" and Florida's Standards for Imposing Lawyer Sanctions will be referred to as the "Standards".

References to the Appendix will be set forth as "A." followed by the sequence number and the corresponding page number(s), if applicable. References to the transcript of the hearing on Respondents' Motions to Dissolve Emergency Suspension held on November 24 and December 1, 2011 will be set forth as "TR1." followed by the page number. References to Volumes I and II of the transcript of the Final Hearing held on April 20 and 21, 2011 will be set forth as "TR2." followed by the page number, and references to Volume III of the same transcript will be set forth as "TR3." followed by the page number. References to the transcript of the hearing on Respondents' Motion for Rehearing/Clarification and Respondents' Objection to The Bar's Request for Payment of Costs held on June 22, 2011 will be set forth as "TR4." followed by the page number. Finally, documents introduced into evidence by The Florida Bar will be designated "TFB

Ex.” followed by the corresponding exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar will rely on its Statement of the Case and of the Facts set forth in its Initial Brief.

SUMMARY OF THE ARGUMENT

The Referee properly concluded that Respondents' actions in soliciting loans from their own clients and other individuals to cover trust shortages, without disclosing the intended use of those funds, as well as the exercise of their own discretion in determining which clients to pay and when, was not only a conflict of interest, but was also dishonest, fraudulent, deceitful, and a misrepresentation. Similarly, Respondents' actions in continuing to represent clients and take their money at a time when their trust account was seriously underfunded "was dishonest, fraudulent, deceitful, and a type of misrepresentation." (A1; A2.) Finally, the Referee properly concluded that it was a violation of Rule 4-8.4(c) for Respondents "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 if not impossible to repay the debt owed." (A1; A2.)

Respondents' challenge of the Referee's finding of guilt as to Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) fails since they have failed to establish that this finding was clearly erroneous or without support in the record. Nevertheless, it is the position of The Florida Bar that the Referee's findings of fact and not guilty finding as to Rule 5-1.1 (trust accounts) are clearly erroneous and without support in the record. Similarly, the Referee's recommendation that the Staff Auditor costs be reduced as an "equitable

adjustment" to all parties was an abuse of discretion. In light of the extensive findings, the seriousness of the misconduct, and the extent of the aggravation presented, it is the position of The Florida Bar that the recommended terms of discipline are wholly inadequate and that Florida's Standards for Imposing Lawyer Sanctions and the case law mandate the imposition of permanent disbarment as the appropriate sanction.

ARGUMENT

I. THE REFEREE PROPERLY CONCLUDED THAT RESPONDENTS' CONDUCT IN ACCEPTING NEW MONEY INTO THEIR TRUST ACCOUNT AT A TIME WHEN THEY WERE AWARE OF THE MASSIVE SHORTAGES IN THE TRUST ACCOUNT, AND THEIR FAILURE TO DISCLOSE THE INTENDED USE OF THOSE FUNDS, CONSTITUTED CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT AND MISREPRESENTATION, IN VIOLATION OF RULE 4-8.4(C), RULES REGULATING THE FLORIDA BAR.

Respondents contend that the Referee's guilty finding as to Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules Regulating The Florida Bar was improper for the sole reason that it "went beyond the pleaded claims." Despite Respondents' best argument to the contrary, Rule 3-7.6(h)(1)(b) of the Rules Regulating The Florida Bar specifically provides that, in the course of disciplinary proceedings, The Bar is only required to "set forth the particular act or acts of conduct for which the attorney is sought to be disciplined."

