The Supreme Court of Florida

(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JEREMY W. ALTERS,

Respondent.
_____/

Case No.: SC14-100

TFB File No.: 2012-70,119 (11P)

RESPONDENT, JEREMY ALTERS', RESPONSE TO PETITION FOR REVIEW

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SYMBOLS AND REFERENCES

For convenience, references to the record is generally consistent with the Bar's approach. Reference to the Report of Referee is by the symbol "(ROR__)," to the trial transcript by "(T.__)," to the Appendix to this brief by "(A._)," to transcripts other than that of the trial by "(T. [date] __)," to the Bar's brief by "(Br._)," and to the pleadings and motions by "(Index _)." As all exhibits are differentiated by number (Bar) versus letter (Alters), they will simply be referenced by their number or letter.

All emphasis is ours unless otherwise indicated.

INTRODUCTION AND EXPLANATION FOR ALTERNATIVE STATEMENT OF THE CASE AND FACTS

The disciplinary arm of The Florida Bar has acquitted itself well over the years in firmly but fairly prosecuting lawyers. This case, however, is not its finest hour.

> Just as we expect prosecutors in criminal cases to pursue an overarching goal of justice, and not just the zealous pursuit of convictions, I expect bar counsel to pursue an overarching goal of justice, and not just the zealous pursuit of discipline.

In re. Dianne F. Dillon, 2004 WL 5215018 (Mass. 2004)(Sosman, J.).

"The Court has made clear that the Bar has an obligation to process disciplinary cases in a fair and just manner." *Florida Bar v. Kane,* 202 So.3d 11, 19 (Fla. 2016).

The gravamen of this case is that funds were improperly taken out of the trust account of Alters, Boldt, Brown, Rash & Culmo ("ABBRC") and used for firm operations. The question was whether the Bar proved that the Respondent, Jeremy Alters ("Alters"), was responsible. The Referee found that it did not.

In its investigation and prosecution of Alters, the Bar did not pursue the overarching goal of justice or proceed in a fair and just manner. Believing it had big game in its cross-hairs, it hastily formulated a narrative of Alters' guilt and ignored all evidence that contradicted its theory, including admissions by Alters' then law partner, Kimberly Boldt ("Boldt"), that **she** authorized over $1 million in improper trust account transfers for which the Bar blamed **Alters**. Boldt worked in tandem

with the firm's Vice President of Finance and Alters' then brother-in-law, Marc Salpeter ("Salpeter") to effect those transfers.

The Referee had a front row seat for five (5) years and patiently and methodically devoted hundreds, if not a thousand hours to this case. She has now **twice** found that Alters neither authorized nor knew about **any** of the improper trust account transfers.[1] The Referee was also bewildered by the Bar's unequal treatment of Alters and Boldt. It never pursued Boldt - a law school classmate of Bar counsel, (T.1749, 1753-54), who was on a first name basis with him, (ROR 62), despite claiming they hadn't known each other - with the same vigor, ultimately dismissing its case against her despite overwhelming evidence of her guilt.

The Bar fails in its responsibility to "provide a statement of facts and to interpret the evidence in the light most favorable to sustaining the conclusions of the trier of fact." *Hall v. Hall,* 190 So.3d 683, 684 (Fla. 3d DCA 2016). Its statement omits key facts and can best be described as largely a list of what it hoped the facts were, rather than what they were found to be. This Court has repeatedly stated that "[t]he referee is in a unique position to assess the credibility of witnesses, and [the

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[1] The Referee presided over Alters' 2012 emergency petition for reinstatement to the Bar, numerous complex motions in this matter, the equivalent of a four week trial during which 24 witnesses testified and over 100 exhibits were introduced, and a sanctions hearing. She dedicated seven months for preparation of her 71 page Report.

referee's] judgment regarding credibility should not be overturned absent clear and convincing evidence." *Florida Bar v. Karten*, 829 So.2d 883, 888 (Fla. 2002).

The Referee found that the Bar's three key witnesses, including Boldt and Salpeter, were not credible and that the purported text message evidence supplied to the Bar by Salpeter, and on which it heavily relied at trial, was fabricated and unreliable. Yet, the Bar relies on their testimony and the adjudicated fake evidence in its statement here. Accordingly, Alters offers his own Statement of the Case and Facts consistent with the findings of the Referee in her 71 page report.

STATEMENT OF THE CASE AND FACTS

The Referee's Report is the culmination of two separate but inextricably linked proceedings: (1) an emergency suspension of Alters secured by the Bar *ex parte*, which was dissolved by this Court on January 25, 2012 at the Recommendation of the Referee following an evidentiary hearing (A.72, 92), and (2) this proceeding on the merits which the Bar initiated in January 2014.

THE FACTS

ABBRC's Origin

Jeremy Alters was a young and highly successful attorney. (Ex.53 at 209-13; T.3367-8). In a relatively short time, he had amassed an impressive courtroom and settlement record, handling medical malpractice and catastrophic injury cases. (Ex.53

at 209-13) However, his read of the marketplace was that the future was not in injury work. (*Id*. at 214.) He was looking for an alternative model and formed ABBRC in 2007. Its shareholders included Alters and Boldt. (*Id*. at 208, 214; T.3688.) They had been close friends. (Ex.53 at 222.) ABBRC's vision was to form a niche practice in class action and mass tort litigation. (*Id*.) Early in its history, Alters filed the first Chinese drywall mass tort lawsuit in Florida. (T.3736-37.) He also filed the first bank overdraft class action lawsuit against Bank of America. (Ex.53 at 214-18.) Both became significant matters, the latter of which was spearheaded by ABBRC.

ABBRC was initially seeded with over $2.5 million from Alters. (T.3693-94; Ex.53 at 275.) No other shareholder contributed financially at the start. (T.3693-94.) ABBRC also had a credit line of $4 million, not unusual for plaintiffs' firms. (T.902.) In April, 2009, after the bank crisis, the law firm's bank unexpectedly cut its credit line to $2 million. (Ex.53 at 219-211.) Alters subsequently reduced the firm's exposure on that credit line to the new $2 million limit by December 2009 (by way of loans and use of personal funds). (*Id*. at 220-21; T.3870.)

Boldt is Made Managing Partner of ABBRC

As Alters became more involved in business development, as lead counsel in the bank overdraft litigation, and in overseeing around 500 Chinese drywall cases, it was too much for him to continue to run the firm's day to day operations. (*Id*. at

221; Ex.53 p.273.) He elected to make Boldt managing partner of ABBRC because "she was the person I trusted the most." (*Id*. at 222.) On September 28, 2009, Boldt sent an email blast on behalf of Alters to the firm employees to formally announce ABBRC's management structure. It stated, in part, as follows:

> First, on the structural side, Kimberly [Boldt] will now be the firm's managing partner in order to help create consistency and alleviate the need for me [Alters] to fill that role. I cannot thank her enough for her willingness to do so. She will oversee the firm's operations from its finances to its day to day operations to the movement and handling of cases. This will help free me up to work on business development, cases, trials, networking, politics, etc., etc... (Ex. 3.)

Boldt told others that she was in charge of managing the firm. Matthew Moore, then a law clerk, but soon to become ABBRC's newest associate (he graduated first in his law school class), had been working closely with Boldt. They were also friends. (T.3478, 80.) Boldt told him around mid August 2009 that "she was basically going to run the firm."(T.3482, 3489) Cindy Russell, then a paralegal, testified that in August or September [2009] that, "Boldt told us in a meeting that we were to go through her for anything that might need Jeremy's consultation, that we were not to contact Jeremy directly, we were to go through her for everything." (T.3181.)

In her role as managing partner, Boldt inquired about correct trust account procedures. For example, in October 2009, Moore emailed Boldt the results of his inquiry of the Bar's ethics hotline - made at her behest - regarding the proper way to

pay trust account funds to outside vendors. (T.1487-88; Ex. NN.) Boldt remained the firm's managing partner through late June, 2010. (T.3493, 3851, 3860.)

The Bar claims that Boldt's tenure and responsibility as managing partner of ABBRC was short lived and minimal and that Alters made all financial decisions. Its narrative, however, is at odds with the Report, testimony, evidence and inferences supporting the Report, because it is based almost exclusively on the testimony of three self-interested witnesses: Boldt, Marc Salpeter and Cindy Orlinsky.[2] Salpeter, as noted earlier, was the firm's Vice President of Finance and Alters' then brother-in-law. Orlinsky was the firm's executive vice president. (T.116.) Both went to work with Boldt after they left ABBRC. (T.114-16, 1530.) After he was fired by Alters, Salpeter helped Boldt set up her new law firm's trust account. (T.1659.) Orlinsky, a close friend of Boldt's, went into business with her, handling disability claims. (T.114-16, 1530.) The Referee found all three were **not credible**.

The Referee succinctly put it: "The Court did not find the testimony of Ms. Boldt or Cindy Orlinsky to be credible." (ROR 64.) Among other things, Boldt was unable/refused to authenticate any documents that incriminated her, but was totally

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[2] The Bar cites to the testimony of several others as well, but their testimony is notable for either a lack of knowledge or merely based upon supposition and assumption, which, by definition, is not clear and convincing evidence.

able to authenticate documents in other areas. (*Id*.) Similarly, as for Salpeter: "[t]he Referee did not find the testimony of Mr. Salpeter to be credible. He contradicted himself numerous times and parts of his testimony were contradicted by Ms. Boldt, the Respondent [Alters] and the other witnesses." (ROR 62.) The Referee also found that Salpeter tampered with and destroyed evidence and painstakingly altered bank documents to hide the trust account problem. (ROR 62-3.)

The Referee found that the 34 documents Alters introduced in cross-examination of Boldt showed her "giving direction on financial matters of the firm including settlement disbursements, loan funds, payment of loans, rent payments, overdue bills, short lists for payment and releasing funds from the firm's trust account. [Alters] was not included or copied on any of those emails." (ROR 10.) Boldt's sorry performance when confronted with them proved beyond doubt that she was totally untruthful when she testified that her tenure as managing partner was minimal and ended on January 5, 2010, (T.920). It also helped convince the Referee that all three of the Bar's key witnesses were untruthful about Boldt's alleged lack of involvement with firm finances through June 2010.[3]

[3] Key parts of the devastating cross-examination of Boldt may be found at T.1763-1892.

The Bar also cites to Boldt's false testimony that her responsibilities as managing partner ended on January 5, 2010, (Br. at 11), when she was proven to have made important financial decisions well into the Spring of 2010. Boldt even signed for a $1.5 million loan to ABBRC in April, 2010, long after she claimed her tenure as managing partner ended. (T.1466-74; Ex. LL.)

Finally, ABBRC's Operations Handbook, Version 1.0, January 2010, listed Alters as the firm's "Founder/Partner" and Boldt as its"Managing Partner." (Ex. Q.) It was circulated in January 2010, (T.3715), after the time Boldt falsely claimed that she had already relinquished her managing partner role.

Boldt Authorizes over $1 Million in Improper Trust Account Transfers in January and February, 2010

In late 2009, Thomas Culmo, a partner in ABBRC, settled the "M" case for $8.5 million.[4] Secretly, however, he had made plans to leave the firm. In conjunction with the settlement, Culmo had the client sign a retainer with his new law firm while he was still with ABBRC and after the case had settled. He also signed a closing statement on behalf of both his new firm and ABBRC without authority, and had the money sent to his new trust account.[5] (T.1692-1714.) When they found out, Alters

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[4] Because the settlement is confidential, the client is referred to as "M."

