IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEREMY W. ALTERS,

Respondent.

_____/

Supreme Court Case
No. SC14-100

The Florida Bar File
No. 2012-70,199 (11P)

INITIAL BRIEF

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SYMBOLS AND REFERENCES

For the purpose of this brief, The Florida Bar may be referred to as "The Florida Bar" or the "Bar". Jeremy W. Alters may be referred to as "Respondent".

References to the Report of Referee will be by the symbol "ROR" followed by the corresponding page number(s). References to the transcripts of Final Hearing will be by the symbol "Tr." followed by the corresponding page number(s), separated by a colon and followed by the line number(s). References to transcripts of motion hearings, will be similarly designated, but followed by the date of that hearing.

Additionally, the Referee prepared an Index of Record. References to the Index of Record will be "Index" followed by the corresponding tab number. References to The Florida Bar's exhibits will be by "TFB Ex." followed by the exhibit number(s). References to The Florida Bar's exhibit no. 53 (the emergency suspension hearing transcript) will be "TFB Ex. 53 - " followed by the corresponding page number(s), separated by a colon and followed by the line number(s). References to the Respondent's exhibits will be by "Resp't Ex." followed by the exhibit(s).

STATEMENT OF CASE

On December 22, 2011, the Bar filed a Petition for Emergency Suspension (Supreme Court case no. SC11-2467) as a result of massive shortages in Respondent's trust account extending more than thirteen (13) months. On December 28, 2011, this Court granted the Bar's Petition and suspended Respondent from the practice of law. Thereafter, on December 28, 2011, this Court referred the matter to the Chief Judge of the Eleventh Judicial Circuit for the appointment of a referee pursuant to rule 3-5.2(f) as a result of Respondent's Response to The Florida Bar's Petition for Emergency Suspension, which was treated as a motion for dissolution.

On January 5-6, 2012, the Referee conducted a hearing pursuant to rule 3-5.2(f).[1] On January 20, 2012, the Referee filed her Report of Referee on recommending dissolution of this Court's suspension order and Respondent's immediate reinstatement. On January 23, 2012, this Court entered an Order to Show Cause directing the parties to show cause why the Referee's recommendations should not be approved. On January 25, 2012, following receipt of both parties submissions, this Court entered its order approving the Report of Referee, lifting Respondent's suspension, and reinstating Respondent.

1 The assigned referee was the Honorable Marcia B. Caballero who was also appointed as the referee in the instant matter.

On January 22, 2014, the Bar filed its complaint in the instant case subsequent to a grievance committee finding of probable cause for the violation of rules 3-4.3, 4-1.15, 4-8.1(a), 4-8.4(c), 5-1.1(a) and 5-1.1(b) (Index to Pleadings "Index" #1). On January 24, 2014, the Bar filed its Motion to Consolidate this case with The Florida Bar v. Kimberly Boldt; Supreme Court case no. SC14-118. (The Bar filed a notice of related cases two days prior.)[2] (Index #4). The Referee was appointed on January 31, 2014 (Index #7). On February 28, 2014, Respondent filed his Motion to Dismiss/For Summary Judgment ("1st Motion to Dismiss") (Index #10).

On May 13, 2014, a hearing on the Bar's Motion to Consolidate was conducted by the Honorable Bertila Soto, Chief Judge of the Eleventh Judicial Circuit. A written order denying the motion was entered the following day (Index #22). On June 5, 2014, the Referee entered an oral ruling denying both Respondent's motion to dismiss and for summary judgment (Index #59, Tr. 8:6-8, June 5, 2014). On June 23, 2014, the Referee entered her written order denying Respondent's motion to dismiss without prejudice and denying the motion for summary judgment (Index #38).

2 On January 23, 2014, the Bar filed a complaint against Kimberly Boldt ("Boldt") subsequent to a grievance committee finding of probable cause for the violation of rules 3-4.3, 4-1.15, 4-8.1(a), 4-8.3, 4-8.4(c), 5-1.1(a) and 5-1.1(b).