Similarly, this Court has specifically concluded that The Bar is *not* required to connect every alleged item of misconduct in its Complaint to a specific Rule violation. *The Florida Bar v. Committe,* 916 So.2d 741, 744 (Fla. 2005). The Bar is merely required to set forth the particular act or acts of conduct for which the attorney is to be disciplined. *Id.* In this case, The Bar's Complaint specifically addressed the conduct it relied upon to show that Respondents had violated their

ethical duties. Moreover, it is the combination of these acts that properly led the Referee to conclude that Respondents had engaged in unethical conduct.[1]

Most significantly, there is simply no concern that Respondents' due process rights may have been violated, as Respondents suggest. This Court has repeatedly concluded that, "due process is satisfied where the attorney has notice and an opportunity to be heard." *The Florida Bar v. Fredericks*, 731 So.2d 1249, 1254 (Fla. 1999). In this case, there is no question that Respondents were afforded both with sufficient notice of the allegations against them, as well as with an opportunity to be heard. Their response to The Florida Bar's Complaint and the zealous arguments they presented to the Referee, both at the hearing on their Motions to Dissolve Emergency Suspension and at the Final Hearing, in and of themselves demonstrate that Respondents were adequately informed of the allegations against them and afforded a full and fair opportunity to defend against those allegations.

As previously concluded by this Court, it is sufficient for a respondent to be

[1] In support of their contention that the Referee's guilty finding as to Rule 4-8.4(c) was erroneous, Respondents cite to the case of *The Florida Bar v. Vernell*, 721 So.2d 705 (Fla. 1998), where this Court rejected a referee's recommendation of guilt regarding violation of a Bar Rule on the ground that the attorney did not have fair notice. However, the referee's finding in that case was based on allegations of "new misconduct" that arose during the proceedings and was not mentioned in the initial complaint. In this case, however, The Bar's Complaint specifically addressed the conduct that the Referee ultimately relied on in making his findings. The Referee's findings were not based on "new misconduct" as was the case in *Vernell*.

on notice of the "conduct" under investigation, and in this case, there is no question that The Florida Bar's notice was both fair and in full compliance with the Rules Regulating The Florida Bar. *Committe*, 916 So.2d at 744. Respondents simply cannot meet their burden of demonstrating that there is no evidence in the record to support the Referee's finding of guilt as to Rule 4-8.4(c), or that the record evidence clearly contradicts the Referee's conclusions, merely by pointing to contradictory evidence when there is also competent, substantial evidence in the record to support the Referee's findings.[2] *Id.*

In addressing an attorney's obligation to be candid and truthful, this Court has previously stated that:

> [a] lawyer has the absolute responsibility of being truthful, candid, and aboveboard with his client[s]. A failure in this regard should result in a heavy penalty to assure that other lawyers will be deterred from similar conduct and to protect the clients of lawyers.
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> *The Florida Bar v. Wilder*, 543 So.2d 222 (Fla. 1989).

Additionally, this Court most recently concluded that "conduct involving dishonesty, fraud, deceit, or misrepresentation, can result in a violation of [R]ule 4-8.4(c), it is not necessary to establish each of these elements." *The Florida Bar v.*

[2] While Respondents may disagree and continue to object to The Bar's evidence in this case, arguing that it has been discredited, it is nevertheless the evidence that was introduced and accepted by the Referee both at the hearing on Respondents' Motions to Dissolve Emergency Suspension and at the Final Hearing.

Berthiaume, 2011 WL 5217514 (Fla. 2011).

In this case, the Referee made extensive findings that Respondents had solicited loans from their own clients and other individuals to cover trust account shortages, without disclosing the intended use of those funds, and then exercised their own discretion in determining which clients to pay and when.[3] (A1; A2.) Respondents have failed to show that these findings were clearly erroneous or without support in the record. Instead, as the Referee properly recognized, "Respondents failed to show that the bulk of clients were advised" of the intended use of their funds, or that the clients otherwise provided their consent to the use of their funds to cover shortages in the account." (A1; A2.)

Similarly, the Referee properly concluded that Respondents had continued to represent these clients and take their money at a time when their trust account was seriously underfunded. (A1; A2.) Finally, the Referee found that Respondents had "engage[d] in business transactions with a client at a time when there was a possibility – a possibility that was realized – that it would be difficult if not impossible to repay the debt owed." (A1; A2.) Based on these specific findings,

[3] Although Respondents further assert that the Referee's finding of guilt as to Rule 4-8.4(c) was erroneous because The Bar failed to prove that all of the depositors were "clients" of the firm, in determining whether Respondents' conduct was dishonest, fraudulent, deceitful, or a misrepresentation, the issue is not whether the depositors were clients of the firm, but rather, that Respondents failed to disclose the intended use of those funds, and specifically, that these funds were used to cover trust account shortages. Moreover, these funds were placed into trust, and as such, they became client funds.

the Referee properly concluded that Respondents had engaged in conduct that "was dishonest, fraudulent, deceitful, and a type of misrepresentation." (A1; A2.)