[5] The Bar overlooked Culmo's misconduct, instead securing him as a witness.

and Boldt were furious and demanded that the funds be transferred to the ABBRC trust account. (A.116-17.) After much back and forth, Boldt believed that Culmo had committed to do so. In fact, he did not follow through.[6] (A.150-52.)

In mid-January 2010, Boldt traveled with several other lawyers, including Matthew Moore, to St. Croix for a 2 week trial. Moore testified that Boldt was in daily contact with Salpeter (who physically executed all of the transfers) by text and phone while in the car to and from court, and by email while in court. (T.3487-89.) Between January 12 and February 9, 2010, Boldt authorized Salpeter to make 20 transfers (totaling $1,102,000) from trust to operating to pay bills, in reliance on Culmo's false promise to return the settlement funds. The trust funds actually moved by Boldt were for other matters, predominantly hold backs for medical liens on client recoveries that had not yet been resolved, and third party case hold back costs, that had been in trust for a while. (Ex.53 p.265; A.165.)

The February 9, 2010 Meeting Among Rogow, Alters and Boldt

The following key facts were omitted by the Bar: When Alters returned from an out of town meeting, Salpeter forwarded him an email from the bank that the

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[6] Boldt had trusted Culmo because they were having an affair. (T.3759-3764; Ex. 53 pp. 260-63.)

firm's trust account balance was very low. He hastily called a meeting with Boldt at ABBRC's office that day. (T.3769-70; Ex.53 pp.259-60.) Attorney Bruce Rogow was special counsel to the law firm and happened to be at the office. Alters asked him to join the meeting. (T.3617.) Rogow, a former law school dean, constitutional law professor and appellate specialist, testified at both the hearing on proceedings to lift Alters' suspension in January 2012 and the trial. (Ex.53, pp.370-83; T.3614-60.)

Rogow testified that at the February 9, 2010 meeting, "Jeremy was, as I had said before [in January 2012], ashen-faced, he was just kind of in shock." (T.3617.) Boldt explained that she was trying a case in the Virgin Islands and she thought that Culmo had transferred fees in settlement of a case to the ABBRC trust account, but, in fact, the money had not come in. Nonetheless, checks were paid from trust under the assumption that the earned fees were there. (T.3618; Ex.53 p.372.) Boldt confirmed to Rogow that she is the one who authorized the transfers. Rogow testified: "Yes, I mean, it was clear she was covering the managerial role at the firm at that point, but it clearly was unintentional, a mistake, and I felt for both of them." (T.3618; Ex.53 p. 374.) Rogow's impression is that Alters had just found out about the transfers that day. (T.3618; Ex.53 p. 374-75.) Alters' testimony of what occurred at the meeting was consistent with Rogow's. (T.3769-74.)

Rogow instructed Boldt to draft a letter to the Bar explaining what happened. (T.3619.) She did and emailed it to Alters on February 15, 2010. The next day Alters sent an email to Rogow saying, "Kimberly sent me a good draft. I will edit this afternoon and call you tonight if you are available." Alters then edited the draft (his edits are all in capital letters), (T.3783; A.155-58; Ex. GGG), which he sent to Boldt on February 17 with an email stating: "Here are my revisions. I want to send to Bruce." (A.154.) Boldt made further revisions and sent the draft to Alters who forwarded it to Rogow, also on February 17. (A.169-70.)

All drafts of the letter, which never went out, contained the following language, with slight variation, admitting **Boldt approved the transfers** from trust to operating:

> Ms. Boldt would routinely communicate with the firm's V.P. of Finance, Marc Salpeter, regarding transfers from the trust account to the operating account. Many of these communications would occur via text message.[7] At this time Ms. Boldt believed that the transfer of the [M case] settlement funds and attorneys' fees had occurred based on a discussion with Mr. Alters the prior week. As a result, on January 12, 2010, she approved a transfer from the trust account to the firm's operating account in the amount of $110,000. The text message generically requested approval for the transfer of funds from the trust

[7] Her use of texts to authorize the transfers was significant because Salpeter claimed he had no texts prior to February 8, 2010 (a pivotal date) due to lack of phone memory. (T.235.) Alters' expert, however, found no technical reason for missing texts as Salpeter's phone had plenty of memory, so it was intentionally deleted. (T.3305-09; ROR 16-17). The deletion was obviously to destroy evidence of Boldt's guilt.

account to the operating account and, as noted, approval was given.[8] (A.151,156, 163.)

Boldt's letter outlined another 19 "Boldt approved ...transfers"from trust to the operating account. (A.151-52, 156-57, 163-65.) At trial she denied authorizing or knowing about any of them, (T.1192), until August 2011, when she claims she learned that Alters' former nanny was turning him into the Bar.[9] (T.981.)

When presented with these emails and the draft letters later in her testimony, Boldt refused to authenticate them, but at the same time admitted to drafting five paragraphs of the letter. (T.1063, 1830, 1843.)[10] Boldt had an office computer, laptop

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[8] Despite the clear language of the drafts, Bar counsel argued in closing that "Ms. Boldt did not authorize any improper transfers, rather, based on an alleged misunderstanding, Ms. Boldt authorized the payment of bills." (T.4034.) He said the "letters said that she authorized Mr. Salpeter to pay bills, not to make improper transfers." This is one of many efforts by the Bar to protect Boldt.

[9] But see Exhibit K, where Rogow, on February 11, 2010, discusses the transfers, plural.

[10] Those paragraphs involved Culmo's promise to transfer funds to the firm. (T.1677-79.) It proved she was lying in her consent judgment, where she claimed she only knew about one transfer by Salpeter (and she was even inconsistent about that). (T.1763-1807; 1792-93.) If all she knew about was a single erroneous transfer by Salpeter of $110,000, there would be no reason to even bring up Culmo because his issue was only relevant to explain the $1 million in transfers. Her draft of even those paragraphs therefore proved her knowledge of the 20 improper transfers (that she authorized). Moreover, Salpeter testified that Boldt helped him prepare a notebook chronicling the trust accounting problems and gave him direction. (T.605.) Her input would have been unnecessary if she was aware of only one improper transfer.

and cell phone, and would have received the emails on all three; Boldt had no problems with receiving or sending emails. (T.1051-54.) The Referee found Boldt able to authenticate numerous emails presented to her, "but could not [refused to] authenticate any emails that contained incriminating evidence against her with regards to the self-reporting letter and the improper transfers." (ROR 64.) The Referee found that Boldt was not credible. (*Id*.) Boldt's performance had a hugely negative impact on the Referee's opinion of her.[11]

In addition, Cindy Russell, a paralegal who had loaned money to the firm, was called into the meeting room after the principal discussions concluded. She testified that Boldt looked "crestfallen" and told her there would be a delay in repayment of her loan because she [Boldt] relied upon Tom [Culmo] and made a mistake, but she was going to fix it. Russell suspected it was a trust account issue, but Boldt did not state that explicitly. (T.3172-74.) This testimony further bolstered the fact that Boldt had lied in denying she authorized the transfers and her lack of knowledge of them.

Draft Self-Reporting Letter and Forensics

[11] The cold record cannot convey how truly uncomfortable and non-believable Boldt was on the witness stand, when it was so obvious she was being untruthful and evasive in responding to simple questions with obvious answers. (T.1763-1892.)

For years the Bar sought to protect Boldt and justify its blind pursuit of Alters. Its effort included supporting Boldt's denial that she authored the draft self-reporting letter. Yet, its own auditor, Thomas Duarte, concluded in October 2012 that he believed Boldt authored that draft letter admitting her fault. (T.2456). Despite this, in opening statement the Bar told the Referee that, "the evidence will show that Respondent [Alters] was responsible for authorizing each and every one of the 20 improper transfers from January 12, 2010 through February 9, 2010." (T.20.) Duarte also testified on direct examination that he had no evidence who authorized those transfers, which at once contradicted the Bar lawyer's opening statement, ignored the overwhelming evidence proving it was Boldt, and contradicted his own conclusion in October 2012. (T.2349.)

Because Boldt denied that she drafted the self-reporting letter, both sides hired computer experts. The Referee found that, "there is no doubt by either of the forensic experts that the chain of emails that indicated Ms. Boldt had knowledge of several [actually 20] improper transfers was authentic." (ROR 64.) The Bar's own computer expert admitted that the metadata showed she created the draft. (T.3116-17.)

Polygraph Results

Determined to prove his innocence at the earliest opportunity, Alters took a polygraph test and forwarded the results to the Bar on November 14, 2011, **before** it

petitioned to suspend him *ex parte* on December 23, 2011.[12] (Comp. Ex. EEE; A.126-135.) Alters was asked several questions, the substance of which was whether he knew funds were taken out of trust to cover his personal expenses between January and October 2010. He answered NO.[13] The polygrapher, John Palmatier, a world renowned expert, (T.3414), testified at the emergency suspension hearing that there was a probability of 99.7% that he was truthful. (Ex.53 p.383-94.)

After the Bar's second auditor, Duarte, issued a report in October 2012, where he noted an additional 6 questions he thought should have been asked, Alters insisted on taking another 2 tests of just the Bar's questions. (T.2847-2856.) He again passed, this time to a 99.9% certainty, an even higher score than before. Both tests scored at the highest end of the spectrum for truthfulness. Palmatier again testified at trial and his report was admitted into evidence. (T. 3410-25; Ex. JJJ.)

Alters' Role when Boldt was Managing Partner

A central theory of the Bar's case was that because Alters had voting control, he was responsible for everything, even when Boldt was managing partner. But the

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12 Polygraph results are admissible in bar disciplinary proceedings. *Florida Bar v. Pavlick,* 504 So.2d 1231 (Fla. 1987).

13 Those discrete questions were asked because that was the Bar's primary concern that prompted it to consider the emergency suspension route. (A.126-35.)

facts proved otherwise, as found by the Referee. The whole point for the management structure was to free Alters from day to day issues. Boldt had access to all bank records and, in fact, spoke with Salpeter all the time about the bank accounts. (T.3902.) In fact, when the bank sent its email on February 9, 2010 alerting Salpeter of the low trust account balance, Alters was **not** copied. (Ex. 17.)

The Referee was unpersuaded by the Bar's effort to portray Alters as a "know all" who solved operating account needs with improper trust transfers. Alters testified that his knowledge of any operating account potential overdrafts did not equate, ever, to trust account transfers. "I had no expectation that was going to occur." (T.3884-85.) The Referee believed him.

The Bar also mis-characterizes by omission the testimony of Carlos Perez, the bank officer overseeing ABBRC's accounts. On direct by the Bar, he was presented with a carefully sanitized packet of emails showing Alters copied on bank exchanges with Salpeter regarding the operating account and impending overdrafts. (Ex. 9.) The Bar struggled to use that to establish that Salpeter made no decisions on his own. After reviewing the packet Perez said "it appeared" Salpeter made <u>all</u> financial decisions <u>after convening with Alters</u>. (T.185) But the Referee did not agree, noting in her Report the emails on which Alters was <u>not</u> copied. (ROR 6; Ex.A; T.192-94.) Thus, based on Exhibit A, the speculative nature of Perez's testimony, and the fact

that Salpeter was not credible, the Referee found the Bar's claim that Salpeter "appeared" to make all banking decisions in consultation with Alters was inaccurate.

