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

INITIAL BRIEF OF THE FLORIDA BAR

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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

On or about November 2, 2010, The Florida Bar filed its Petitions for Emergency Suspension as to both Respondents. The Supreme Court entered Orders of Emergency Suspension on November 8, 2010. Respondents immediately filed Motions to Dissolve the Emergency Suspension, and a hearing was held on Respondents' Motions on November 24, 2010 and December 1, 2010. Thereafter, the Referee filed his Report recommending that the Orders of Emergency Suspension be modified. On December 17, 2010, the Supreme Court issued an Order to Show Cause directing both sides to simultaneously show cause on or before December 28, 2010 why the Report of Referee should not be approved. Both sides responded, and on April 4, 2011, the Supreme Court entered an Order disapproving the Report of Referee, denying Respondents' Motions to Dissolve, and continuing the emergency suspensions in effect.

The Florida Bar filed its formal Complaint on January 5, 2011, and the case proceeded to final hearing on April 20, 2011 and April 21, 2011. The Referee filed his Report of Referee on June 1, 2011, recommending thirty (30) month suspensions as the appropriate sanction. (A1.) Respondents subsequently filed a Motion for Rehearing/Clarification and an Objection to The Florida Bar's Request for Costs. A hearing was conducted on said motions on June 22, 2011. Thereafter, the Referee filed an Amended Report of Referee on June 28, 2011, recommending

that Roth receive a fifteen (15) month suspension and Rousso a twelve (12) month suspension. (A2.) With respect to Respondents' Objection to The Bar's Request for Payment of Costs, the Referee agreed that The Bar was properly entitled to recover costs as the prevailing party in this matter, but reduced the amount of Staff Auditor Costs that The Bar could recover by half. The Referee further recommended that Respondents each be responsible for paying half of the total costs. The Bar now appeals the Referee's findings of fact and not guilty finding as to Rule 5-1.1(trust accounts), as well as the Referee's reduction of the Staff Auditor Costs and his recommendations of discipline.

This case encompasses both the evidence presented at the hearing on Respondents' Motions to Dissolve the Emergency Suspension, as well as the evidence presented at the final hearing of this cause. At the commencement of the final hearing, The Florida Bar introduced into evidence the transcript from the hearing on Respondents' Motions to Dissolve the Emergency Suspension, as well as The Florida Bar's exhibits from that hearing. (TR2. at 9-10, 15-16; TFB Ex. 1; TFB Comp. Ex. 2.)

Factual Background

The Florida Bar presented the testimony of Carlos Ruga ("Ruga"), its Staff Auditor, as its sole witness at the hearing on Respondents' Motions to Dissolve the Emergency Suspension and at the final hearing. Ruga is a Certified Public

Accountant, licensed in the State of Florida, who has been employed as The Florida Bar's Staff Auditor for over twenty-six (26) years. (TR1. at 23; TR2. at 46.) According to Ruga, on or about March 31, 2009, and pursuant to The Florida Bar's investigation of two grievances that were filed by Michael D. Gardner ("Gardner") and Grant W. Kehres ("Kehres"), The Bar subpoenaed bank records from Respondents and from Mellon United National Bank ("Mellon Bank") for the trust account of the law firm of Roth, Rousso & Katsman ("RRK"), maintained at Mellon Bank, bank account #xxxxx0174, for the period of January 1, 2007 to December 31, 2008. (TR1. at 24; TFB Comp. Ex. 2.) Ruga's review of these records revealed that during this twenty-four (24) month period, approximately three hundred and forty-four million, nine-hundred thirty-two thousand, six hundred and ninety-one dollars and sixteen cents ($344,932,691.16) was deposited into the firm's trust account.

The records produced by Respondents and the bank further revealed that Respondents, together with Fernando Horigian ("Horigian"), a non-lawyer employee, and other individuals, had been involved in numerous real estate development businesses and other ventures. (TR1. at 26; TFB Comp. Ex. 2.) Ruga further testified that the bank records revealed funds pertaining to these personal business ventures being deposited into and out of the law firm's trust

account.[1] (TR1. at 34-36; TFB Comp. Ex. 2.)

When asked whether Respondents had provided all of the records that were requested in The Bar's subpoena, Ruga indicated that Respondents had failed to fully comply with the subpoena. (TR1. at 24-26.) Specifically, Respondents failed to produce a workable receipt and disbursement journal reflecting the deposits, disbursements and balance remaining, as requested in The Bar's subpoena. (TR1. at 24.) Similarly, they failed to produce a single bank and client reconciliation, which should be performed monthly and is required by the Rules Regulating Trust Accounts, until after the hearing on Respondents' Motions to Dissolve the Emergency Suspension.[2] (TR1. at 24-25; TR2. at 47-49.) Moreover, according to Ruga, the records that were ultimately produced by Respondents after the hearing, which included records through March 2009, were completely doctored and

[1] At the hearing on Respondents' Motions to Dissolve the Emergency Suspension, The Bar introduced as its Exhibit 2 a listing of the numerous business ventures in which Respondents and Horigian were involved. (TR1. at 29; TFB Comp. Ex. 2.) This Exhibit is also part of The Florida Bar's Composite Exhibit 2 introduced at the final hearing, which consists of all the exhibits introduced at the hearing on Respondents' Motions to Dissolve the Emergency Suspension. (TFB Comp. Ex. 2.)

[2] When asked whether the records requested were records that Respondents should have been able to produce, Ruga testified that this was "[a]bsolutely" the case, as Respondents had sophisticated computer systems in place, which would have allowed them to produce the requested records at the simple push of a button. (TR1. at 25.)

unreliable records containing numerous irregularities.[3] (TR2. at 99.) Relying on the records that had been obtained directly from the bank, Ruga was able to perform a bank and client reconciliation as of January 1, 2007. (TR1. at 39; TR2. at 58; TFB Comp. Ex. 2.)

Based on the records that had been provided and were available to The Bar at the time of the filing of its formal Complaint, Ruga determined that the net client balance on January 1, 2007 was approximately $24,091,539.23, and that amount should have been in the trust account on that date. (TR1. at 40; TFB Comp. Ex. 2.)

[3] For example, the client ledger cards for December 31, 2008, reflected a total sum of approximately $5 million dollars in closing balances. (TR2. at 50, 99.) Nevertheless, the very next day, on January 1, 2009, that same amount had been reduced to approximately $2 million, reflecting a discrepancy of approximately $3 million. (TR2. at 50, 99.) According to Ruga, the significance of these balances not being carried over to January 1, 2009 is that this was a firm liability, which simply "disappeared." (TR2. at 51.) When asked what had occurred to those $3 million dollars, Respondents simply testified that they "did not know" and sought to shift the blame to their so-called bookkeeper, this despite the fact that Horigian had left the country several months back. (TR3. at 53-54.) Similarly, the client ledger cards for the months of January through March 2009 reflected closing balances on a number of client ledger cards. When asked about the disposition of those funds, Roth testified under oath that he had provided The Bar with copies of all checks and wires reflecting the disposition of the funds. (TR2. at 13; TR3. at 16, 31, 37.) In actuality, however, those records were not produced until the date of the final hearing. Moreover, the records produced at the hearing did not include evidence, such as checks or wires, for a number of the payments reflected on the ledger cards. (TR3. at 13-49.) When asked why he had failed to produce checks or wires reflecting those specific disbursements, despite his testimony that he had provided such evidence to The Bar, Roth now asserted that he did not have the records and further testified that he did not know about the ultimate disposition of those specific funds. (TR3. at 13-49.) Respondents further admitted that their client ledger cards were inaccurate and unreliable. (TR3. at 57.)