Throughout the course of these proceedings, Respondents have repeatedly argued that this was a case of mere "negligence," distinguishable from cases where the lawyer's conduct was intentional or deliberate. Despite Respondents' best argument to the contrary, this Court has specifically concluded that intent, as an element for finding an attorney in violation of Rule 4-8.4(c) is established by showing that the attorney acted "deliberately" or "knowingly." *Fredericks*, 731 So.2d at 1249. The motive behind the respondent's action is not the determinative factor; rather, the issue is whether the respondent deliberately or knowingly engaged in the activity in question. *The Florida Bar v. Barley*, 831 So. 2d 163 (Fla. 2002).

In this case, both the Report of Referee and the record clearly establish that Respondents' actions in soliciting loans from clients and other individuals to cover trust account shortages, without disclosing the intended use of those funds, were both deliberate and knowing. The fact that Respondents may disagree with the Referee's guilty finding as to Rule 4-8.4(c) is simply not a legally sufficient basis to establish that such finding was clearly erroneous or without support in the record. *The Florida Bar v. MacMillan*, 600 So.2d 457, 459 (Fla. 1992).[4]

[4] Respondents have not sought to appeal the Referee's underlying findings of fact

II. (On Reply) THE REFEREE'S FINDINGS OF FACT AND NOT GUILTY FINDING AS TO RULE 5-1.1 (TRUST ACCOUNTS), RULES REGULATING THE FLORIDA BAR, ARE CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE EVIDENCE AND RECORD AT TRIAL.

Respondents argue that The Bar failed to establish by clear and convincing evidence that Respondents had misappropriated any client funds, and therefore, that the Referee's findings of fact and not guilty finding as to Rule 5-1.1of the Rules Regulating The Florida Bar, should not be disturbed. In concluding that Respondents were not guilty of violating Rule 5-1.1, the Referee was apparently similarly persuaded by Respondents' argument that they had not "personally benefitted" from the transgressions, but rather, that they had been the victims of theft by their law firm's former "bookkeeper," Fernando Horigian ("Horigian"), whom they allege stole funds from them and ultimately fled the country. (A1; A2.)

In this regard, The Bar presented evidence that, in actuality, this so-called "bookkeeper" was also Respondents' business partner in a number of business ventures. (TR1. at 37-38.) Additionally, The Bar's review of Respondents' own records conclusively revealed that significant sums of money had been disbursed from the firm's trust account for the benefit of various entities in which

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as to dishonesty, and therefore, they should be precluded from making any such argument. Similarly, as part of their challenge to the Referee's guilty finding as to Rule 4-8.4(c), Respondents seem to incorporate an objection to the Referee's finding of a conflict of interest as not having been alleged by The Bar. This challenge was not raised in Respondents' Petition for Review, and therefore, they should be precluded from raising it at this juncture.

Respondents, together with Horigian and other individuals, had an interest.[5] (TR1. at 47, 49; TFB Comp. Ex. 2.) Finally, The Bar presented evidence that, at a time when they were aware of the massive shortages in their trust account, Respondents transferred significant sums of money into their operating account. (TR2. at 106; TFB Comp. Ex. 2.) Although Respondents argue that these transfers were proper because these funds were earned fees, the fact remains that the transfers were made at a time when Respondents knew there were insufficient funds in trust, thus placing themselves in first priority position, ahead of clients.