Alters' Remedial Measures and Efforts to Replenish the Trust Account

Alters' priority was twofold: save the firm and replenish the trust account. Bruce Rogow twice testified that Alters' efforts in both regards under extraordinarily difficult circumstances were "heroic." (Ex.53 p.375; T.3628.) Rogow told Alters that if he self reported and the money was not back in trust, the Bar would shut him down. (T.3791.) Alters testified:

> I wasn't going to let that happen. No offense to the Bar or anybody else, but the Fund, it wasn't the Fund and the people who contribute to that Fund, it wasn't their obligation. It was the firm's obligation to get it paid back.
>
> And I also had 40 or 45 families at the time that were being supported by the firm and would look – there was no way that I was going to let other people pay something that we screwed up. And there was no way I was going to let all the things that we had started, which could pay for this, and the families, its not happening.
>
> That was the decision I made, and I made it speaking to Mr. Rogow and to Ms. Boldt. (T.3792-93.)

The Referee did, however, fault Alters for failing to implement safeguards after he first discovered the improper transfers, to ensure that ABBRC had effective measures in place to avoid a recurrence. But Alters had left Boldt and Salpeter in place because he knew Boldt to be an accomplished board certified appellate lawyer

who had run her own law firm for years before joining ABBRC. Alters "didn't have any questions about [Boldt's] fitness, honesty or trustworthiness. I thought she made a mistake." (T.3941.) He left her in charge to oversee the trust account, (T.3856), also because she asked to be. (T.3787-88.) Alters never thought the problem was anything beyond an isolated, albeit devastating mistake. (*Id*.) Salpeter also had good financial credentials, including an MBA. (T.286.) Further issues at the time, by way of explanation, not excuse, were that Alters' mother had just been diagnosed with leukemia, he was going through a divorce, and he had to raise funds to replenish the trust and save the law firm. (Ex.53 pp.267-72.) Others had to help run the firm.

The Bar faults Alters for not hiring a CPA to review the account or recommend changes to ABBRC's internal controls, but in February 2010 it was not a complicated accounting issue. ABBRC handled a manageable amount of large cases. It was not a personal injury mill or a real estate firm, where scores of trust account transactions occurred regularly, requiring the need for expertise to unravel a trust account snafu. (T.3840.) Everyone knew the amount of the deficit and how it occurred. Alters chronicled them all in his letters to the Bar. (Ex. EEE; Ex.2.)

On February 10, 2010, the day after Alters discovered the trust account shortage caused by Boldt, he deposited $100,000 into trust. He immediately undertook efforts to liquidate assets and raise cash to fully replenish the account.

(Ex.53 p.376.) Beginning with that February 10 deposit, and continuing through November 3, 2010 it is undisputed that through a combination of personal loans, proceeds from the sale of two homes, and co-counsel fees, he deposited $874,500 into trust to reduce the $1,102,000 deficit. (A.120.) At the January 2012 hearing, the Bar's then auditor conceded that clients were timely paid out of the trust account and that from September 2009 through March 2011, he had no evidence that any client was not paid money that was due, when it was due. (Ex.53 p.164.)

Bruce Rogow testified:

> Jeremy, from [February 9, 2010] on, worked tirelessly to obtain monies to make sure the trust account was right and to run the firm. And, of course, I loaned him money, mostly on a handshake, to help run the firm and pay the payroll. He worked tirelessly. I mean, it was heroic stuff. He had terrific potential, he had great cases, he was a great and is a great lawyer. And ... he communicated with me regularly, always told me the truth about what was going on. This was something that was number one on his mind to get this taken care of and make sure that no client ever lost a dime and that the Bar would never have to use the client security fund. (Ex. 53 p.375.)

Improper Transfers from March to October 2010, Alters' Illness, and his Discovery of a Trust Account Deficit Inconsistent With His Replenishment of Trust Funds

The evidence in support of the Report established that Boldt was managing ABBRC until late June 2010 and the Referee exonerated Alters from authorizing or being aware of **any** of the improper trust account transfers. Alters conceded that he

was back in charge on or about June 22, 2010, (T.3851, 3860), and that some additional improper transfers were made **without** his knowledge between July and October 2010. All transfers were made by Salpeter.

Alters needed some time to gain his footing as managing partner, since Boldt had held that position for the better part of a year. (T.3915-16.) Even the Bar's auditor, Duarte, testified the financial morass created by Boldt and Salpeter [after the initial 20 transfers] was a 1000 piece puzzle that took him, a CPA, considerable time in an office with no windows to figure out. (T.2890-92, 3916.)

When Alters took over the reigns of the firm, Salpeter showed him documents in July and August - which were never found because Salpeter's files were complete "chaos" (T.3190) - evidencing the progress made in replenishing the trust account. (T.3857-58, 3904-05.) Alters does not recall whether he was shown a similar review in September, but he fell ill late that month and was largely out of the office for about six weeks. (T.3857-58.) He accepted the reports as accurate because they were consistent with the deposits he had made to replenish the account. (*Id.*; A.120.) He had no idea that as he put money back in Salpeter, on Boldt's watch, was wrongly taking it out. (T.3903.) As the Referee found, Salpeter was expert at painstakingly fabricating and modifying pdf bank statements and other electronic information (text messages). (ROR 9, 63.) Since the Referee found in favor of Alters and determined

him to be a credible witness, he is entitled to an inference that Salpeter fabricated those July and August documents to hide the true state of the trust account.

In late September 2010, Alters fell violently ill. A number of witnesses confirmed that he was largely absent from the office from late September through around Thanksgiving 2010.[14] (T.3187-88, 3454,3539-40.) He visited the emergency room multiple times over a six week period. His gastroenterologist, Dr. Wolfson, ruled out any logical causes for his illness, which festered until November 2010; but it had to be from something ingested. Dr. Wolfson later posited that Alters may have been poisoned, because lesions on his stomach lining were consistent with ingestion of a foreign substance. Alters suspected he was poisoned by his former nanny, who filed the underlying bar complaint, since he fully recovered after she was gone. (T.3804-10.)

Upon Alters' return around Thanksgiving, (T.3541), he fired Salpeter and asked a firm paralegal, Cindy Russell, to review the firm's financial records. She had handled the finances for the Clark Silverglate law firm and had a masters degree in business. (T.3913-14.) Her review of the firm finances began in early December

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[14] The Bar does not dispute this. It deposed Dr. Wolfson, received Alters' hospital and medical records, and stipulated that from sometime in September through November 2010, Alters was ill. (T.2699-2700; ROR 36.)

2010 and included a review of its operating and trust accounts. They were a mess. (T.3190.) When she got to the trust account she thought she might have missed something because the bank and Quickbook balances "were light years apart." (T.3191.) She thought there had to be another account somewhere. When she called Alters to tell him, he did not believe her. "He thought I had missed something, too. Complete disbelief." (T.3192.) After she conducted a second review that yielded the same result Alters reaction was, "[c]omplete shock, anger. He said, no I've paid this back, this can't be. He was just completely shocked." (T.3192.) That was the first time that Alters realized that the $874,500 he had put back into the trust account had vanished and the firm's overall financial condition had eroded further.

Alters immediately called a meeting of all employees to advise that he did not have money to pay them. He told them that if anyone had short term needs they should come see him personally and he would try to address them, but "in good conscience he couldn't, you know, make payroll." (T.3194.) It was particularly disquieting because the announcement came around the holidays at the end of 2010. He promised that if they stayed he would get them paid. All stayed except one attorney. (T.3812.) Alters immediately set about to fix the trust account problem on

his own and by around March 2011, the trust account was replenished and his employees were thereafter paid what they were owed.[15] (T.3194-95.)

All told, Alters deposited $1,865,983.90 to repay an initial trust account deficit as of February 9, 2010 of $1,102,000. (A.120.) He also deposited $13,059,938.73 into the operating account between February 9, 2010 and October 5, 2011, which included the funds to replenish the trust account. (A.121-25.) Alters testified that some funds he received were earmarked for particular purposes. (T.3943.) His trust deposits included funds from the sale of his assets, homes, (Ex. 53 p.376), and other loans and co-counsel agreements. (A.120.)

THE CASE

The Bar Breached Confidentiality at Inception

Shortly after the bar inquiry was filed against Alters in September 2011by Alters' disgruntled ex-nanny (who was also a part-time ABBRC employee), the Bar confirmed to the Daily Business Review ("DBR") that it was investigating Alters for "possible trust account misappropriation." (A.110, 113.) Kenneth Marvin, former head of Bar discipline, claimed that because the reporter mentioned "trust accounts"

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[15] Due to Salpeter's manipulation of the records, the trust account actually remained about $30,000 short until September 2011, but the Bar understood the mistake and has not made an issue of it, other than to correctly note its existence.

she was not making a general inquiry, which somehow changed the paradigm and required the Bar to respond. (A.115.) Alters moved to dismiss the charges based upon this confidentiality breach, but his motion was denied. (Index #38.)

The Referee revisited this issue at trial and concluded that the disclosure was a violation of Bar confidentiality.(ROR 71.) The Bar's confirmation went beyond **status** (the most it could confirm at that stage), by confirming the **nature** of the investigation. Moreover, the matter was not in the "public domain" at the time - the only allowed exception to confidentiality. Rule Reg Fla. Bar. 3-7.1.

As a consequence of the Bar's confirmation, on September 21, 2011, the DBR ran a front page story that cast a pall over Alters, (A.110-112), forcing him to step down as lead counsel of the Plaintiffs' Executive Committee ("PEC") overseeing the very large Checking Account Overdraft Fee MDL litigation class actions in Miami federal court. (T. 9/9/16 at 90.) He had recently settled the first of scores of such cases in the MDL (against Bank of America) for $410 million. As a result of the loss of his coveted lead counsel position of the PEC, his firm's attorneys fees were reduced by between $32 and $36 million dollars.[16] (T.9/9/16 at 93-94, T.3546.)

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[16] For Alters, the timing could not have been worse. The class action fee was approved in November 2011, after he stepped down as chair of the PEC. (T.3546.) Had the Bar not disclosed until December 23, 2011, the date of its emergency suspension petition, Alters would not have lost out on substantial fees on the Bank of America case.

Alters Fully Cooperated With The Bar, But It Spurns His Repeated Requests to Meet Or Give a Sworn Statement

The Referee found that Alters "never denied that the improper transfers occurred and he conducted himself in a very cooperative and candid manner." (ROR 65, 69.) On the other hand, she was deeply troubled by the Bar's refusal to grant him an audience (before or after the emergency suspension), despite repeated requests for one, and the fact that it met with Boldt 6 times, at up to 3 hours per meeting, and had approximately 6 phone calls with the her. (ROR 25, 38, 62; T.1216-17, 2071-72, 2907-26.) Alters repeatedly offered to give a sworn statement, no strings attached, (Ex. EEE; A.132; Ex 2), but the Bar was not interested. (ROR 38, 62.)

Alters' law partner, Justin Grosz, who spent almost 12 years as an assistant Broward County State Attorney, ultimately as a felony division supervisor, (T.3514-17), testified of his failed efforts to set up a face-to-face meeting between Alters and the Bar to discuss the facts of this case. (T.3550-52.) Grosz said it was unheard of for a prosecutor to turn down such an offer:

> You know, as a prosecutor I would never turn down the opportunity to take a sworn statement with no strings attached from the subject of the investigation. (T.3551.)