In actuality, however, the total balance in the five (5) bank accounts provided, as determined by their bank statements, was a total of $6,395,098.12, reflecting a shortage of $17,696,441.11. (TR1. at 40-41; TFB Comp. Ex. 2.)

Following the hearing on Respondents' Motions to Dissolve the Emergency Suspension, Respondents produced supplemental evidence, for the very first time, indicating that funds reflected on a number of their client ledger cards were actually held in escrow accounts separate from the law firm's trust account, thereby reducing the total amount of the trust account shortage to $4,377,094.89, as of January 1, 2007. (TR2. at 240-242.) Based on the new evidence, The Florida Bar immediately filed two Motions to Supplement the Record with the Florida Supreme Court, which were granted on April 4, 2011.

During the hearing on Respondents' Motions to Dissolve the Emergency Suspension and at the final hearing, Ruga testified about the specific findings of his investigation. Based on his review of the bank records and other records for the year 2008 for the account identified as Florida Bar Foundation, Inc., Roth, Rousso Katsman LLP, IOTA Trust Account #XXX-XXX017-4, Ruga determined that Respondents had misappropriated client funds to satisfy personal and other clients' liabilities, in a manner similar to a Ponzi scheme. (TR1. at 68; TR2. at 110-111.) Funds had been transferred from the trust account into the operating account as needed, resulting in significant shortages and overdrafts in the trust

account. (TR1. at 60; TR2. at 110-111,105; TFB Comp. Ex. 2.)

At the beginning of April 2008, even though Respondents had deposited $245,600.00 of personal funds to cover shortages, the firm's trust account had an overdraft of $7,128.00 on April 14, 2008. (TR1. at 44-45; TFB Comp. Ex. 2.) On that date or immediately prior, a total of $394,061.50 was issued in checks, and therefore, the account was short at least $401,195.50 based on a sampling of the outstanding checks and without factoring in the firm's client trust account liabilities. (TR1. at 44-45; TFB Comp. Ex. 2.)

In addition to the foregoing shortages, Ruga testified about Respondents' use of a law firm line of credit to satisfy client trust account liabilities. (TR1. at 47; TFB Comp. Ex. 2.) According to Ruga's investigation, on May 5, 2008, the beginning balance in the trust account was $165,384.91. (TR1. at 47; TFB Comp. Ex. 2.) On that day, the firm received a loan disbursement in the amount of $343,315.00 from Trans Capital Bank, Re: Letter of Credit #018. (TR1. at 47; TFB Comp. Ex. 2.) These funds were drawn from a line of credit to the firm. Nevertheless, they were used to pay Seymour International Unit 1107 the amount of $299,185.23. (TR1. at 47; TFB Comp. Ex. 2.)

Ruga's investigation further revealed that in a number of instances, Respondents had made use of client funds for purposes other than those for which they had been entrusted. (TR1. at 49; TFB Comp. Ex. 2.) For example, on May 7,

2008, Respondents received into the trust account a credit memo in the amount of $3,230,580.50 from Commonwealth Land Title Insurance Co., which funds were earmarked for Unika/4300 Biscayne Associates ("Unika"). (TR1. at 49; TFB Comp. Ex. 2.) Thereafter, an entry was made in the firm's journal (called Detail Reconciliation Report) allocating the $3,230,580.50 to eighty-eight (88) different units at Unika, but instead of using these funds for their intended purpose, the funds were used to fund shortages in a development identified as Point Orlando Seymour International, Inc. and to satisfy other clients' liabilities.[4] (TR1. at 49; TFB Comp. Ex. 2.)

On June 19, 2008, the beginning balance in the trust account, according to Ruga's review, was $164,597.71, and only one deposit of $14,418.80 was made, for a total of $179,016.51 in available funds. (TR1. at 50; TFB Comp. Ex. 2.) On that day, twenty-two (22) trust account checks totaling $432,370.28 were presented for payment, creating an overdraft in the account of $253,353.77. (TR1. at 50; TFB Comp. Ex. 2.) On the following day, Respondents made four (4) deposits into the trust account, including a check in the amount of $100,000 from Roth and a check in the amount of $100,000 from Rousso, to cover the overdraft. (TR1. at 51; TFB Comp. Ex. 2.)

On or about September 30, 2010, nearly two (2) years since the

[4] Point Orlando Seymour International, Inc. was a business venture in which Rousso held an interest. (TR1. at 48.)

commencement of The Bar's investigation of this matter, Hattim Kais Yordi ("Yordi") filed a grievance with The Florida Bar. (TR1. at 53.) In his grievance, Yordi averred that Respondents and RRK had provided him with legal representation in a claim to recover deposits on a condominium. (TR1. at 53; TR2. at 171; TFB Comp. Ex. 2.) Respondents and RRK successfully recovered a total of $396,780.68 for Yordi. From these funds, Respondents and RRK were due $11,450.34 in attorney's fees and Yordi was due $385,330.34. (TR1. at 53; TR2. at 171; TFB Comp. Ex. 2.)

Having received the settlement funds into the law firm's trust account, Roth informed Yordi that he needed a short term loan, and Yordi agreed to provide one. (TR1. at 53-54; TR2. at 172; TFB Comp. Ex. 2.) As a result, RRK disbursed only $154,106.66 to Yordi and retained the balance of $231,223.68 in trust. (TFB Comp. Ex. 2.) Respondents then prepared a Non-Negotiable Promissory Note in which they listed the borrower as La Estancia Retail Stores, LLC ("La Estancia"). (TR1. at 54; TR2. at 173-174; TFB Comp. Ex. 2.)

RRK made several interest payments to Yordi, but then failed to make any other payments on interest or principal. (TR1. at 55; TR2. at 175; TFB Comp. Ex. 2.) After the filing of his grievance with The Florida Bar, Yordi provided an affidavit to The Florida Bar, where he explained in detail his meetings with Roth. (TFB Comp. Ex. 2.) In addition, Yordi indicated that in one of those meetings,

Roth introduced him to Rousso, and in his presence told Rousso about the loan and that Yordi was the person "lending them a hand" by making funds available to them. (TFB Comp. Ex. 2.)

Ruga testified that at the time Yordi's funds were deposited into the firm's trust account on July 22, 2008, the firm was bankrupt. (TR1. at 54; TFB Comp. Ex. 2.) The beginning balance on July 21, 2008 was $268,800.09, and the client trust account liabilities were at least $1,539,726.43, resulting in a shortage of at least $1,270,926.34. (TR1. at 54; TFB Comp. Ex. 2.) The Non-Negotiable Promissory Note that was provided to Yordi as a guaranty on his loan reflected that the borrower was La Estancia. (TR1. at 53-54; TR2. at 174; TFB Comp. Ex. 2.) Although the client ledger card for La Estancia listed the loan of $231,223.13 as received, in reality, Ruga's review of the records revealed that the funds were never transferred to La Estancia, but were used instead to satisfy unrelated business or personal liabilities. (TR1. at 54-55.) When asked whether Yordi had ever been informed about the actual disposition of his funds, Roth admitted that they had never advised Yordi how his funds were actually used. (TR3. at 51.) According to Roth, he only informed Yordi that he needed a "personal loan."[5] (TR2. at 172;

[5] Although The Bar had been investigating this matter for nearly two (2) years at the time Yordi's grievance was filed, it was the filing of this grievance and the additional information uncovered as a result of this grievance regarding other loans solicited by Respondents from clients and other individuals, which ultimately prompted The Bar to file its Petition for Emergency Suspension. (TR1. at 226-

TR3. at 51.)