Respondents seem to suggest that, merely because they may not have initially understood the magnitude of the problem, as well as the fact that they made use of personal funds and requested loans from clients and other individuals in an attempt to cover the massive trust account shortages, they should be viewed as less culpable. Nevertheless, in determining whether there has been a violation of Rule 5-1.1, this Court has specifically concluded that "[p]ersistent shortages in [a] trust account[,] despite deposit of personal funds, payment of personal obligations from trust [], and sloppy and intentionally improper trust accounting procedures[,] warrants [a] finding of *intentional misappropriation of clients' funds*," in violation of Rule 5-1.1. *The Florida Bar v. Simring*, 612 So.2d 561 (Fla.

[5] Although Respondents object to The Bar's reliance on an exhibit which detailed the numerous entities in which they held an interest, along with Horigian, they acknowledge having an interest in some of the ventures listed. Respondent's Answer Brief/Cross-Petition, at pg. 18, n.24.

1993).[6]

In a final attempt to divert attention from their own misconduct, Respondents seek to discredit the findings of The Bar's extensive investigation by arguing that the testimony of The Bar's Staff Auditor, a licensed Certified Public Accountant ("CPA") who has been employed by The Florida Bar for over twenty-six (26) years and has conducted hundreds of similar investigations, lacked credibility. (TR1. at 23; TR2. at 46.) This argument is disingenuous, at best. Rather than taking responsibility for their own transgressions and addressing the actual findings of the Staff Auditor's extensive investigation, including findings that Respondents failed to apply client funds for the specific purpose to which they were entrusted, in direct contravention of Rule 5-1.1, and subsequently sought to "cover-up" their transgressions, Respondents again simply attempt to shift the blame for those transgressions.[7] Both the evidence presented and the case law

[6] Although Respondents repeatedly contend that they lacked the requisite *mens rea* to make a finding of misappropriation of client funds, in addition to the foregoing facts, their actions upon discovering the shortages provide further support for the conclusion that Respondents not only benefitted from the transgressions, but that they were complicit in those transgressions. Not only did Respondents fail to ever conduct a full audit of their account or to report this matter to The Florida Bar, but they solicited loans from their own clients and other individuals in an attempt to cover the shortages in trust, and then failed to fulfill their repayment obligations to those individuals. (TR1. at 407-408; TR2. at 170.)

[7] The fact that Respondents would even accuse The Bar's Staff Auditor of lacking credibility is offensive, particularly in light of the fact that it was Roth who testified under oath at the Final Hearing that he had provided The Bar with certain

clearly and convincingly establish that Respondents' conduct was in violation of Rule 5-1.1. The Referee's finding to the contrary is "clearly erroneous," "lacking in evidentiary support," and therefore, must be reversed. *The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla. 1986).

III. (On Reply) THE REFEREE'S FINDING THAT THE FLORIDA BAR'S STAFF AUDITOR COSTS SHOULD BE REDUCED AS AN "EQUITABLE ADJUSTMENT" WAS AN ABUSE OF DISCRETION AND CONTRARY TO THIS COURT'S PRECEDENT AND TO THE RULES REGULATING THE FLORIDA BAR.

Respondents contend that it was not an abuse of discretion for the Referee to reduce The Bar's Staff Auditor costs by half because most of the Staff Auditor's time was spent trying to prove misappropriation by Respondents, which was not ultimately found by the Referee. In reviewing the reasonableness of The Bar's costs, this Court has previously concluded that Staff Auditor costs are properly

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records, but when questioned on cross-examination about this statement, admitted that he did not in fact have the records or even know of the disposition of the funds referenced in those records. (TR2. at 13; TR3. at 13-49.) Similarly, it was Respondents who submitted annual certifications to The Bar affirming that their trust account was in compliance with the Rules Regulating Trust Accounts during the relevant time period, when this was not in fact the case. (TFB Ex. 3.) With respect to Respondents' repeated contention that The Bar's case was flawed from its inception, as evidenced by the difference between the initial shortage calculated by the Staff Auditor of $17.6 million and the ultimate amount of the shortage of $4.38 million, The Bar has clarified on numerous occasions that the initial amount of the shortage was based on the records produced by Respondents at the time. Moreover, upon receiving additional records from Respondents following the hearing on their Motions to Dissolve Emergency Suspension, which for the first time established the amount of the shortage to be $4.38 million, The Bar immediately supplemented the record with this Court by filing two Motions reflecting the actual amount of the shortage.