Alters was only granted one audience by the Bar much later, solely to prove the propriety of his various co-counsel agreements and loans contracts with other law

firms. (T.2071-72, 2893, 3552.) The Referee found that Alters was never granted an audience to discuss the issues involved here. (ROR 62.)

In the Fall of 2011 - before the Bar's petition for emergency suspension - Alters supplied the Bar with several detailed letters enclosing exculpatory information and documents, including Boldt's confession to Bruce Rogow and her draft self-reporting letter with emails. (Ex. EEE.) The Bar paid them no heed. In fact, its then auditor, Carlos Ruga, who admitted to submitting an affidavit to this Court with no basis in fact, (A.79), testified at the emergency suspension hearing that he spent a total of 5 minutes reviewing Alters' submissions. (Ex.53 p.164-5.) Therefore, the Bar chose to completely ignore evidence that Boldt, not Alters, was managing partner at the relevant time and her admitted authorization of the initial 20 transfers.

Grosz also testified that if, as a prosecutor, he came upon evidence that undercut his theory of a case, he would adjust his thinking:

> It's really a no-brainer. I mean, the obligation , as Your Honor has said, is to find the truth. And I took that very, very seriously when I was a prosecutor and it didn't really matter what someone else might say about a particular case or a particular person. If the evidence wasn't there, the evidence isn't there .. it's just not adding up ...You follow the evidence, you don't channel it to where you want it to go. (T.3516.)

Alters' Emergency Suspension and the Hearing to Dissolve It

Despite its knowledge in the Fall of 2011 that Boldt had admitted to Alters and Rogow in February 2010 that she had authorized the initial 20 improper trust account transfers totaling $1,102,000, and a trove of other exculpatory evidence, (Ex. EEE,), the Bar stubbornly continued to blame Alters for Boldt's (and Salpeter's) wrongdoing. It still doggedly pursue him, moving for the emergency suspension on December 23, 2011, even enlisting Boldt and securing her false affidavit for the January 2012 hearing.

Following a two day evidentiary hearing on Alters' petition to dissolve the *ex parte* emergency suspension, the Referee recommended his immediate reinstatement. (A.72-91.) It was ratified and he was reinstated by this Court 5 days later. (A.92.) The Referee found it unlikely the Bar would succeed on its claim of misappropriation, because Alters neither authorized nor knew about **any** improper transfers when they occurred. **Notably, the Referee also signaled an early warning about Boldt's lack of credibility**. (A.84-5.) She also found that the Bar's auditor "had no basis in fact to swear under oath that Alters made or authorized the transfers from trust to operating, and he [the auditor] admitted that fact during his testimony." (A.79.) The Bar paid the Report no heed and re-filed the identical charges against Alters, although it waited two years to do it.

The 2014 Complaint and Trial Thereon

As noted, the Complaint contained the identical claims as in the earlier Petition for Emergency Suspension of Alters. The claims actually tried against Alters centered around improper transfers from trust to operating and misappropriation.

Fake Text Messages and Forensics

The evidence presented against Alters at trial, and the theme of his culpability, was largely the same as in 2011, except for two things: the testimony of Marc Salpeter (who pled the Fifth in 2012), and the supposed text messages between he and Alters purporting to show Alters authorizing a number of the improper transfers.

The Referee noted that, "the veracity of the PIM backups [text messages] and the credibility of Mr. Salpeter are crucial in determining whether the Respondent can be found guilty of violating the Florida Bar Rules." (ROR 62) Salpeter delivered the PIM backups of the purported four (4) year old text messages between he and Alters to the Bar in September 2014, (Ex.19), **after** he was given immunity from criminal prosecution, and **after** Alters discovered Salpeter had cheated on his (Alters') sister,

leading to their divorce that same month.[17] (T.706.) The Referee concluded that the texts were "not reliable" and that Salpeter was not credible. (ROR 62, 63.)

Despite that finding, the Bar tries to resurrect the discredited evidence and testimony, claiming that no expert could pinpoint a particular text message as changed or tampered with. But that was not the point. As stated below, the expert forensic testimony - including from the man who wrote the software Salpeter used - demonstrated that **none** of the texts were reliable and that Salpeter lied. That was more than enough for the Referee to make her findings. (ROR 63.) *See Murray v. State,* 838 So.2d 1073, 1082 (Fla. 2002)("Relevant evidence is admissible unless there is an indication of probable tampering.").[18] Whether Salpeter tampered with text messages was not even a debatable question of opinion. **As a matter of fact**, the Referee found that the evidence was tampered with and unreliable.

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[17] Of Salpeter's gratuitous remark that he doesn't hold a grudge against Alters for exposing his affair that ended his marriage, and that he couldn't be happier, the Referee wrote, "This testimony did not appear to be sincere." (ROR 10.)

[18] Salpeter sent Boldt an email on January 31, 2012 with the name of the software he used to download the texts from his phone and the name of its developer. She then asked her assistant in the same email chain to "google research" the software to ensure that what Salpeter delivered to the Bar "looks the same." (Ex.L; A.118.)

On *voir dire*, Salpeter was asked how he handled the text messages he gave the Bar. He explained in detail the method he claims he used to transfer text messages from his cell phone to his computer, (T.234-40), and he swore that he never exported texts from his computer back into his cell phone. (T.243.) Both were demonstrated to be lies to cover up his manipulation of the texts.

Frederic DeClercq lives in Belgium and developed the software used by Salpeter to transfer the text messages from his cell phone to his computer. (T.3226, 3233-35.) He testified that Salpeter's description of how he transferred the texts to his computer (choosing just texts with Alters) was impossible using his software. He also testified that Salpeter was untruthful when he said he never exported messages back into his phone. (T.3237-3250.) Based on the computer generated modify times of the text messages in the PIM backups supplied to the Bar, Sapleter created a backup of his texts by putting them into his computer and then restoring them back to his phone. (T.3248-49.) DeClerq testified this was **not his opinion, but a fact** based upon the forensic evidence in the PIM backups.[19] (T.3250.)

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[19] The Bar's auditor, Thomas Duarte, himself observed that Salpeter testified he did not put any messages back into the phone, yet the modify times looked like they were cumulatively saved at once. (T.2881-83.) He thus identified a key fact that proved Salpeter was lying and the texts were unreliable. Salpeter deleted the modify times from an earlier document he delivered to the Bar in or around 2011. (Ex.13.)

Yalkin Demirkaya, Alters' computer forensic expert, is principal of Cyber Diligence, Inc., a computer forensic company in New York. Prior to that, in 1995, he founded the Computer Crimes Investigative Unit for the NYPD, which he commanded for two decades. He is a Digital Forensics Certified Practitioner, the most prestigious certification in the field, and designed and taught courses in computer forensics for the NYPD and has lectured to the FBI on advanced persistent threats, i.e. hacking, and how to prevent and investigate it. (T.3280-86.)

Demirkaya testified that Salpeter's text messages were a **fraud** and that Salpeter **lied** about how he used the software to download text messages from his cell phone. He found absolute forensic evidence that the text messages were tampered with. In addition, each time Salpeter exported information from his phone to his computer, he wiped the phone clean. Absent a nefarious motive there was no reason to do that. Salpeter's phone would merely have shown progressive backups. (T.3335-3339.) The forensic evidence showed that the texts were re-loaded in bulk from Salpeter's computer back onto the phone after they were "doctored" on the computer. (T.3345.) Salpeter had thus falsely testified that he never reloaded messages onto his phone. Demirkaya said this was not an opinion, but **fact**. (T.3346.) In addition, there were purported messages with no corresponding phone bill record, and some used language that Alters said he would never use. (T.3345.) Mr. Demirkaya testified:

> What confirmed it 100 percent, no ifs ands or buts, that for me to say that without any reservations these are, in fact, 100 percent forgeries submitted by Mr. Salpeter to this Court. They are absolute forgeries based upon the modify time... modify time is smoking gun evidence. (T.3354-55.)

Demirkaya further testified that given the evidentiary value of Salpeter's smart phone, he should have preserved it along with the computer he used to download the messages. The fact that he didn't was to Demirkaya, a seasoned law enforcement officer, indicative that Salpeter had something to hide. (T.3371, 3374.)

The Referee was exceedingly impressed by Mr. Demirkaya's testimony, finding that he "convincingly disproved" the Bar expert's hypothesis to explain the anomalies that indisputably existed in the PIM backups of text messages. (ROR 63.) The Referee found,

> the text messages that were allegedly backed up by Mr. Salpeter from his phone are not reliable evidence. Mr. Salpeter, by his own testimony[20] and previous alterations to documents was admittedly skilled and capable of creating or altering text messages to place the blame on the Respondent [Alters] for the improper transfers. (ROR 63.)[21]

Documents Given to Searcy and Other Law Firms

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[20] *See* T.531-540.

[21] In the very next sentence the Referee wrote: "Mr. Salpeter was fired from Respondent's firm and was subsequently hired by Ms. Boldt at her new law firm."(*Id*.)

The Bar's statement related to Alters dealings with the Searcy firm and others is a red herring. The Complaint alleges no facts concerning Alters' financial dealings with them. In discovery, the Bar received Exhibit 8 and other documents, which it apparently believed raised such questions, but never amended its Complaint. The Referee indulged the Bar some, permitting the introduction of Exhibit 8, but drew the line when it tried to introduce evidence involving Alters' personal taxes.

Essentially, in late May 2010, Alters was in discussions with members of the Searcy law firm about a possible co-counsel relationship on some of ABBRC's mass tort cases, to relieve financial pressure on ABBRC. (T.137-38.) Searcy's controller requested specific documents for a meeting and Salpeter prepared a notebook with them. (Ex.8.) The documents supplied by Salpeter also included fabricated trust account records, **which were not requested by Searcy**. (T.155, ROR 5, 56.) Not only was Alters not trying to conceal the firm's financial condition, but Searcy personnel came away from the meeting with the impression that ABBRC's finances were dire. (T.155-56.)

Salpeter claims he spent days tampering with and altering the trust account bank statements at Alters' instruction. (T.531-40, ROR 9.) However, the Referee rejected his testimony and found that Alters did not "create[] false trust account records that were given to the Searcy firm." (ROR 65.) Moreover, Salpeter's

testimony was implausible. It is patently ridiculous that Alters would instruct him to undertake an unnecessary and painstakingly meticulous process to doctor bank statements that Searcy never requested.

The Bar takes issue on appeal with the Referee's decision to exclude as irrelevant other alleged evidence related to Alters' supposed misrepresentation to Searcy about his personal tax liability. Interestingly, during the Bar's proffer of the evidence outside the Referee's presence its auditor, Duarte, noted a sequence anomaly within the supposed key email chain. Alters' purported response in the sequence at 12:24 PM was sandwiched between an 11:09 AM email from Searcy's controller and an email from Salpeter at 11:28 AM on the same day. (T.4151-53; A.192-93.) Based upon the expert testimony already discussed, such sequencing anomalies are markers of tampering by Salpeter.

Referee Report

This **second** report by the Referee excoriated the Bar's unequal pursuit of Alters and Boldt, and once again exonerated Alters of authorizing improper transfers, having prior knowledge of them, or misappropriating trust funds. Yet, the Bar still stands by its rejected narrative. It does so even though it was proven that Alters was "set up" by Boldt and Salpeter as the fall guy for their mistakes and misdeeds.