In addition to the loan that was made by Yordi, Ruga's review of the client ledger card for La Estancia, as well as the bank records, revealed that several individuals, including Rousso, had made loans to the RRK trust account to attempt to cover the shortages in the account.[6] (TR1. at 55-56; TFB Comp. Ex. 2.) At the hearing on Respondents' Motions to Dissolve the Emergency Suspension, The Bar introduced the following list naming some of the individuals who made loans to the firm (TR1. at 55-56; TFB Comp. Ex. 2; TFB Ex. 4.):

04/04/2008	Loan from Mark Rousso	$ 190,000.00
04/15/2008	Loan from JAD Holdings	81,000.00
05/30/2008	Loan from Chateaux Fernando	39,965.00
05/30/2008	Loan from Bug Terminator	80,000.00
06/03/2008	Loan from Fernando Horigian	10,000.00
06/05/2008	Loan from Fernando Horigian	5,000.00
06/05/2008	Advance on Line Note #1	200,000.00

227, 239.) Yordi's grievance and the additional information uncovered provided evidence that Respondents had not only been negligent in their failure to properly supervise and manage their trust account, but rather, that they had actively sought to cover the shortages in their trust account upon learning of those shortages. (TR1. at 226-227.) Although Respondents asserted that The Bar had refused to meet with them to discuss Yordi's grievance after it was filed, The Bar advised them that any information they wished to provide should be provided in writing, at which point The Bar would make a determination whether it would meet with Respondents or not. (TR1. at 158, 310-311.)

[6] When asked how he knew that these funds were loans to the firm, Ruga testified that the respective deposits were coded as "loans" in Respondents' own records. (TR1. at 56; TR2. at 47.) In addition, Respondents stipulated, through counsel, that those funds they could identify were "loans … used to help pay back trust account shortages." (TR2. at 70-71, 78.)

06/06/2008	Loan from Jorge Hugo Arancibia	35,000.00
07/11/2008	Carlos A. Reynier (Buenos Aires)	69,540.00
07/23/2008	Hattim Kais Yordi	231,223.18
07/24/2008	Aventura One LLC (Joel Bary)	150,000.00
10/16/2008	Advance on Line Note #00001	150,000.00
10/21/2008	David Pons	100,000.00
10/27/2008	Loan from Mark Rousso	150,000.00
10/27/2008	Loan from Mark Rousso	30,000.00
10/29/2008	Loan from Mark Rousso	80,000.00
11/03/2008	Fernando Horigian (Kuchikian)	70,000.00
11/05/2008	MH New Investments	175,026.00

According to Ruga, all of the funds listed were deposited into the trust account of RRK and then used to satisfy business or personal obligations. (TR1. at 57.) The client ledger card for La Estancia was just a "front" and was used to keep track of the various loans. (TR1. at 57; TFB Comp. Ex. 2.)

On or about December 14, 2011, following the hearing on Respondents' Motions to Dissolve the Emergency Suspension, The Florida Bar sent a letter to Respondents requesting additional information as part of its ongoing investigation of this matter.[7] (TR2. at 47.) The additional information requested specifically included contact information and copies of the client files for the various individuals and entities listed above, who made loans to the firm. (TR2. at 47.) Respondents failed to produce such information to The Bar, even after the Referee

[7] The Bar's request was made by letter based on Respondents' representations during the hearing on their Motions to Dissolve the Emergency Suspension that they would comply with any requests for information without the need for the issuance of a formal subpoena. (TR1. at 519.)

entered an order compelling them to do so. (TR2. at 77.) When asked why they had failed to provide the requested information, Respondents merely asserted that they "did not know" the identity of these various individuals or entities who at some point made deposits into their own firm's trust account.[8] (TR2. at 82.)

In addition to the foregoing loans to the firm, the firm requested a loan from an individual by the name of Roberto Ferracioli ("Ferracioli") in the amount of $600,000 in February 2009. (TR1. at 58; TR2. at 177; TFB Comp. Ex. 2.) This amount was used to satisfy the outstanding obligation to Kehres, one of the initial complainants in this matter, who alleged that RRK had failed to satisfy a mortgage on his behalf. (TR1. at 60-62.) Furthermore, RRK failed to repay Ferracioli's loan. (TR1. at 61; TR3. at 52; TFB Comp. Ex. 2.) Consequently, on or about October 28, 2010, Ferracioli filed a civil suit against Respondents, Horigian and others[9]. (TR1. at 58; TFB Comp. Ex. 2.)

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[8] Respondents subsequently identified three of the entities listed, JAD Holdings, Aventura One LLC and MH New Investments, as well as one of the individuals listed, Yordi, who had himself already contacted The Bar. (TR2. at 78.) Nevertheless, they failed to provide contact information or client files for any of the individuals or entities listed, despite The Bar's specific requests for such information. (TR2. at 78.)

[9] In addition to the $600,000 loan, Ferracioli also averred that he had previously made loans to the firm in excess of $2.5 million, which according to his civil complaint have still not been fully repaid. (TR3. at 51; TFB Comp. Ex. 2.) When asked about these additional loans, Roth admitted at the final hearing that he had provided Ferracioli with a promissory note at the time they received the $600,000 loan, which guaranteed not only the $600,000, but in excess of $2 million, simply

The total collapse of the firm occurred in October 2008, when the firm's trust account had numerous overdrafts and numerous checks returned due to insufficient funds. (TR1. at 61; TFB Comp. Ex. 2.) According to Ruga, on or about October 23, 2008, Respondents received a wire transfer of $200,000 into trust from a client identified as Constructora Dos Arroyos. (TR1. at 63; TFB Comp. Ex. 2.) Thereafter, on October 31, 2008 and November 3, 2008, Respondents received two additional wires, each in the amount of $100,000, from two other clients. (TR1. at 63; TFB Comp. Ex. 2.) The total funds received, in the amount of $400,000, were recorded in a client ledger card identified as New Second Avenue Inc., but in actuality, the funds were used to satisfy business or personal liabilities unrelated to the clients who made the deposits. (TR1. at 63-64; TFB Comp. Ex. 2.)

In another instance, on or about December 24, 2008, Respondents issued trust account check #66561 payable to Republic Federal Bank in the amount of $634,523.32, which was dishonored due to insufficient funds and resulted in an overdraft of $601,503.86. (TR2. at 104.) Similarly, in at least two instances, Respondents received funds to be held in trust for certain real estate transactions, including a check in the amount of $220,000 from Robin Davis ("Davis"), and a check in the amount of $106,429.37 from Garbor Rado ("Rado"), but rather than

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because he felt "pressured" to obtain the money. (TR3. at 51.)

releasing these funds for their intended purpose, Respondents proceeded to make multiple transfers from their trust account into their operating account.[10] (TR2. at 106; TFB Comp. Ex. 2.) The total amount transferred from the trust account into the operating account in the months of September through December 2008 was approximately $1,404,446.14.

As a result of Respondents' financial malfeasance, numerous clients filed claims against Respondents and/or Liberty Surplus Insurance Corporation, the firm's malpractice insurance carrier. (TR1. at 80.) At the hearing on Respondents' Motions to Dissolve Emergency Suspension, Respondents presented the testimony of David Hartnett ("Hartnett"), the attorney who represented RRK in connection with these claims. (TR1. at 79.) According to Hartnett, settlements totaling more than $2.85 million were ultimately paid to clients of RRK. (TR1. at 81.)