taxable, even where they "involved both proven and unproven charges," as those charges cannot be "readily segregated." *The Florida Bar v. Wilson*, 616 So.2d 953 (Fla. 1993). In fact, this Court has specifically found that it would not be an abuse of discretion to assess the *full* amount of costs against a respondent, where it was his/her misconduct that gave rise to the initiation of the charges against him/her. *Id.* Even in cases where The Bar fails to prove all of the allegations against a respondent, this Court has concluded that it is not an abuse of discretion to assess The Bar's costs against the attorney. *The Florida Bar v. Miele*, 605 So.2d 866 (Fla. 1992). "But for the attorney's misconduct, there would have been no complaint, and thus, no costs." *Id.*

While Respondents may argue that The Bar's costs in this matter were "excessive,"[8] the fact is that Respondents' delay in producing all the records requested, coupled with their production of incomplete and doctored records, contributed in great part to the costs associated with The Bar's audit and investigation. In short, there is simply no basis under this Court's precedent or under the Rules Regulating The Florida Bar to deny The Bar's recovery of all of

[8] Rule 3-7.6(q) of The Rules Regulating The Florida Bar provides that, "[w]hen the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent, unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated." Additionally, Rule 5-1.2 specifically authorizes the award of Staff Auditor costs in a disciplinary matter, when the attorney is found to be not in substantial compliance with the trust accounting requirements. In this case, Respondents have been found to be in violation of Rule 5-1.2, and they take no issue with such finding. (A1; A2.)

the Staff Auditor costs incurred in this matter.

While agreeing with The Bar's case law on this issue, Respondents assert that the Referee's reduction of the Staff Auditor costs should not be reversed simply because they are bankrupt, and thus, they claim an inability to pay these costs. This Court has the final discretionary authority to assess costs in a disciplinary matter. *The Florida Bar v. Bosse*, 609 So.2d 1320 (Fla. 1992). In cases where an attorney has suggested his/her inability to pay The Bar's costs, as in this case, the Court has specifically concluded that it is "an abuse of discretion for the referee *not* to assess costs against [the] guilty respondent based upon the respondent's ability to pay." *The Florida Bar v. Lechtner*, 666 So.2d 892, 895 (Fla. 1996). While cognizant that an attorney may not have the present ability to pay those costs, this Court has further concluded that "the appropriate course [under those circumstances] is for the parties to establish an agreeable repayment arrangement." *Id.* Consequently, the Referee's determination in this case that the Staff Auditor costs should be reduced as an "equitable adjustment" to all parties was an abuse of discretion and contrary to this Court's own precedent.

IV. (On Reply) PERMANENT DISBARMENT IS THE APPROPRIATE SANCTION FOR RESPONDENTS' MISCONDUCT INVOLVING THE MISAPPROPRIATION OF CLIENT FUNDS TO SATISFY PERSONAL AND UNRELATED BUSINESS OBLIGATIONS, THEIR ATTEMPTS TO COVER THE SHORTAGES IN THEIR TRUST ACCOUNT BY SOLICITING LOANS FROM CLIENTS AND OTHER INDIVIDUALS, AND THEIR FAILURE TO COOPERATE WITH THE FLORIDA BAR'S INVESTIGATION.

Although Respondents do not challenge the Referee's recommended terms of discipline,[9] they contend that this case should be analogized to cases like *The Florida Bar v. Stanton*, Case No. SC06-408 (Fla. Jul. 17, 2007) and *The Florida Bar v. Moore*, 59 So.3d 109 (Table) (Fla. 2011), where attorneys who were the victims of theft by their office managers received far lesser discipline than the discipline sought by The Bar in this case. These cases, however, are entirely inapposite to the facts presented in this case, as the attorneys in those cases not only immediately reported the matter to The Florida Bar, but they also retained a CPA to conduct a full audit of their account. Additionally, there was no evidence in those cases that the attorneys had in any way benefitted or been complicit in the transgressions.