The Referee was bewildered by the Bar's unequal treatment of Alters and Boldt. (ROR 61-2.) Even though Boldt was indisputably guilty of authorizing over $1 million in improper trust account transfers, the Bar never pursued her with the same vigor, ultimately dismissing her case, except for a claim of failure to report "an isolated trust violation which occurred in January 2010" to the Bar, which earned her a 3 hour ethics course.[22] (A.136-41.) Moreover, the Bar knew before the emergency suspension and obviously before this latest trial that Boldt confessed to Rogow that she did it. So unless Rogow (who testified she was the manager at the time) was untruthful - an absurd claim that the Bar never made directly (although Boldt so testified (T.1069)) - the Bar's narrative is patently false Most importantly, it was rejected by the Referee.

The Referee was also troubled that, "[t]he discrepancies and inconsistencies in [Boldt's] testimony and in the documentary evidence were not put through the same scrutiny that [Alters] faced in this proceeding." (ROR 61-62.) In fact, the Bar's auditor admitted that in his years of investigation, he never once confronted Boldt about them, (T.2966-70), even though he concluded in his October 2012 report that

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[22] The Bar also gave Boldt a free pass involving a November 2009 improper trust account transfer, where she was implicated in emails during a period where she admits she was managing partner. (T.1522-35, Ex. NN.)

she had drafted the letter admitting her fault for the improper transfers. (T.2456; ROR 33). Ignoring evidence of Boldt's unquestioned guilt cleared the way for the Bar to pursue Alters, a more attractive target.

The Referee further had a deep concern that the Bar let Boldt – who had been charged along with Alters – off the hook by allowing her to secure, without opposition, a referee order permitting redaction of overwhelming evidence of her guilt from her record, which included key portions of Rogow's testimony and Boldt's draft self-reporting letter. (ROR 62.) That clever orchestration enabled the Bar to dismiss her case without any discipline. With the array of incriminating evidence against Boldt concealed, her referee and this Court gave their necessary approvals to that dismissal, unaware of the true facts.[23] *Florida Bar v. Boldt,* Case No. 14-118.

After Boldt's disciplinary case was abruptly dismissed, (T.1042), she proceeded to falsely testify against Alters. She also tried to invoke an alleged attorney-client privilege to prevent him from presenting testimony and evidence critical to his innocence, including her admission to Bruce Rogow, her draft admission letter to the Bar, and metadata and email chains discrediting her later

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[23] The Bar's agreement to permit Boldt to accept responsibility for knowing of, and not reporting, only one instance of "an improper trust violation in January 2010," is beyond belief. (A.136-41.)

denials of preparing it. That was the same evidence she successfully sealed in her case. Here, however, she could no longer bury the truth. Her credibility - if she had any with the Referee after the 2012 hearing[24] - was quickly shattered when her effort to suppress evidence of Alters' innocence was rejected by the Referee and this Court (through a unanimous denial of her mid-trial petition for writ of certiorari (A.142)), and she was confronted with the incriminating evidence on cross-examination. Having nowhere to turn, she resorted to a hollow and desperate attempt by refusing to authenticate any incriminating document. But the truth shone through.

The Referee did find Alters responsible under Rules 4-1.15(safekeeping property) and 5-1.1(b)(application of trust funds for particular purpose), but for failing to take reasonable remedial steps after his February 9, 2010 discovery to avoid a recurrence of the problems caused by Boldt and Salpeter. But she found he had suffered enough and recommended no further discipline.

SUMMARY OF THE ARGUMENT

As its primary point of error, the Bar argues an evidentiary issue (designed to try to discredit Alters), but does not seek the proper remedy; a new trial. This raises

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[24] Her disciplinary case was initially assigned to this Referee. She moved to disqualify the Referee, (A. 93) which was granted. (A.109.) The basis of Boldt's motion was that the Referee had made findings adverse to her and favorable to Alters in the January 2012 Report on Alters petition to dissolve his emergency suspension.

serious questions about its reason for raising it. Regardless, the Referee did not abuse her discretion in excluding the supposed character "evidence" regarding an alleged misrepresentation made by Alters to the Searcy law firm because a lawyer's character is not an "essential element" of a trust account violation.

Next, Alters himself did not misuse client trust funds. The Referee **twice** found he did not authorize any transfers and was unaware of them when they occurred. Once he took control of the firm from Boldt in late June 2010, Alters needed some time to regain his footing, especially when Salpeter showed him false trust account reconciliations in July and August 2010 and then he became violently ill in September. After he recovered in November, he discovered and fixed the problems in short order. Whether Alters should have discovered the worsening trust account problems sooner than he did in December 2010 was a factual question resolved in Alters' favor. There was also substantial competent evidence to support the four challenged mitigating factors found by the Referee.

The Referee's decision to find Alters not guilty of violating Rule 4-8.4(c)(dishonesty, fraud, deceit, misrepresentation) and Rule 5-1.1(a)(property entrusted to attorney) was not clearly erroneous. This Court previously approved a refusal to make a Rule 4-8.4(c) finding against a lawyer on similar facts. On the Rule 5-1.1(a) issue, Alters' replenishment of the trust account is now authorized by rule,

and is no longer considered commingling. This Court should apply the rule in effect at the time it hears the case, except for the notice requirement, which would be a violation of due process since it did not exist back in 2010 and 2011.

Finally, the recommendation that Alters has suffered enough should be accepted. The Bar's failure to "fairly and justly" investigate and prosecute Alters deeply troubled the Referee, as did its dismissal of charges against Boldt. Alters has already suffered incredible financial loss and has effectively been publicly reprimanded and suspended for five years. In addition, the requirement of proportionality would be frustrated if the guilty partner walks and the one who fixed her mistakes is sanctioned further.

ARGUMENT

I. THE REFEREE ACTED WITHIN THE BOUNDS OF ITS BROAD DISCRETION IN REFUSING TO ADMIT IMPROPER CHARACTER EVIDENCE

With its key witnesses and evidence discredited, the Bar attempts to salvage its failed prosecution by trying to take this Court's judicial eye off the ball by focusing on excluded supposed prejudicial "evidence." The most glaring defect with this argument is that the Bar seeks no remedy if it prevails. The only available remedy when evidence is excluded is a new trial. *See eg. Beal v. State,* 620 So.2d 1015 (Fla.

1st DCA 1993). The obvious questions, then, are why is this argument being made; why does the Bar lead with it; and why does it spend ten pages arguing it?

To Alters, the answer is simple: this is consistent with the unfair and unjust prosecution of him and is a cynical attempt to have this "evidence" considered (or at least viewed) for the first time on appeal, in the hope it will anger this Court into rejecting the Referee's recommendation on discipline. Yet, for this Court to consider the material would be completely unfair to Alters (and a violation of due process), when it was not considered by the Referee – the proffer was outside her presence – and Alters had no reason to even respond to a proffer.[25] There is simply no

[25] To ease any concerns, had Alters had the chance to develop a defense and respond to the proffer, he would have at least pointed out two things: (1) he never personally responded to the question of his personal taxes, i.e. that email was fabricated, probably by Salpeter, and (2) the sequencing in the email chain evidences such tampering because, as the Bar's auditor himself volunteered during the proffer, "the next message appears to be out of sequence by the time, but I will read it anyway." (T.4151-53.) The purported email from Alters confirming he had no tax liability was at 12:24 PM and was sandwiched between an 11:09 AM email from Searcy's office asking for the information and an 11:28 AM email from Salpeter referring to Alters's **later** alleged email. (A.192-93.) What the parties know from the forensic computer experts is that sequencing anomalies are "markers" of tampering. The same auditor also raised similar questions about Salpeter's text message evidence due to strange modify times and sequencing. (T.2880-85.) Those texts were rejected as tampered with and unreliable. Had this issue been fairly litigated, Alters expects this "evidence" would have suffered the same fate.

legitimate reason this issue was raised when the Bar is not seeking a new trial and the Referee already found that Alters did not mislead Searcy. (ROR 66.)

On the substance, it is black letter law that, "[a] referee's decisions regarding the admissibility of evidence will not be disturbed absent an abuse of discretion," and a referee "has wide latitude to admit or exclude evidence." *Florida Bar v. Tobkin*, 944 So.2d 219, 224 (2006); see also R. Reg. Fla. Bar. Rule 3-7.6(f)(2). Exclusion of the proffered evidence and testimony was not an abuse of discretion because: (1) it was irrelevant to any fact issue pled in the Complaint; (2) Alters' dealings with Searcy were not tried by consent; and (3) it was inadmissible because Alters' character was not an "essential element" of a trust account violation.

The Bar (1) does not argue that Alters' personal tax history and representations to Searcy were within the scope of its Complaint, (Br.34, n.9), and (2) correctly makes no argument that the issue involving representations to Searcy was tried by consent. That leaves the third point, which is the only one it argues.

The Bar claims that dishonesty is "an essential element of its charge" of misappropriation, making character evidence admissible under section 90.405(2) of the Florida Evidence Code. It is **wrong**. First, "[s]ection 90.405(2) recognizes the traditional rule that specific acts of an individual are generally <u>inadmissible</u> to prove the individual's character. Evidence of specific actions may not be offered as a basis

of an inference that because a person acted in that manner in the past, the person acted in the same manner on the occasion in question." *See* Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 405.3 at 300-01 (2011 ed.). Second, when character is truly "in issue," as when it "is an operative fact which under the substantive law determines the legal rights and obligations of a party," specific act evidence **may** be admissible. *Id.* at 302. However, as recently as 2011 this Court held that, "[i]t is a rare occurrence that character is an essential element of a claim or defense." *Pantoja v. State,* 59 So.3d 1092 (Fla. 2011). Ehrhardt also observed that, "[t]he cases when character is admissible under section 90.405(2) are 'relatively few.'" Ehrhardt at § 405.3 at 300-01. The same is true under the Federal Evidence Code. *See* Wright and Graham, Federal Practice and Procedure: Evidence §5267.

Dishonesty is not an "essential element" of a trust account violation. Conscious but careless mishandling may suffice. *Florida Bar v. Brutus*, 216 So.3d 1286 (Fla. 2017). Thus, the Bar was not permitted to introduce this evidence in the guilt phase. Significantly, it **never** sought to introduce it at the sanction hearing.

The Bar relies entirely upon *Beal*, no doubt seduced by its language that dishonesty is an essential element of theft. But *Beal* is easily distinguishable for two reasons. First, dishonesty is not an "essential element" of a trust account violation. Second, the Bar confuses the prosecutor's ability to introduce "specific act" character

evidence to prove a defendant acted in conformity therewith - which is **impermissible** under Rule 90.404(b) - with a defendant's right to defend himself against a criminal charge. In *Beal* the trial judge erroneously prevented the defendant from putting on relevant character evidence in defense. In fact, *Beal* found the trial judge **did not err** in refusing to admit evidence **by the state** of two other instances where the Beal took money without performing construction work, based upon *Williams v. State,* 110 So.2d 654 (Fla. 1959). Here, the Bar's argument is akin to the state's, not the defendant's effort in *Beal.* The Bar was trying to introduce alleged bad act character evidence, not evidence of motive, intent, plan, knowledge, or the other limited exceptions under Rule 90.404(2).