Respondents made reference to a clause in their insurance policy, which provides that the insurance company will not provide coverage where there is evidence of wrongdoing. (TR1. at 75-76, 90-91.) Respondents argued that the insurance company would not have paid in excess of $2 million in claims had it found any evidence of wrongdoing on their part. Nevertheless, Respondents' own witness, Hartnett, testified that the insurance company had not conducted a full audit of their account and that it had only investigated the specific claims

[10] Both Davis and Rado filed grievances with The Florida Bar.

submitted. (TR1. at 95.)

Additionally, on or about March 9, 2009, Commonwealth Land Title Insurance Co., RRK's title insurance carrier, filed a civil suit against the firm alleging that the firm's partners had failed to comply with the terms of their Agency Agreement with the title insurance carrier by, *inter alia*, failing to disburse certain monies for the purposes which they were intended, and by failing to permit Commonwealth to audit and examine RRK's financial and business records, including its escrow account and any trust account the firm used in connection with Commonwealth's title insurance transactions. (TR3. at 59.)

Respondents both took the stand at the hearing on their Motions to Dissolve the Emergency Suspension and at the Final Hearing. Throughout the proceedings, Respondents pointed to Horigian, whom they referred to as a long-time trusted employee, as the culprit of the transgressions. (TR2. at 162; TR3. at 69.) According to Respondents, it was Horigian, whom they entirely entrusted with the ultimate responsibility over their trust account, who misappropriated funds from the trust account. (TR2. at 164; TR3. at 81.) Respondents further claimed that they did not learn of the shortages until April or June, 2008, when Horigian first brought the matter to Roth's attention, because of the amount of money that kept coming into the firm's trust account from the extensive business that was being

generated.[11] (TR2. at 164.)

Although Respondents claimed that they did not learn of the shortages because Horigian only presented them with an isolated picture of their trust account and that they only reviewed the ledger cards for their own clients, they admitted that they held monthly meetings during which the firm's financials were discussed. (TR2. at 165; TR3. at 49-50.) Respondents further testified that, in addition to Horigian, they had an assistant bookkeeper who would "balance the accounts and reconcile entries." (TR3. at 49.)

According to Respondents, immediately upon learning of the shortages in their trust account, they requested that Horigian, the same person whom they accuse of misappropriating funds from their account, investigate the matter.[12] (TR1. at 407-408.) They subsequently sought out loans from family and friends, as well as made use of personal funds to attempt to cover the shortages. (TR2. at

[11] Although Rousso acknowledges that Roth advised him there was a problem in the spring of 2008, he claims that he did not learn of the magnitude of the problem until December 2008, when he received a call from a bank to advise that a mortgage had not been paid off. (TR3. at 68.) It was at that time that Respondents claim they first learned Horigian had forged a number of trust account checks. (TR3. at 69.)

[12] Even after being advised of the problems with the trust account, Respondents agreed to deposit money into the trust account upon Horigian's request, without further inquiry. (TR2. at 166.) According to Roth, he thought that "maybe with the short-term dollars that were put in, which [he] know[s] today to be inappropriate," the problem "would have been resolved." (TR2. at 167.)

170.) Several months later, they requested that their accountant review their account records to determine where monies were missing, but a full audit of their account was never conducted. (TR2. at 213; TR3. at 57.) Finally, Respondents filed a police report against Horigian and made a call to The Florida Bar's Ethics Hotline, which they claim advised them that they did not need to take any further action. (TR2. at 213; TR3. at 22, 90.) Respondents failed to provide any record of such call to the Ethics Department. (TR3. at 22.) Similarly, they failed to ever bring this matter to the attention of The Florida Bar until a grievance had been filed against them. (TR1. at 175; TR2. at 168.)

Respondents claimed that they took these steps upon learning of the shortages in an attempt to protect their clients, and they further suggested that they have resolved all claims.[13] (TR3. at 58.) Nevertheless, when asked whether it was possible that other claims could remain pending, they admitted that this was possible and further acknowledged that the claims by Yordi and Ferracioli still remain pending. (TR3. at 52, 59.)

Respondents filed annual certifications with The Florida Bar for the years 2007 through 2009, the relevant time period, where they certified that they had

[13] Throughout the proceedings, Respondents took the position that the fact that no additional claims had been presented provided evidence that all clients had been made whole, this despite The Bar's argument that many of their clients were foreigners who likely had no familiarity with their legal rights or remedies in this country. (TR2. at 207; TR3. at 52.)

read the Rules Regulating Trust Accounts and that their trust account was in compliance with those Rules. (TR3. at 56-57, 87; TFB Ex. 3.) When asked about these certifications, Respondents acknowledged that these were their certifications and admitted that their trust account was not in fact in compliance with the Rules at the time they made the certifications. (TR3. at 56-57, 87; TFB Ex. 3.) In his testimony, Roth further indicated that many times he would simply have his "secretary fill out th[ese] forms and send them" out.[14] (TR2. at 245.)

The Referee filed his Report of Referee in this matter on June 1, 2011. Based on Respondents' testimony regarding Horigian's alleged theft of trust funds, the Referee did not find Respondents guilty of misappropriation, concluding that no clear and convincing evidence established any direct benefit to them from the missing $4.4 million. (A1.) The Referee made this finding despite Ruga's testimony that trust funds had been diverted to business interests in which Respondents and Horigian held interests, as well as his testimony regarding Respondents' transfers of trust funds into their operating account at a time when there were massive shortages in the trust account. (TR2. at 115-121, 128; A1.) Similarly, the Referee recognized that there was "galling evidence that

[14] In addition to presenting their own testimony, Respondents presented the testimony and affidavits of several character witnesses who generally testified about Respondents' reputation in the community and their charitable activities. (TR3. at 92-142.)

Respondents distributed earned trust money to the firm's operating account ahead of clients."[15] (A1.)

The Referee did conclude that Respondent's failure to supervise their trust account and to comply with trust accounting requirements ultimately led to the embezzlement of trust funds. (A1.) The Referee recognized that "[t]he ultimate responsibility for trust fund accounts vests with the lawyer," and this responsibility cannot be "divest[ed] to any non-lawyer employee." (A1.) Finally, the Referee found that the securing of loans from clients to cover trust shortages was a conflict of interest, as was Respondents' exercise of their own discretion as to which clients to pay and when. (A1.) In this regard, the Referee found their conduct to be dishonest, fraudulent, deceitful, and a misrepresentation in that Respondents had taken new client money into their trust account at a time when they knew of the massive shortages. (A1.)

Respondents subsequently filed a Motion for Rehearing/Clarification and an Objection to The Florida Bar's Request for Costs. A hearing was conducted on said motions on June 22, 2011. While agreeing with The Bar that the findings of fraud, deceit and misrepresentation were proper, The Referee agreed with Respondents that the loan from Ferracioli should not have been considered as part

[15] At the final hearing, the Referee similarly concluded that "at a time when the firm should have been concerned about legitimate depositors and creditors, [Respondents'] operating account was taking [its] disbursements first." (TR2. at 106.)

of his findings that Respondents had engaged in a conflict of interest because Ferracioli was not a client of the firm and was represented by independent counsel at the time he made the loan to the firm.[16] (A2.) The Referee further agreed that Rousso had not been directly involved in procuring the loan from Yordi, which was procured by Roth.[17] (A2.)