In this case, The Florida Bar presented clear and convincing evidence, and the Referee so found, that Respondents had failed to meet the minimum standards with regard to maintenance of their trust account by, *inter alia*, failing to maintain separate ledger cards for each client and failing to prepare monthly trust account reconciliations, which in turn resulted in disbursements of trust funds at a time

[9] While not appealing the recommended terms of discipline, Respondents do take issue with the Referee's recommendation that Respondents' reinstatement be conditioned upon full repayment of the loan from their client, Hattis Kaim Yordi ("Yordi"). Regardless of whether this claim has now been settled or not, this appears to be a civil issue, which should have no impact on the ultimate determination of discipline in this case.

when the account could not cover client liabilities. (A1; A2.) While recognizing Respondents' argument that funds had been stolen by their so-called "bookkeeper", the Referee concluded that this "argument might hold for an isolated and recent conversion of trust funds, [but] the shear size of the $4.38 million [] deficit proves that this bookkeeper had been embezzling for many months, if not years."[10] (A1; A2.) As the Referee properly noted:

> [t]he ultimate responsibility for trust fund accounts vests with the lawyer. Lawyer responsibility for safekeeping of trust account funds cannot divest to any non-lawyer employee of the firm. A misappropriation or conversion by office staff does not relieve the lawyer from utilization of at least the minimum standards with respect to his or her trust account.
>
> (A1; A2.)

Most significantly, The Bar presented evidence that Respondents' actions were not only reckless in that they blatantly disregarded their trust accounting responsibilities, but rather, that they were intentional. At a time when they were on notice of the millions of dollars in shortages in their trust account, Respondents consciously chose to continue in the same pattern of misconduct by soliciting

[10] The Referee's finding that any embezzlement had been going on for "years" discredits Respondents' contention that they "did not know" what was happening, or that this case is a case involving nothing more that their failure to properly supervise a non-lawyer employee, in violation of Rule 4-5.3, as Respondents suggest. Respondents' Answer Brief/Cross-Petition, at pg. 30-31. Similarly, Respondents themselves acknowledged that they were provided with individual trust reports for their own clients and held monthly meetings during which the firm's financials were discussed. (TR2. at 165; TR3. at 49-50.)

funds from their own clients and other individuals, whom they subsequently failed to repay, and by using personal funds in an attempt to cover the shortages. (TR2. at 170.) In this regard, the Referee noted that "these types of deposits into the trust account amount[ed] to commingling." (A1.)

By their own admission, Respondents became aware of shortages in their trust account as early as the spring of 2008, but rather than taking immediate action to rectify the situation, they instructed Horigian, the same person whom they now claim stole from them, to investigate the situation. (TR1. at 407-408.) Moreover, they failed to immediately retain a CPA to conduct a full audit of their account or to report this matter to The Florida Bar, instead attempting to cover the shortages by requesting loans from clients and other individuals. (TR1. at 56-57; TR2. at 70-71, 78, 170.) When asked to provide contact information for these individuals, whose money they deposited into their own law firm's trust account, Respondents claimed that they did "not know" who these individuals were. (TR2. at 82.) Most significantly, Respondents continued to make transfers into their operating account even after being on notice of the massive trust account shortages, essentially transferring funds into their own pockets, ahead of clients and innocent third parties, as the Referee properly recognized. (A1; A2.)