Finally, the Bar argues that because the Referee found Alters' replenishment of the trust account and his remorse as mitigating factors, how Alters acted in those respects was relevant to its Complaint. Once again, the Bar confuses the issue. But it did **not** seek to introduce the evidence in the sanction phase. That evidence was not an "essential element" of its trust account claim and was therefore properly excluded in that phase of the proceeding. Moreover, use of the word "may" in Section 90.405(2) indicates that admission is discretionary and not mandatory, even if character were an element of the claim, which it isn't. *See* 21 Am. Jur. Proof of Facts 3d 629 (Originally published in 1993). No abuse of discretion has been shown.

II. THE REFEREE DID NOT OVERLOOK THE DECEMBER 7 TRANSFER FROM TRUST, BUT CONSIDERED THE TOTALITY OF CIRCUMSTANCES IN MAKING HER RECOMMENDATIONS; THE REFEREE'S FINDINGS OF MITIGATION AND AGGRAVATING FACTORS WERE NOT AN ABUSE OF DISCRETION

A. The Referee's factual determination that Alters' was not guilty of misusing client funds for the December 7, 2010 improper transfer was not clearly erroneous.

The Bar seems to have finally conceded that it cannot hold Alters directly responsible for the misappropriations on Boldt's watch or before he came back from his illness in November 2010 (although it remains steadfast that he is still responsible overall, for more speculative reasons).[26] It elects instead to focus on just one transfer on December 7, 2010, **without having proven** at all (let alone by clear and convincing evidence) that Alters was aware of the extent of the new trust account problems (in addition to those he was advised of in February 2010) when that transfer was made. Without such proof this argument fails.

It is a logical certainty that if funds were removed from a trust account that was depleted, money in trust for client #1 would be used to pay client #2 if there were

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[26] In fact, the Bar alleged in paragraph 19 of its Complaint, (Index #1),that by virtue of his status as managing partner Alters "was or reasonably should have been knowledgeable of, and therefore was complict in, the improper transfers." Having failed to prove direct knowledge or complicity, all that is left is imputed knowledge.

insufficient funds to cover both and client #2 was paid first. Indisputably, that is what occurred on December 7, 2010. Alters never denied it. The Bar argues that the Referee's failure to hold Alters responsible was clearly erroneous. But she did hold him responsible, only not to the extent of the Bar's liking. In advocating its position, the Bar ignores all of the salient facts supportive of the Referee's Report.

The Referee found that Alters neither authorized nor knew about **any** of the improper transfers and did not become aware of the transfers made after February 9 until sometime in December 2010. The Bar does not challenge those factual findings nor could it. In the Summer of 2010, Alters was supplied with false trust account reconciliations by Salpeter. They reflected the progress that had been made by Alters to replenish the account, consistent with his knowledge of what he put back in.

The Bar seeks to hold Alters to an impossible **strict liability standard,** charging him with full knowledge of all of the firm's **new** problems on day one of retaking control. Its effort is unreasonable for two reasons: (1) Salpeter misled Alters about the status of the trust account in the summer of 2010 and (2) in late September 2010 Alters was stricken by illness that caused him to be largely absent from the office for about six weeks, until around Thanksgiving. In the window in between, and given all that was on his plate, Alters needed a reasonable time to regain his footing as managing partner. The record support the conclusion that the time it took Alters

to discover the additional problems was not unreasonable under the circumstances. The Bar alludes to a lack of express finding on this issue, but all evidence is to be construed in favor of the Referee's Report, and there is more than ample evidence in the record.

When he recovered, Alters immediately fired Salpeter and had the firm's books reviewed by a qualified employee, Cindy Russell, who holds a masters in business and who had run another law firm's books. Russell's review began in December 2010 and she focused on the operating account first. When she got to the trust, her review uncovered that all the money that Alters had deposited back into trust had been removed. When she told Alters he was in shock. He said it had to be a mistake, that it was impossible given all the money he had replaced. Alas, it was true. But the Bar **never established when** Alters became aware of the extent of the deficit relative to the December 7 transfer. It was the Bar's burden to prove that when the December 7 payment was made, it was done with Alters' knowledge that the remaining funds were designated for a particular client (not funds that Alters had used to replenish the account) so the check could not be written. It never even tried.

After the December revelations, in about 90 days, by early March 11, 2011, all problems were resolved. Alters saved the firm and fixed the trust account problems. Boldt, who created it, did not contribute one penny to the effort.

This Court has never held that any trust account leakage is a strict liability violation. For example, if an employee in an isolated instance forges a signature on a trust account check and cashes it, no one could seriously argue that the lawyer was culpable and has violated the rules. In fact, in *Florida Bar v. Rousso*, 117 So.3d 756, 766-7 (Fla. 2013), erroneously relied upon by the Bar, this Court acknowledged with approval the referee's comment that even a diligent lawyer could be victimized for a one or two month period by an employee's improper conduct, but not the extended period involved in *Rousso* (likely years). Here, the time from when Alters took over from Boldt and when he became ill is tight enough that a delay in discovery could be excused given the false reconciliations he was provided. Regardless, whether Alters reasonably should have found out about the additional problems sooner was a **fact question** for the Referee and she resolved it in Alters' favor. *Stirling v. Sapp,* 229 So.2d 850 (Fla. 1969)(negligence is a quintessential factual determination).

In *Rousso* the referee found that the lawyers abdicated their active trust account to a non-lawyer for months or years and never supervised him. They deposited hundreds of thousands of dollars to cover deficits, and initially went on their way, with nary a thought. Here, the ABBRC trust account was in the hands of **another lawyer, Boldt**, for the better part of a year (September 2009 through June 2010), and the circumstances between July and December have been exhaustively recounted. The

Referee's refusal to make findings to the Bar's liking are supported by the totality of the evidence and therefore cannot be clearly erroneous. Boldt left the firm in tatters and Alters was focused on saving it and fixing the trust account problem. He accomplished both and for that he should be celebrated, not vilified.

B. The Referee did not misapply mitigating and aggravating factors

The Bar claims that each of the four identified mitigating factors found by the Referee were "clearly erroneous." They were not. Each is addressed in turn.

Absence of Dishonest or Selfish Motive

Alters testified fully about these matters at the January 2012 emergency suspension hearing. (Ex. 53, pp. 32-41.) He did not personally sign most checks for his expenses. Moreover, between September 2009 and March 2011, when the trust account was repaid, Alters had deposited $11,300,000 into the ABBRC **operating** account and took out only a fraction of that for himself, consistent with his past practice in working at the firm. (*Id.* at 340-41; *see also* A.121-25.) "I deposited every penny I could get into the law firm to sustain the law firm and get that trust paid back." (Ex.53 at 341.)

Alters does not dispute the money trail. But the Referee found that the Bar failed to prove he was aware that funds deposited into his personal account from

operating were the result of improper trust account transfers. **Alters took and passed three lie detector tests**, the first of which squarely addressed that issue. He testified that if his intent was to use the firm and its trust account as his personal piggy bank, as the Bar had suggested, he would simply have deposited less into the firm and would not have replenished the trust knowing he would need that money. (*Id*. at 340-41.) In fact, it would be ridiculous to deposit $874,500 into trust from February through November 2010, only to create a new trust issue, on the heels of trying to fix Boldt's, by removing funds to pay his personal expenses during that same time period. (T.3903, 3942.) The Bar's failure to prove Alters' knowledge is consistent with the Referee's conclusion that Alters had no dishonest or selfish motive.

Restitution

The Bar argues that Alters took no serious steps to resolve the trust account problem once he was on notice. It could not be more wrong. In sharp contrast, Bruce Rogow called Alters' efforts "heroic." The Referee sided with Rogow's assessment over the Bar's, and the evidence supports it. Between February 10 and November 8, 2010, Alters deposited $864,500 back into the trust account. The continued deficit existed only because while he was replenishing the account through the front door, Salpeter, largely on Boldt's watch, was taking it out the back. (T.3903.) That does not

diminish Alters' efforts to replenish the account. The Bar knows this, making its argument here disappointing.

Alters traveled the country in search of co-counsel relationships to save the firm and repay the trust. He considered the firm's stable of cases, including the very large Checking Account Overdraft MDL and Chinese Drywall MDL, to be ABBRC's greatest assets and was determined to use them to right everything. (Ex.7.) He did. However, it was a delicate balance because he was not free to use all funds infused into the firm from co-counsel agreements and other arrangements for trust account replenishment. (T.3943.) He also had to divide the incoming funds between trust and operating to keep the firm afloat, as its cases were its sole assets and the co-counsel agreements (which provided funds essential to the firm's survival) hinged on his continued role in them. This finding was supported by overwhelming evidence and credible testimony of those with first hand knowledge of Alters' efforts.

Delay

In the end, the Referee concluded that the Bar tried the same flawed case as it did in 2012. She was within her right to conclude that it had no reason to wait two years from January 2012 to re-file the flawed identical case, when she wrote in 2012, "I also recommend that the Bar be ordered to file its complaint, if it still chooses to do so, expeditiously so this matter can be resolved in short order." (A.91.) The

Referee knew the damage and pain this open matter was causing Alters, having dragged on for five years. She foretold the Bar in 2012 that it had no case against him for misappropriation and that Boldt's credibility was a concern.

The Bar points to some extensions requested by Alters, the delay caused by Boldt's certiorari proceeding and the Referee's review of evidence and preparation of her Report to blunt this finding, but the Referee was focusing on the colossal waste of time in the Bar retrying a worse case than it had in 2012. The key evidence it relied upon was also the same evidence it had from day one. The PIM backups that fell into its lap nine months after it filed this action proved to be fake and played no role in its decision to re-file charges it could not prove. All of the other forensic computer evidence simply validated Alters' defense from day one.

Breach of Confidentiality

The Bar's confirmation that it was investigating of Alters for "possible trust account misappropriation," (A.113), resulted in a September 21, 2011 front page article. Among other things, it questioned whether it would impact Alters' "role as lead plaintiff attorney in a proposed $410 million settlement with Bank of America over overdraft fees." (A.110-112.) It did. Alters was forced off as head of the PEC, costing his law firm over $30 million in fees. Had the Bar not leaked, that money

would not have been lost as the ill fated emergency suspension did not occur until late December, after the fee was approved by Judge King.

Rule 3-7.1(a) of the Rules Regulating The Florida Bar defines what the Bar can and cannot say about ongoing disciplinary proceedings and provides that,

> When disclosure is permitted under these rules, it shall be limited to information concerning the status of the proceedings and any information that is a part of the public record as defined in these rules.

The "public record," defined in subsection "b," consists of the contents of the record before a grievance committee and any reports or other documents furnished in connection with grievance committee matters (after a finding of probable cause, or not). At the time of the Bar's confirmation, the matter had not yet even progressed to the grievance committee; hence nothing was part of the "public record."

Furthermore, subsection (a)(1) provides that,

> Disciplinary matters pending at the initial investigatory and grievance committee levels shall be treated as confidential by the Florida Bar, except as provided in rules 3-7.1(e) and (k).

Subsection (e), provides that,

> Authorized representatives of The Florida Bar shall respond to specific inquires <u>concerning matters that are in the public domain</u>, but otherwise confidential under the rules, <u>by acknowledging the status of the proceedings</u>.

In September 2011, no part of this matter was in the public domain. Even if it were, the Bar could only confirm the **status** of its investigation, **not its nature**.[27] From the public's perspective, it makes a huge difference whether Alters was being investigated for not having completed his CLE, not returning phone calls to a client, or trust account misappropriation, which most view as stealing. (T.9/9/16 at 74-5.)