Based on these findings, the Referee filed an Amended Report of Referee on June 28, 2011, recommending that Roth receive a fifteen (15) month suspension and Rousso a twelve (12) month suspension. With respect to Respondents' Objection to The Bar's Request for Payment of Costs, the Referee agreed that The Bar was properly entitled to recover its costs in this matter, but he reduced the costs for the transcripts of Respondents' depositions by $200 and the Staff Auditor Costs from $61,640 to $30,820. (TR4. at 73, 95.) While recognizing that Staff Auditor Costs are taxable under Rule 5-1.2(f), even where they involve both

[16] Ferracioli had been a client of the firm in the past, and Roth acknowledged as much at the final hearing. (TR2. at 177.) Moreover, Rousso acknowledged that, while he had not personally solicited the loan from Ferracioli, he had guaranteed the loan. (TR3. at 72, 85.)

[17] The Referee did acknowledge that, even where the loan from Yordi had been procured by Roth alone, Yordi was a client of the *firm* and both Respondents benefited from the loan. (A2.) In his Amended Report of Referee, the Referee ultimately found Respondents to be in violation of Rules 4-1.7 (conflict of interest; current clients), 4-1.8 (conflict of interest; prohibited and other transactions), 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and 5-1.2 (trust accounting records and procedures). (A2.) He did not find Respondents to be in violation of Rule 5-1.1 (trust accounts). (A2.)

proven and unproven charges, and even where Respondents may be insolvent, the Referee recommended that the costs be reduced as an "equitable adjustment" to all parties. (TR4. at 94.) The Referee recommended that Respondents each be responsible for paying exactly half of the total costs. (TR4. at 95.)

On or about August 23, 2011, The Bar filed its Petition for Review of the Referee's findings of fact and not guilty finding as to Rule 5-1.1 (trust accounts), as well as the Referee's reduction of the Staff Auditor Costs and recommendations of discipline. The Bar's Initial Brief follows.

SUMMARY OF THE ARGUMENT

This case involves findings that Respondents failed to comply with trust accounting requirements, which in turn resulted in massive shortages in their trust account and the embezzlement of trust funds, as well as distributed earned trust money into their operating account, ahead of clients, at a time when they were aware of shortages in their trust account. In addition, The Bar presented evidence that upon learning of the shortages in their trust account, Respondents failed to cease transacting business, to retain a CPA to conduct a full audit of their account, or to report the matter to The Florida Bar, but instead continued in the same pattern of misconduct by requesting loans from their own clients and other individuals in an attempt to cover the trust account shortages. Similarly, Respondents failed to cooperate with The Florida Bar's requests for information, and any records that were produced were doctored and fabricated records.

The Referee, upon consideration of the evidence, ultimately concluded that Respondents had failed to supervise their trust account and to follow proper trust accounting requirements. Additionally, the Referee concluded that Respondents' conduct in securing loans from their own clients and other individuals, without advising them of the intended use of those funds, was not only a conflict of interest, but also dishonest, fraudulent, deceitful and a type of misrepresentation. The Referee disagreed, however, that Respondents had violated Rule 5-1.1 (trust

accounts) of the Rules Regulating The Florida Bar. The Referee further recommended that the amount of Staff Auditor Costs The Bar seeks to tax be reduced by half. While recognizing that The Bar is properly entitled to recover costs as the prevailing party, and further, that Rule 5-1.2(f) (costs of audit) of the Rules Regulating The Florida Bar clearly establishes that Staff Auditor costs are properly taxable, the Referee concluded that the Staff Auditor Costs should be reduced by half as an "equitable adjustment" to all parties.

Based on his finding that Respondents had violated Rules 4-1.7 (conflict of interest; current clients), 4-1.8 (conflict of interest; prohibited and other transactions), 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rule 5-1.2 (trust accounting records and procedures), the Referee recommended that Roth receive a fifteen (15) month suspension and Rousso a twelve (12) month suspension. 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 are clearly erroneous and without support in the record. Similarly, the Referee's recommendation that the Staff Auditor Costs be reduced was an abuse of discretion and must be reversed. Finally, 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'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.

Rule 5-1.1 of the Rules Regulating The Florida Bar unequivocally establishes that "[m]oney or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose." Moreover, when determining whether there has been a violation of Rule 5-1.1, this Court has previously concluded that "[p]ersistent shortages in [a] trust account[,] despite deposit of personal funds, payment of personal obligations from trust account, 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. 1993).

Throughout the course of these proceedings, Respondents have attempted to shift blame for their trust account shortages to the law firm's former "bookkeeper," Horigian, whom they allege forged trust account checks and ultimately fled the country. In actuality, however, this so-called bookkeeper was also Respondent's business partner in a number of business ventures. (TR1. 37-38.) Moreover, regardless of Respondents' contentions regarding Horigian, the fact remains that the firm's trust account sustained rampant shortages and millions of dollars went

missing as a proximate result of Respondents' blatant disregard for their responsibilities as partners in the law firm and their inadequate supervision of their so-called "employee", even after being put on notice of significant trust account shortages. (TR3. at 68-69.)

At best, Respondents' complete disregard of their trust accounting responsibilities during the time when Horigian was still employed by the law firm can be characterized as reckless, but this case is not a case of mere recklessness. By their own admission, Respondents were aware of the shortages in their trust account as early as the spring of 2008, but rather than immediately ceasing to transact business, retaining a CPA to conduct a full audit of their account, and bringing this matter to the attention of The Florida Bar, they continued to engage in the same pattern of behavior by depositing their own funds into the trust account, requesting loans from clients in an attempt to cover the massive shortages in their trust account and then failing to fulfill their repayment obligations to those clients. (TR1. at 56-57; TR2. at 70-71, 78, 170.)

The Referee's determination that Respondents had not engaged in a violation of Rule 5-1.1 (trust accounts), was largely based on his finding that Respondents had not "personally benefited" from the malfeasance. (A1; A2.) Nevertheless, a review of Respondents' own records conclusively reveals that significant sums of money were disbursed from the firm's trust account for the benefit of various

entities in which Respondents, together with Horigian and other individuals, had an interest. (TR1. at 47, 49; TFB Comp. Ex. 2.) Similarly, 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 claim that these funds were earned fees, and therefore, that the transfers were proper, the fact remains that these transfers were made at a time when Respondents knew there were insufficient funds in trust. (TR2. at 106; TR3. at 68-69.) Consequently, Respondents placed themselves in first priority position, despite having knowledge of the significant trust account shortages. Moreover, the funds that were requested from various individuals as loans were only used to cover the trust account shortages, and not to protect innocent clients or third parties, as Respondents would suggest. (TR2. at 170.)

In concluding that Respondents had not violated Rule 5-1.1 (trust accounts), the Referee was apparently persuaded by Respondents' arguments that their insurance company would not have paid out approximately $3 million dollars in claims had it found any evidence of malfeasance on their part, as well as the fact that Respondents had made deposits from personal funds into their trust account upon discovering the shortages. (A1; A2.) However, despite Respondents' best argument to the contrary, their own witness at the hearing on their Motions to

Dissolve the Emergency Suspension, an attorney who was retained by their insurance carrier to represent them in connection with the various malpractice claims filed against them, testified that the insurance company paid out on these claims *without* having conducted a full audit of the trust account. (TR1. at 95.)