The Bar does not dispute that the firm's malpractice carrier paid $2,926,531.86 in client claims, but the fact is that a number of claims remain

outstanding, including the claim by Roberto Ferracioli ("Ferracioli").[11] (TR3. at 52, 59.) Most significantly, had it not been for the insurance carrier making payments on numerous claims, many more claims would remain and there is simply no way of ascertaining how many more potential claims may still exist.[12] Whether the insurance company decided to pay these claims as a business decision or because their review was based solely on the specific claims submitted, and not on a full audit of Respondents' trust account, as Respondents' own witness acknowledged, the fact remains that innocent clients were largely made whole by the insurance company, not by any goodwill on the part of Respondents, who consciously chose to continue transferring funds into their operating account even after being on notice of the massive trust account shortages. (TR1. at 95; TR2. at

[11] Respondents claim that the claim by Yordi has been resolved since the time of the Final Hearing. Nevertheless, the claim by Ferracioli remains pending, contrary to Respondents' statement that "no claims" remain pending at this time. Respondents' Answer Brief/Cross-Petition, at pg. 8, n.11.

[12] Roth himself acknowledged at the Final Hearing that it is possible that other claims might remain pending. (TR3. at 52, 59.) Moreover, although Respondents claim that no client was harmed, the fact is that many clients were forced to file lawsuits against Respondents to recover monies that had been entrusted to them, and even where they may have ultimately recovered those monies, whether through the insurance company or through Respondents directly, these clients were forced to forego access to the funds while their claims remained pending. Most significantly, this Court has previously concluded that disbarment is the appropriate sanction in cases involving misappropriation of client funds, *even where clients did not sustain any loss*, as the absence of any client loss or other mitigation does not excuse the egregiousness of the attorney's misconduct. *The Florida Bar v. Diaz-Silveira*, 557 So.2d 570 (Fla. 1990).

106; TR3. at 68-69.)

To further aggravate Respondents' misconduct, throughout the course of The Bar's investigation, they failed to produce all records requested by The Bar, despite multiple requests by The Bar, and despite the entry of an order by the Referee compelling them to do so. (TR2. at 77.) Moreover, the records that were produced were doctored and unreliable.[13] (TR2. at 99.)

Respondents' egregious misconduct involving the misappropriation of client funds to satisfy personal and unrelated business obligations, compounded with their subsequent attempts to cover the shortages in their trust account by soliciting loans from their own clients and other individuals, their transfer of funds into their operating account at a time when they were aware of the massive trust account shortages, and their failure to cooperate with The Florida Bar's investigation, are such that permanent disbarment is the only appropriate sanction. Moreover, this conclusion is consistent with this Court's case law and with Florida's Standards for Imposing Lawyer Sanctions.

[13] Although Respondents assert that they ultimately produced all records requested by The Bar and that the issue was one of "presentation," rather than an "absence of production", the fact remains that they never provided the contact information or client files for a number of individuals who made loans to the firm, as requested by The Bar. Moreover, the trust account records that were produced were doctored and fabricated records that could not be properly relied on. (TR2. at 99.) Respondents claim that these records were maintained by Horigian; nevertheless, many of the records produced were for the time period after Horigian had left the country and was no longer with the firm.

CONCLUSION

Based upon the foregoing, as well as the reasons and citations of authority initially expounded in The Florida Bar's Initial Brief, The Florida Bar respectfully requests that this Court reject the Referee's findings of fact and not guilty finding as to Rule 5-1.1 (trust accounts) of the Rules Regulating The Florida Bar, as well as the Referee's reduction of Staff Auditor costs and the recommended terms of discipline. The Florida Bar further submits that permanent disbarment is the appropriate sanction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer and Reply Brief of The Florida Bar were sent via electronic mail to the Honorable Thomas D. Hall, Clerk, at e-file@flcourts.org, and via regular mail to Supreme Court Building, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and that a true and correct copy was sent via electronic mail to Mark Enrique Rousso, c/o Brian Lee Tannebaum, at bt@tannebaumweiss.com, and via regular mail at 150 West Flagler Street, Suite 2850, Miami, Florida 33130; and via electronic mail to Leonardo Adrian Roth, c/o Andrew Scott Berman, at aberman@ybkglaw.com, and via regular mail to 1101 Brickell Avenue, Suite 1400N, Miami, Florida 33131; and via regular mail only to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this _____ day of _____, 2011.

_____
DANIELA ROSETTE
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CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Answer and Reply Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

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DANIELA ROSETTE
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