In *Florida Bar v. Rubin*, 362 So.2d 12, 16 (Fla. 1978), this Court was very clear in what it demands of the Bar in its prosecution of attorneys:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.

In *Rubin,* as here, the Bar breached its own confidentiality rule (the rule was different then). The breach there made headlines in several Florida papers and was reported nationwide. The Bar there argued that the press release was merely a limited waiver of "information concerning the pendency or status of an investigation or trial

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[27] Ken Marvin's interpretation of the rule - that if someone asks about trust accounts the Bar will respond, but if someone asks a general question it will not - makes no sense.(A.115.) If that were true, a reporter could put the Bar on speed dial and rattle off a different rule each call until hitting upon the right one. That is hardly consistent with a policy of confidentiality, and does not address that the Bar went beyond confirmation of status (that a file is open) and confirmed its nature (trust account misappropriation).

or other confidential matter." This Court sharply disagreed, stating that, "we are satisfied that the press release in this case exceeds any reasonable interpretation of the terms of 'pendency or status' in the limited waiver provision." *Id.* at 16. It dismissed the charges against Rubin as a sanction for the Bar's breach of confidentiality. The Referee found the same violation in this case and was correct as a matter of law.

III. THE REFEREE'S DECISION TO FIND ALTERS NOT GUILTY OF A VIOLATION OF RULE 4-8.4(c) and 5.1.1(a) WAS NOT CLEARLY ERRONEOUS.

Rule 4-8.4(c)

To try to salvage the ultimate sanction it has blindly sought from the beginning, the Bar (1) ignores the Referee's findings made with full knowledge of everything it argues in this section, and (2) ends where it began; with the notion that the mere fact of Alters' majority voting interest in ABBRC (he owned only 36% of its shares, Ex.22) makes him responsible for everything. But that latter thesis was rejected in 2012 when the Referee found that the Bar auditor - who relied upon this faulty premise - had no basis to swear that Alters authorized any of the improper transfers.

The Bar offered nothing beyond speculation and circumstantial evidence to prove its case. The former is the antithesis of clear and convincing evidence[28] and the

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[28] "[S]peculation is not 'clear and convincing' evidence. '" *K.R.L. v. Dep't of Children & Fam. Serv.,* 83 So.3d 936, 939 (Fla. 3d DCA 2012); *R.B. v. Dept. of Children and*

latter is insufficient to convict where, as here, the facts are consistent with a reasonable hypothesis of innocence.[29] Alleged knowledge of the firm's cash needs does not equate inevitably to Alters' authorization of the trust transfers. He denied it, (T.3884-85), sufficient evidence supported his denial (including 3 polygraph tests and Boldt's approval of at least 20 transfers), and the Referee believed him.

First, the Bar's relentless argument ignores the safe harbor of Rule 4-5.1 of the Rules Regulating The Florida Bar (Responsibilities of Partners, Managers, and Supervisory Lawyers), which provides in part:

> (c) Responsibility for Rules Violations. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders the specific conduct or, with knowledge thereof, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which he other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Families, 997 So.2d 1216 (Fla. 5th DCA 2008) ("Instead of presenting clear and convincing evidence of duress, R.B. simply presented supposition and speculation.")

[29] *Florida Bar v. Marable,* 645 So.2d 438 (Fla. 1994)(if circumstantial evidence is consistent with reasonable hypothesis of innocence, lawyer must be exonerated). *See* also T.3884-85.

Based on this rule, the Referee correctly found Alters **not** responsible for the trust account violations which occurred when Boldt was managing partner of the firm.

Second, for the period from late June through December 2010, the Referee's finding that Alters neither authorized nor knew about any of the transfers, coupled with the unique facts, justified the recommendation that he be found not guilty under Rule 4-8.4(c)(conduct involving dishonesty, fraud, deceit, or misrepresentation). (ROR 66.) That recommendation was, by definition, a factual determination.[30]

Moreover, the Bar conceded in its Complaint, (Index #1, ¶19), that if it failed to prove Alters' direct involvement in the transfers (it failed) its backstop position was he "knew or should have known of them." The Referee clearly concluded he didn't know, thus leaving "should have known" as its only remaining theory which, almost by definition, is not a Rule 4-8.4(c) violation, as the rule requires an element of actual knowledge or intent.

The Bar concedes that *Florida Bar v. Johnson,* 132 So.3d 32 (Fla. 2013), undermines its argument, but it forges ahead anyway. There, as here, the Bar sought review of a referee's failure to find a lawyer guilty of a violation of Rule 4-8.4(c),

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[30] Rule 4-5.3 is equally applicable on these unique facts as a safe harbor for Alters as to the actions of Salpeter because he did not direct or know of them, and the Referee did not find him culpable for the delay in his discovery as to the subsequent transfers.

where the lawyer delegated significant responsibilities to an unsupervised non-lawyer who did not properly administer the trust account. This Court relied heavily on the referee's factual findings, giving deference to its credibility determinations, and approved the referee's not guilty recommendation because the non-lawyer's activities were conducted without the lawyer's knowledge:

> Given these factual findings, we conclude that Johnson's deliberate and knowing actions in delegating responsibilities to [the non-lawyer] and then failing to properly supervise her is insufficient under these specific circumstances to prove intent to misappropriate client funds in violation of rule 4-8.4(c). *Id.* at 37.

Johnson supports, if not directs, acceptance of the Referee's express finding that, on these facts, "there was no evidence that he [Alters] engaged in conduct involving dishonesty, fraud, deceit or misrepresentation." (ROR 66.) Alters was unaware of what Salpeter was doing when he did it, was presented with fake reconciliations, and was stricken with an illness in late September 2010 that delayed his discovery. He then fired Salpeter in November, discovered the worsening trust account problems in December, and proceeded to fix the trust account problems once and for all in relatively short order.

Despite *Johnson's* clear applicability, the Bar tries to draw a parallel between this case and *Rousso* and *Florida Bar v. Riggs,* 944 So.2d 167 (Fla. 2006), but its effort falls flat. The most obvious difference is that in both *Rousso* and *Riggs* (unlike

Johnson and here), the referees found a Rule 4-8.4(c) violation. Thus, the standard of review played an important role in this Court's upholding those factual findings. Conversely, the referee's refusal to find the lawyer guilty of that rule in *Johnson*, also upheld by this Court, is similarly explained by the standard of review and the deference given to unique factual findings made by a referee. The Bar even concedes that "the same standard of review applicable to findings of fact applies to recommendations of guilt." (Br. at 49.) That is an extremely deferential standard in that if substantial competent evidence supports the finding or recommendation, this Court cannot disturb it. That is the case here.

Second, *Riggs* involved a lawyer, as in *Rousso*, who abdicated trust account responsibility to an unsupervised non-lawyer for years (*Rousso* probably for years). For most of the relevant period, Boldt, **a lawyer,** was in control. Riggs was also active in commingling and moving money around. Alters was not. Unlike *Rousso*, Alters never accepted funds from a client to replenish the trust (the Bar never even alleged that he did), let alone failed to disclose what the funds were to be used for. (ROR 65.) Alters testified that funds from third parties were often designated for specific purposes. (T.3943.) The finding of a violation of this Rule in *Rousso* was based upon knowingly deceiving clients, which is not an issue here.

Rule 5-1.1

The Bar claims that Alters should be found liable under this rule based upon *Rousso*, which held that replenishment of a trust account with the lawyer's own funds was commingling. *Rousso* was decided in 2013, **after** Alters replenished the trust account in 2010 and early 2011. But this Court then quickly retreated from *Rousso* by revising this rule to permit replenishment so long as the lawyer notified the Bar. The current Rule 5-1.1(a) not only permits Alters' conduct in replenishing the trust account shortage, it encourages it, and should be applied here. However, its new reporting requirement cannot be applied retroactively where it imposes a burden on Alters that did not exist in 2010 and early 2011.

A court should apply the law in effect at the time it renders its decision even though that law was enacted after the events that gave rise to the suit. *Goodfriend v. Druck*, 289 So. 2d 710, 711 (Fla. 1974)(appellate court will dispose of the case according to the law prevailing at the time of the appellate disposition.) Retroactive application of statutes serves to correct mistakes. *Metro. Dade Co. v. Chase Federal Housing Corp.*, 737 So.2d 494 (Fla. 1999). Procedural or remedial statutes should be given retroactive effect unless they affect vested, substantive rights, impose new legal burdens, or create new obligations. *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1216-17 (Fla. 2d DCA 2004); *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978).

In 2015, Rule 5-1.1(a) was amended to allow lawyers to "deposit the lawyer's own funds into trust to replenish a shortage in the lawyer's trust account." The intent was to "encourage lawyers to take action to identify and replenish shortages in their trust accounts (whether the shortage is caused by misappropriation or error) without risking further disciplinary action for commingling funds." *In re Amendments to Rules Regulating the Florida Bar (Biennial Petition)*, 167 So. 3d 412, 415 (Fla. 2015). And because allowing lawyers to replenish trust account shortages achieves a remedial purpose without creating a new substantive right or imposing a new legal burden, this amended portion of Rule 5-1.1(a) should apply retroactively to Alters. The Referee expressly so held. (ROR 66.)

However, the second part of the 2015 Rule change requires the attorney to contemporaneously report the shortage to the Bar. It imposes a new obligation concerning already completed transactions that cannot be applied retroactively. Alters cannot be expected to comply with a rule that did not then exist, but no concept of justice is offended by him having acted consistent with **current policy** with regard to replenishment.

The Bar's claim that Alters was given a complete exemption from Rule 5-1.1(a) is highly cynical. He followed his moral compass. Even Bruce Rogow advised him to replenish the account. *Rousso* was simply an outlier that had the potential to harm

clients and third parties, and this Court quickly retreated from it. No existing policy is served by finding him guilty. In fact, this argument is not the pursuit of justice.

IV. ALTERS HAS ALREADY BEEN EFFECTIVELY SUSPENDED FOR FIVE YEARS AND THE REFEREE'S RECOMMENDATION THAT HE SUFFERED ENOUGH SHOULD BE RATIFIED

The Bar's advocacy for the ultimate sanction profoundly exaggerates its case against Alters, as found by the Referee. It made this identical argument at the sanction hearing, prefaced with the following: "Your Honor, the bar takes issue with numerous factual findings in the report..." (T.9/9/16 at 198.) But those are the facts! Since they are supported by substantial competent evidence, the Bar can no longer run from them and advance its "alternative facts." That it continues to try illustrates that it has, for whatever reason, never been serious about pursuing the overarching goal of justice in this case. The Bar simply repeats its stale, hollow and failed theories with the same blind fury it has done from the beginning.

The Referee found violations of Rules 4-1.15 (safekeeping of property) and Rule 5-1.1(b)(application of trust funds for a particular purpose), in both instances because Alters failed to take remedial measures to avoid a recurrence of the problems after he discovered them in February 2010 (he left Boldt in control, and they discussed safeguards to ensure it did not recur). (T.3854-55.) The Referee sat through

the equivalent of four weeks of testimony and observed first hand the Bar's prosecution of this case. Her vantage point enabled her to see and feel Alters' pain and weigh his credibility and that of others. The Referee also observed first hand how the Bar continued to ignore the truth, conceding nothing, ever. For a variety of factors, mitigation and otherwise, the Referee recommended that notwithstanding her limited guilty recommendation, Alters has suffered enough and has been essentially reprimanded and suspended for five years. Her recommendation should not be disturbed.