Respondents' actions upon discovering the shortages provide further support for the conclusion that they not only benefited from the transgressions, but that they were complicit in the transgressions. Not only did Respondents fail to immediately retain a CPA to conduct a full audit of their account upon discovering the shortages or bring this matter to the attention of The Florida Bar, but they requested that the same individual whom they now allege stole from them, Horigian, "check things out." (TR1. at 407-408.) They then requested loans from clients and third parties, and deposited personal funds into trust in an attempt to cover the shortages without ascertaining its cause. (TR2. at 170.)

In reviewing a referee's findings of fact, this Court has determined that such findings carry "a presumption of correctness and should be upheld *unless clearly erroneous or without support in the record*." *The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla. 1986). If the referee's findings are supported by competent, substantial evidence, the Court is "precluded from reweighing the evidence and substituting [its] judgment for that of the referee." *The Florida Bar v. MacMillan*, 600 So.2d 457, 459 (Fla. 1992). In the instant case, the Referee's findings of fact

and not guilty finding as to Rule 5-1.1 are clearly erroneous, without support in the record, and therefore, must be reversed.

Both the Rules Regulating The Florida Bar and this Court's own case law clearly establish that the failure to use client funds for the specific purpose to which they were entrusted is a violation of Rule 5-1.1 of the Rules Regulating The Florida Bar. Specifically, Rule 5-1.1 defines the term "conversion" as "a refusal to account for and deliver over such property upon demand."[18] Additionally, this Court has previously determined that an attorney's actions in utilizing the same account for client trust funds and personal business ventures, as well as in borrowing funds from other clients to cover deficits when those business ventures experienced financial difficulty, constituted a violation of Rule 5-1.1. *See The Florida Bar v. Perri*, 435 So.2d 827 (Fla. 1983); *see also The Florida Bar v. Moxley*, 462 So.2d 814 (Fla. 1985); *The Florida Bar v. Rule*, 601 So.2d 1179 (Fla. 1992). Finally, unauthorized withdrawals from a trust account have been found to be violations of Rule 5-1.1. *See The Florida Bar v. Bailey*, 803 So.2d 683 (Fla. 2001).

In this case, The Bar presented evidence that Respondents ran multiple business ventures through their trust account and repeatedly used client funds for

[18] In this case, as a result of their transgressions Respondents failed to return monies owed to clients and other individuals, such as Yordi and Ferracioli, upon demand. (TR1. at 55, 61; TR2. at 175; TR3. at 52; TFB Comp. Ex. 2.)

purposes other than those for which they had been entrusted. (TR1. 34-36; TFB Comp. Ex. 2.) Additionally, the Referee properly recognized that Respondents' failure to follow proper trust accounting requirements and procedures resulted in rampant shortages in their trust account and the misuse of client funds. (A1; A2.) This finding and the evidence presented simply cannot be reconciled with the Referee's conclusion that Respondents did not violate Rule 5-1.1. In contrast, the foregoing facts and case law establish clearly and convincingly 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. *Vannier*, 498 So.2d at 898.

II. 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.

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." This Rule further provides that the taxation of costs in disciplinary proceedings is within the Referee's discretion. The Referee's award of costs will not be reversed, absent an abuse of discretion. *The Florida v. Nunes*, 661 So.2d 1202 (Fla. 1995). Administrative

costs, court reporter fees, and investigator fees are all taxable costs under Rule 3-7.6(q), and as such, The Bar sought to have those costs taxed to Respondents.

Rule 5-1.2 of the Rules Regulating The Florida Bar specifically authorizes the award of Staff Auditor Costs in a disciplinary matter. According to subsection (f) (costs of audit) of the same provision, "[a]udits conducted in any of the circumstances enumerated in this rule *shall be at the cost of the attorney audited* only when the audit reveals that the attorney was not in substantial compliance with the trust accounting requirements." In this case, the Referee found Respondents to be in violation of Rule 5-1.2, and Respondents took no issue with such finding. (A1; A2.) Consequently, there is no issue that The Bar is properly entitled to recover its Staff Auditor Costs in this matter.

In their Objection to The Bar's Request for Payment of Costs, Respondents argued that the costs The Bar seeks to collect in this matter are unsupported. Respondents further claimed that The Bar was merely "seeking reimbursement for a fixed cost," to-wit, the salary of its Staff Auditor. While recognizing that The Bar was properly entitled to recover its costs in this matter, and specifically, that Staff Auditor Costs are properly taxable under Rule 5-1.2(f), the Referee reduced the Staff Auditor Costs from $61,640 to $30,820. The Referee determined that the Staff Auditor Costs should be reduced by half as an "equitable adjustment" to all

parties.[19] (TR4. at 94.)

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.

In addition to being properly recoverable costs, there is simply no basis to conclude that The Bar's costs were "unnecessary, excessive, or improperly authenticated." In fact, the Referee made no such finding and Respondents

[19] The Referee's finding in this respect was based on Respondents' suggested inability to pay The Bar's costs. (TR4. at 94.) In addition to reducing the Staff Auditor Costs, the Referee also reduced the costs for the transcripts of Respondent's depositions by $200. (TR4. at 73.) The Bar does not seek review of this nominal $200 reduction. The Referee ultimately determined that Respondents should each be responsible for paying exactly half of the total costs assessed. (TR4. at 96.)

provided no such evidence. Moreover, in response to Respondents' Objection to the Bar's Request for Payment of Costs, The Bar provided a detailed summary identifying each item it seeks to tax as to both Staff Auditor Costs and Staff Investigator Costs. While Respondents did argue that The Bar's costs in this matter were "excessive," the fact is that Respondents' delay in producing all the records, 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 reviewing the reasonableness of The Bar's costs, this Court has previously concluded that Staff Auditor costs are properly 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, 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.* 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 the Staff Auditor Costs incurred in this matter.

The assessment of costs is a policy decision that involves a choice between imposing costs of discipline on an attorney who has violated the ethical rules or members of The Bar who have not. *The Florida Bar v. Lechtner*, 666 So.2d 892, 894 (Fla. 1996). The Bar's costs were neither unnecessary, nor excessive or unauthenticated. Moreover, inability to pay is not a basis for refusing to tax costs and the Rules clearly state that audit costs are recoverable where the audit results in a finding of misconduct. Rule 5-1.2, Rules Regulating The Florida Bar. For these reasons, the Referee erred in refusing to award The Bar all of the Staff Auditor Costs in this matter and his recommendation in this regard should be reversed.

III. 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 SOLICITNG LOANS FROM CLIENTS AND OTHER INDIVIDUALS, AND THEIR FAILURE TO COOPERATE WITH THE FLORIDA BAR'S INVESTIGATION.

This Court's scope of review over disciplinary recommendations is broader than that of findings of fact because it is the Court's responsibility to order the appropriate discipline. *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989). *See also* art. V, § 15, Fla. Const. "The Supreme Court shall have exclusive

jurisdiction to regulate … the discipline of persons admitted [to the practice of law]." The Court will generally not second-guess a referee's recommended discipline, so long as it has a reasonable basis in existing case law and in Florida's Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Temmer*, 753 So.2d 555 (Fla. 1999). A fifteen (15) month suspension and a twelve (12) month suspension were recommended by the Referee for Respondents Roth and Rousso respectively. (A2.) This recommended discipline has no reasonable basis in case law and permanent disbarment is the appropriate sanction.

The Florida Bar established by 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 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." (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 funds from their own clients, 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 deposited into their own law firm's trust account, Respondents claimed that they did "not know" who these individuals were. (TR2. at 82.) There is no 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 claims by Yordi and Ferracioli. (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. 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. (TR2. at 99.)

The presumption in cases involving misappropriation of client funds is disbarment, despite the existence of mitigating factors. *The Florida Bar v. Graham*, 605 So.2d 53 (Fla. 1992). Even in cases where clients did not sustain any loss, this Court has routinely concluded that disbarment is the appropriate sanction, 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). While the presumption of disbarment is exceptionally

weighty in cases where the misappropriation is intentional, the Court has also concluded that "intent, as an element for disciplining an attorney for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, is proven by establishing that the conduct was *deliberate or knowing*." *The Florida Bar v. Barley*, 831 So.2d 163 (Fla. 2002).

In this case, the Referee concluded that Respondents' conduct in continuing to represent clients and to take their money into their trust account at a time when they knew that the account was seriously underfunded, was dishonest, fraudulent, deceitful, and a type of misrepresentation. (A1; A2.) Moreover, there is no question that Respondents' actions in attempting to cover the massive shortages in their trust account, as well as their complete lack of cooperation with The Bar's requests for information, were both "deliberate" and "knowing" acts, thus establishing the necessary element of "intent." *Id.*

Although the case law on permanent disbarment is limited, there are a number of cases involving similar facts to those presented in this case where the Court has concluded that disbarment is the appropriate sanction. In *The Florida Bar v. Graham,* 605 So.2d 53 (Fla. 1992), the Court concluded that an attorney's misconduct involving the misappropriation of client funds and misrepresentations to The Florida Bar warranted disbarment.

Graham was charged with twelve counts involving theft of client funds,

misrepresentations to The Bar, and trust account procedure violations. *Id.* The Referee found that Graham had misappropriated settlement proceeds pertaining to a client, as well as made misrepresentations to The Bar in the course of the disciplinary hearing regarding the disposition of client settlement funds. *Id.* at 54. In addition to the foregoing violations, the Referee found that Graham had issued checks, which had been dishonored by the bank for insufficient funds, and commingled his operating funds with client trust funds. *Id.* As a result of these transgressions, The Bar's audit of Graham's trust account revealed shortages of $15,999.40, $16,043.49, $30,503.13, and $30,025.25. *Id.* In addition to these shortages, the Referee found that Graham had failed to follow minimum trust accounting records and procedures. *Id.* Finally, the Referee found that Graham had improperly allowed his wife, a non-lawyer, access to the operating account as a signatory. *Id.* The wife had then issued checks that had no nexus to Graham's practice of law. *Id.*

Like Graham, Respondents in this case not only failed to follow proper trust accounting records and procedures, but they similarly made unauthorized use of client funds and issued checks against insufficient funds in their account, resulting in massive shortages in their trust account, far exceeding the amount of the shortages in *Graham.* Additionally, as in Graham, Respondents gave full access to their account to a non-lawyer, who in turn issued checks that had no correlation to

Respondents' law practice or were issued against insufficient funds in the account.

Although the Referee in the instant case did not find that Respondents' conduct in failing to account for the disposition of missing funds or to provide The Bar with requested records amounted to misrepresentations, the Referee did find that 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.) Further, the Referee found 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.) Thus, like Graham, Respondents' misconduct not only involved trust account violations, but also conduct involving dishonesty, fraud, deceit, or misrepresentation.

The decision in *Graham* is significant not only because it is procedurally and factually analogous to the instant case, but also because the Court determined that disbarment was the appropriate sanction even where the attorney, much like Respondents, lacked any prior discipline and had taken steps to cover the trust account shortages. *Graham*, 605 So.2d at 53. Like Respondents, Graham borrowed money and used fees from closed cases in an attempt to cover the shortages. *Id.* at 54. The Court did not find these efforts to constitute sufficient

mitigation, finding that the case involved two of the most serious charges that could be brought against an attorney, misuse of client funds and lying. *Id.* at 55.

In a second case, *The Florida Bar v. Brownstein*, 953 So.2d 502 (Fla. 2007), this Court similarly concluded that disbarment was the appropriate sanction for an attorney's misuse of client funds, even though the attorney had been suffering from clinical depression and lacked any prior discipline. The request for an audit in this case was predicated upon a complaint filed by Brownstein's partner, who alleged that Brownstein had failed to disburse certain client funds entrusted to him following a settlement in the client's case.[20] *Id.* at 504.

At the final hearing, The Bar presented evidence that Brownstein had made use of client funds for his personal use. *Id.* at 506. Additionally, when asked about the disposition of the settlement funds, Brownstein lied that he had not yet received the funds, knowing that this was dishonest and that he had already made use of those funds. *Id.* at 510. The Bar further presented evidence that Brownstein had commingled funds from his operating account with trust account funds. *Id.* at 506. Finally, like in the instant case, Brownstein's failure to maintain required or appropriate trust account records led to his failure to produce records for The Bar after The Bar served him with a subpoena. Notably, the Court in *Brownstein* found

[20] In this case, the original Bar complaint was similarly predicated upon a complaint filed by a client who alleged that Respondents had failed to satisfy a mortgage following the closing in a real estate transaction.

the attorney's failure to produce records to constitute obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders. *Id.* at 510. The Court then considered this factor to be an aggravating circumstance when determining the appropriate level of discipline. *Id.*

The decision in *Brownstein* is significant because it again demonstrates this Court's willingness to impose disbarment on an attorney who engages in similar misconduct to that presented in this case, even in the presence of mitigating factors. Like Respondents, Brownstein asserted that a lesser sanction was warranted for his misconduct because his misconduct did not harm any client, law firm, or financial institution. Nevertheless, the Court rejected this argument and ultimately concluded that disbarment was warranted, not only because of the seriousness of the misconduct, but also because of the extreme detriment to the public's confidence in members of The Bar. *Id.* at 511.

In *The Florida Bar v. Martinez-Genova*, 959 So.2d 241 (Fla. 2007), this Court again concluded that disbarment was the appropriate sanction for an attorney who, *inter alia*, misappropriated third-party funds and failed to maintain proper trust accounting procedures, even where the attorney suffered from emotional or personal problems.[21] The Bar presented evidence of Martinez-Genova's pattern of

[21] In addition to these violations, The Bar's complaint in *Martinez-Genova* involved a second count arising from the attorneys' two arrests for cocaine possession. (TR1. at 24, 175; TR2. at 168.)

receiving third-party funds and then disbursing them to herself or to a particular client whom she had represented in a loan commitment. *Id.* at 244. Based on the evidence presented, the Referee concluded that, despite the expectation of trust placed on her by her clients, Martinez-Genova "had a pattern of receiving third-party funds and simultaneously withdrawing and disbursing from those funds." *Id.* at 245. Additionally, the Referee found that Martinez-Genova had failed to use third-party funds for their intended purposes and that she had "willfully ignored her responsibilities as an attorney during the period in which she misappropriated money from third-parties." *Id.*

After the Referee recommended that Martinez-Genova be sanctioned by a three-year suspension, The Florida Bar appealed. *Id.* at 246. On appeal, this Court concluded that the Referee's recommendation of suspension was insufficient for an attorney's misuse of client funds. *Id.* The Court agreed with the Referee's findings that Martinez-Genova had "willfully ignored her responsibilities as an attorney," and as a result, her misconduct was "not analogous to negligent misappropriation." *Id.* at 247. On this basis, the Court ultimately concluded that disbarment, and not suspension, was the appropriate sanction.[22] In the instant case,

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[22] Although *Martinez-Genova* involved the additional violations relating to the attorney's arrests for cocaine possession, the decision is significant because it again demonstrates the Court's willingness to disbar an attorney who engages in trust account violations, even in the presence of mitigating factors. Moreover,

Respondents' actions in soliciting loans from their own clients in an attempt to cover the shortages in their trust account and then failing to repay those clients, as well as their actions in transferring fees from their trust account to their operating account at a time when they knew there were shortages in the trust account, similarly amount to more than mere "negligent misappropriation." Like Martinez-Genova, Respondents' acts were willful and intentional.[23]

Although the case law on permanent disbarment is more limited, there are cases involving similar facts to those presented in this case where the Court

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while the misappropriations in Martinez-Genova were significant, they pale in comparison when compared to the millions of dollars in shortages presented in this case.