Justification for the recommendation was and is plentiful. As the Referee found no wilful misconduct, her starting point under the Lawyer Sanction Standards was 4.12 (suspension) or 4.13 (public reprimand), (ROR 68), and she elected to recommend a downward departure. Among the factors justifying a downward departure are:

- The Bar's breach of confidentiality that cost Alters over $30 million. *Florida Bar v. Rubin,* 362 So.2d 12.

- The Bar's refusal to meet with Alters, while meeting with Boldt (the guilty one) 6 separate times, not including phone calls, showing a biased investigation. Had they met Alters, perhaps all of this could have been avoided. *See Florida Bar v Kane*, 202 So.3d at 19 ("The Court has made clear that the Bar has an obligation to process disciplinary cases in a fair and just manner.").

- The Bar's auditor, Carlos Ruga's, admission that he paid Alters' exculpatory evidence and his lawyer's letters no heed (5 minutes worth) before signing his false affidavit to this Court in December 2011. *Kane.*

- The Bar's misguided and ill-fated petition for emergency suspension based upon Ruga's admittedly false affidavit, which dashed any hope that Alters' reputation could be salvaged following the media leak. *Kane.*

- The Bar's refusal to follow the evidence wherever it led, instead looking for every excuse to reject it. Yet, the truth was right under its nose early in the process. In rejecting the evidence, it had to assume that Bruce Rogow was untruthful because before the suspension, he was on record that Boldt confessed to him that she did it. *Kane.*

- The Bar refused to challenge Boldt on her many obvious inconsistencies because she was its star witness against Alters. And its refusal to charge Culmo with wrongdoing because, he too, was a Bar witness. *Kane*

- The Bar agreed to dismiss Boldt' case (except the charge that she failed to report Alters to the Bar (which is beyond belief), based upon a false narrative, and then stood mute while she sanitized her file to conceal from her referee and this Court the truth about the depth of her involvement and her guilt, so that dismissal of her case would be approved in exchange for a 3 hour ethics course. She then testified falsely against Alters and tried to prevent him from presenting key exculpatory evidence. Alters even had to fight in this Court for the right to present the truth! *Kane*.

- Alters' illness, which delayed his discovery of further trust account erosion.

The sanction hearing, altogether ignored by the Bar, was moving. The then U.S Ambassador to Singapore, Kirk Wagar, was among the testifying witnesses. He noted that Alters went from "one of the most respected top guns down here,"

(T.9/9/16 at 19), to being abandoned by almost everyone. (*Id*. at 26-7.) Of this proceeding, he testified that the Bar's obsession with Alters has been "ridiculous" and that he is "flabbergasted and, frankly, the people I've talked to about it are likewise flabbergasted and they go from judges to leaders of large firms here. It's very disappointing." (*Id*. at 28-9.)

Another character witness said that Alters was now "toxic" in the legal community and the community at large. (*Id*. at 33.) Alters and the other two lawyers who remained with him the longest spoke of the destruction of his practice and how he rarely comes to the office. (*Id*. at 71, 74,137.) But to Alters' credit, he kept his sense of humor and is not bitter. (*Id*. at 28.)

Alters lost tremendous business due to this notoriety. (*Id.* at 54-5, 61, 73-4, 137). He also has not tried any cases for clients for fear that a jury would "Google" him, thereby prejudicing the client. (*Id.* at 70, 138-9.) He was largely self-banished from the practice of law, and could have simply hidden. But that was not his way.

Alters continued to give to his community. Unwilling to enter a courtroom, after he received his sharply reduced share of the Bank of America class action fee, he felt a compulsion to change kids' lives. (*Id*. at 144.) He decided that he would focus his life on financially supporting a number of underprivileged youth from the toughest neighborhoods in South Florida, helping them gain admittance to and attend

prestigious private schools, starting at elementary school. (*Id.* at 38, 142-3.) He financially supports around 100 to 150 children, including schooling and travel basketball. (*Id*. at 145.) He donates to a financial aid fund to cover between 50 and 100 children each year for private school. (*Id.* at 146.) He takes teams across the country for high level tournaments, hoping to expose them to colleges in order to gain further opportunity. (*Id.* at 147-8; 45-8.) One witness volunteered that those underprivileged children "really turned into some impressive young gentlemen." (*Id*. at 56.) Six wrote letters to the Referee. (ROR 56.) Alters has also opened his home to those children and their families: "if you go to his house and his kids are there, there are kids from all neighborhoods. The door is wide open - and their parents and families." (*Id.* at 25, 145.) Alters has, as far back as 2007, raised money for the Overtown Youth Center in Miami. (*Id.* at 23-24.)

Even before his Bar troubles, Alters exhibited the empathy and drive to help those in need consistent with the highest ideals of humanity and the legal profession. Following Hurricane Katrina, he put two or three families in homes in Broward County, Florida and a witness believed he purchased one of the houses for them. He also brought people over for short term stints to enable them to get on their feet while New Orleans was cleaning up. (*Id*. at 23.)

Other factors that weighed heavy on the Referee were that when Alters made the decision to leave Boldt in charge he had just received news that his mother was diagnosed with leukemia and he was going through a divorce which, although amicable, had to be delicately handled because of his three children. (T. 3788-9.) He was also traveling the country for ways to save the firm and replenish the trust and was looking for treatment options for his mother. (T. 3747, 3790-2, A.156.) In retrospect, leaving Boldt in charge was not the best decision, but at the time Alters felt he had no choice and his trust of Boldt, despite what happened, was unshaken.

The Referee also had deep concerns about the way the Bar pursued Alters compared to how it handled Boldt with kid gloves, which also impacted the recommended discipline. The Bar outright ignored exculpatory evidence that would have caused a reasonably prudent prosecutor in 2011 to think long and hard about whether it was proceeding against the right lawyer, let alone moving for an emergency suspension of Alters, or continuing on with a vacuous theory years later that Alters authorized the January and February 2010 transfers. The Bar even had the temerity to argue in opening statement that Alters authorized all 20 of them, (T.20), when it knew of Boldt's confession to Bruce Rogow, and it had evidence of Boldt's draft self-reporting letter and of her many inconsistent positions.

This was not a normal bar case. When is the last time in one case that a lawyer was reinstated after an emergency suspension; three bar witnesses (including a lawyer) were adjudicated to be untruthful; and a large swath of Bar evidence was found to be fabricated? At every turn in the investigation and prosecution of this case, the Bar's motives and judgment were suspect. It had many chances to get things right, but for whatever reason was guided by a preordained, unshakable and indefensible belief in Alters' guilt and Boldt's innocence. The truth seemed irrelevant.

The Bar's reliance on *Rousso* and the other cases it cites is misplaced. They involved gross negligence (or worse), default on a client loan, delay in payment, trust accounts left to unsupervised non-lawyers for extended periods, and lawyer preferences of one client over another. This case stands in sharp contrast. No client was denied or delayed payment. Boldt, a lawyer, oversaw the trust account through June 2010. As for the period after Alters took control in late June, those facts have already been discussed and the Referee has spoken, refusing to find him negligent or culpable in not discovering the post February 9, 2010 problems sooner than he did.

This case is most similar to two cases. The first is *Florida Bar v. Stanton,* SC06-408 (Fla. July 17, 2007), where a bookkeeper stole approximately $1.2 million over a period of 6 years. (A.179-91.) The lawyer relied on and had regular meetings

with the bookkeeper, but later discovered that reconciliations were falsified. The referee recommended a public reprimand, but it was **reduced** by this Court to an admonishment, even though lawyer was found guilty of violating Rules 5-1.1(b), 5-1.1(g)(2), 5-1.2(b)(1), (3), (5) and (6) and Rules 5-1.2(c)(1)(A) and 5-1.2(c)(1)(B).[31]

Florida Bar v. Moore, SC10-1826, (Fla. March 22, 2011), involved a bookkeeper who made fraudulent wire transfers resulting in trust account shortages of over $1.9 million, "which went undetected for a significant period of time," from 2003 to 2008. (A.171-78.) As here (with respect to the July to November time period), the bookkeeper doctored books of the firm to cover up misdeeds. The Bar agreed to a public reprimand of Moore even though he was ultimately responsible and found guilty of violating Rule 5-1.1(a)(1)(Nature of Money or Property Entrusted to Attorney) and Rule 5-1.1(e)(Notice of Receipt of Trust Funds; Delivery; Accounting). That case is of fairly recent vintage.

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[31] In *Florida Bar v. Wynn,* 210 So.3d 1271 (Fla. 2017), this Court stated that an unpublished disposition approving an uncontested report of a referee is not "case law" providing a reasonable basis for a discipline recommendation. But *Stanton* was a **contested** proceeding where this Court actually **reduced** the discipline to an admonishment, and was unpublished for that reason. The second (*Moore*) is not "case law" but is nevertheless probative. The Referee did not rely upon either case in her Report, but we cite them here for comparison.

Unlike *Moore,* Alters was not duped for years (although no one faulted Moore because it was a sophisticated scheme), but months. For most of the time ABBRC was managed by a board certified lawyer, with impeccable credentials, who initially made a mistake. Alters left her in charge believing it would never happen again. Unfortunately it did. He also regained the reigns in late June 2010 and while regaining his footing, fell ill in September. After being presented with fake reconciliations by Salpeter and following recovery from his illness in November, Alters moved with dispatch and fixed the problem.

Finally, the centerpiece of what troubled the Referee and what should trouble this Court: the disparate treatment of Boldt and Alters. A "basic principle of justice [is] that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005). Proportionality commands that, "[j]udges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness." *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980); *see also Florida Bar v. Baker,* 810 So. 2d 876, 881 (Fla. 2002)("we conclude that the referee's recommendation of discipline is too severe and not proportionate to discipline which this Court has approved in a similar circumstance"). In fact, the Preface to Florida's Lawyer Sanction Standards first considers, "what types of

sanctions have been imposed for similar misconduct" in its promulgation of the Standards themselves.

To say the Bar's treatment of Boldt and Alters (including its disposition of her case and advocacy against Alters here) was and is disproportionate is a restrained understatement. In fact, the Bar's recommended discipline here would be the ultimate inequity. If the Bar turned a blind eye to Boldt, agreeing to a diversion and a three hour ethics course for what the evidence indisputably established she did, what should Alters receive when she caused the majority of the problems, didn't lift a finger to fix them, and Alters saved the firm and replenished the trust in full?[32] What message would it send for her to go free and Alters punished beyond what he has already endured? To the Referee, who sat front row to this dispute from inception, it was not a close call. She meted out justice, perfectly proportioned. Alters has suffered enough at the hands of an unfair and unjust prosecution.

CONCLUSION

The Report and Recommendation should be approved in its entirety.

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[32] Not to mention Boldt's false testimony and her enterprise, along with Salpeter, to set up Alters as the "fall guy" for their mistakes and misdeeds. *See Florida Bar v. Adams,* 198 So.3d 593 (Fla. 2016)(lawyers permanently disbarred for conspiring to setting up their opposing counsel for a DUI in the middle of trial, and then mocking him in public).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered via electronic filing to: William Mulligan, wmulliga@flabar.org Bar Counsel and Adria Quintela, aquintel@flabar.org Chief Bar Counsel, The Florida Bar this 14th day of August, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that the font used herein is Times New Roman 14 point

/s/Andrew S. Berman
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