[23] In addition to the foregoing cases, there are a number of other cases involving similar facts to those presented in this case where the Court again concluded that disbarment was the appropriate sanction. In *The Florida Bar v. Ross*, 417 So.2d 985 (Fla. 1982), the Court concluded that disbarment was the appropriate sanction for an attorney who made misrepresentations in accounting to a client regarding the disposition of funds held in trust, converted client money to personal use, failed to apply client money for its intended purpose, used funds held in trust to meet personal obligations, and maintained inaccurate and incomplete trust account records. Similarly, in *The Florida Bar v. Barley*, 831 So.2d 163 (Fla. 2002), the Court concluded that an attorney's conduct in manipulating a client into leaving trust funds in the attorney's control, failing to return those funds to the client when requested, and then providing different reasons to the client as to why the funds could not be returned, was "intentional" as an element for disciplining the attorney for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Finally, in *The Florida Bar v. Tillman*, 682 So.2d 542 (Fla. 1996), the Court concluded that, even where the attorney had no prior discipline and a short period of practice, his misappropriation of funds, commingling of client and personal funds, and failure to follow proper trust accounting rules warranted disbarment.

concluded that permanent disbarment was the appropriate sanction.[24] In *The Florida Bar v. Massfeller*, 170 So.2d 834 (Fla. 1964), an attorney was permanently disbarred for misappropriating $10,145 held in trust as guardian for an incompetent. The attorney admitted to the wrongdoing, but claimed that he was immune from discipline because he had cooperated with The Bar when he testified at a prior hearing on an order to show cause. In determining that permanent disbarment was the appropriate sanction, the Court noted that the attorney was unrepentant and had made only token restitution. Finally, in *The Florida Bar v. Mechlowitz*, 238 So.2d 643 (Fla. 1970), an attorney was permanently disbarred after he failed to account for a mere $17,000 held in trust.

This Court has repeatedly held that the purpose of lawyer discipline is three-fold. *The Florida Bar v. Lord*, 433 So.2d 983, 986 (Fla. 1983). First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified

[24] This Court has generally concluded that "permanent disbarment is warranted [] where the conduct of a respondent indicates that he is beyond redemption." *The Florida Bar v. Carlson*, 183 So.2d 541, 542 (Fla. 1966). Respondents' conduct in this case unequivocally establishes that they are "beyond redemption." As two highly experienced attorneys who maintained a lucrative practice, they were not only reckless in their blatant disregard for their trust account responsibilities, but at a time when they knew of the massive shortages in their trust account, they consciously chose to continue in the same pattern of misconduct by soliciting loans from their own clients in an attempt to cover those shortages and then failing to fulfill their obligations to those clients, as well as by failing to cooperate with The Florida Bar's investigation or to account for the disposition of funds held in trust.

lawyer; second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. *Id.*

The conclusion that permanent disbarment is the most appropriate sanction based on the extensive evidence and findings in this case is further supported by Florida's Standards for Imposing Lawyer Sanctions. Specifically, Standards 4.1 (failure to preserve the client's property), 4.31(i) (failure to avoid conflicts of interest), 5.11(f) (failure to maintain personal integrity), 6.11(b) (false statements, fraud, and misrepresentation), and 7.1 (violations of other duties owed as a professional) are applicable to the facts presented in this case. There is simply no question that Respondents intentionally and knowingly converted client funds. At a time when they were aware of the massive shortages in their trust account, they knowingly chose to continue in their same pattern of misconduct by soliciting loans from their own clients and other individuals in an attempt to cover the shortages, and then failing to repay those clients and other individuals. (TR2. at 170; TR3. at 52, 59.) Rather than immediately conducting a full audit of their trust account and bringing this matter to the attention of The Florida Bar, Respondents made a conscious decision to continue in the same pattern of misconduct.

Similarly, Respondents' conduct in soliciting loans from their own clients to

cover the trust account shortages, without disclosing the intended use of those funds to the clients, was not only a direct conflict of interest, but was also dishonest, fraudulent, and deceitful. (A1; A2.) 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.) The Referee further concluded that The Florida Bar presented "galling evidence that Respondents distributed earned trust money to the firm's operating account ahead of clients." (A1; A2.)

Moreover, "[d]espite a conflict of interest between Respondents and their clients as to how and when clients would receive preference in payment, [] Respondents continued to represent them." (A1; A2.) The Referee ultimately concluded that "[i]t 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 [when] Respondents knew that the trust account was seriously underfunded." (A1; A2.) Clearly, Respondents' conduct was a violation of their duty as professionals and members of The Florida Bar. Standard 7.1, Florida's Standards for Imposing Lawyer Sanctions.

Although the Referee did not specifically find the following aggravating

factors, The Bar did present evidence of these factors further supporting the conclusion that permanent disbarment is the appropriate sanction: 9.22(b) (dishonest or selfish motive), 9.22(c) (a pattern of misconduct), 9.22(d) (multiple offenses), 9.22(e) (bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency), 9.22(g) (refusal to acknowledge wrongful nature of conduct), and 9.22(l) (substantial experience in practice of law).

Additionally, Respondents' actions in attempting to cover the massive shortages in the trust account by soliciting funds from Yordi (an aggravating factor which the Referee did specifically find) and others, and their complete lack of cooperation in failing to provide The Florida Bar with reliable trust account records reflecting the receipt and disbursement of specific funds, as well as contact information for the various individuals or entities who made loans to the firm, were both "deliberate" and "knowing." It is these intentional acts and lack of cooperation that ultimately take the case to a level of permanent disbarment.

"A referee's findings of mitigation and aggravation are … presumptively correct and upheld unless clearly erroneous or without support in the record." *The Florida Bar v. Del Pino*, 955 So.2d 556, 560 (Fla. 2007) (citation omitted). Likewise, "a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the

evidence." *Niles*, 644 So.2d at 506-07 (Fla. 1994). However, "unlike the referee's findings of fact and conclusions as to guilt, the determination of the appropriate discipline is peculiarly in the province of this Court's authority." *The Florida Bar v. O'Connor*, 945 So.2d 1113, 1120 (Fla. 2006). As it is ultimately this Court's responsibility to order the appropriate punishment, this Court enjoys broad latitude in reviewing a referee's recommendation. *Anderson*, 538 So.2d at 852.

In this case, the recommended discipline does not comport with existing case law. Based on the foregoing facts and case law, it is The Bar's position that permanent disbarment is the appropriate sanction.

CONCLUSION

In consideration of this Court's broad discretion and based upon the foregoing reasons and citations of authority, 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 Initial 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 Initial Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

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