On September 19, 2014, Respondent filed his Renewed Motion to Dismiss ("2nd Motion to Dismiss") (Index #64). It was heard on October 24, 2014, an oral ruling denying the motion was entered on October 30, 2014 (Tr. 3:17-4:5, October 30, 2014) and on November 10, 2014, the written Order denying the motion was entered (Index #98). On November 7, 2014, Respondent filed his Motion for Partial Summary Judgment (Index #93). On December 8, 2014, the Bar filed its Response in Opposition (Index #105). On December 9, 2014, Respondent sent the Referee a letter advising that he would not be proceeding with his Motion for Partial Summary Judgment and cancelling the scheduled hearing on same.

On February 19, 2015, Respondent filed his Motion to Exclude Testimony of Lawyers from Searcy Denney related to Financial Records Provided to that Firm which were Prepared by Marc Salpeter (And Memorandum of Law) ("Motion to Exclude") (Index #179). On February 27, 2015, the Referee heard argument on the Motion to Exclude and denied said motion as to any records the Bar sought to introduce which would be evidence of the Bar's allegations as to the trust account violations (Tr. 182:22-183:5, February 27, 2015). The Referee then ruled that anything outside of what was alleged in the Bar's complaint, such as matters concerning Respondent's personal taxes, would not be permitted and sustained "the motion to exclude as to his individual tax records . . . ." (Tr. 183:5-11; 185:24-186:1,

February 27, 2015). On March 2, 2015, the Referee entered her written Order on Alters' Motion in Limine Regarding Searcy Denney Witnesses noting that,

> Respondent's motion to exclude the Searcy Denney witnesses is denied and The Florida Bar shall be allowed to introduce testimony and evidence in this regard as it pertains to Respondent's submission of trust account information and trust account records to the Searcy Denney law firm. With regard to Respondent's personal tax information as it pertains to the Searcy Denney witnesses, The Florida Bar shall not be permitted to introduce testimony or evidence in this regard (Index #189).

The initial final hearing dates took place on March 3, 5, 6, 9, and 10, 2015.[3] During the cross examination of Boldt on March 10, 2015, her counsel invoked the attorney client privilege on her behalf (Tr. 1067:21-1074:17). After hearing the argument of counsel for both Boldt and Respondent (Tr. 1095:16-20), the Referee entered her oral ruling on March 11, 2015 denying Boldt's "ore tenus motion to preclude the testimony claimed to be privileged." (Tr. 1095:16-20; Tr. 1108:3-5). Boldt's counsel advised the Referee that they would be seeking review of her decision (Tr. 1114:5-10). Ultimately, the final hearing was adjourned to allow Boldt the opportunity to seek this Court's review of the Referee's decision (Tr. 1178:5-11). All parties were in agreement that the final hearing could not proceed until Boldt received a ruling from this Court (ROR 3). On March 16, 2015, the Referee entered

3 In her report, the Referee mistakenly referenced that the final hearing took place on March 2, 3, 4, 5, 6, 9, and 10, 2015 (ROR 2).

her written Order Denying Witness, Kimberly Boldt's Ore Tenus Motion to Preclude Testimony of Communications Claimed to be Privileged Pursuant to the Attorney-Client Privilege and to Exclude Documents Generated in Connection with those Communications (Index #195).

On April 15, 2015, Boldt filed her Petition for Writ of Certiorari with this Court (Index #201). On September 25, 2015, this Court entered an order denying Boldt's Petition for Writ of Certiorari (Index #219).

On Monday, October 26, 2015, final hearing resumed. It proceeded daily (excluding weekends) through Monday, November 9, 2015. Prior to the closing arguments on November 9, 2015, the Bar entered a proffer on the record through the testimony of Thomas Duarte, the Bar auditor ("Duarte" or "Bar auditor") (Tr. 4140-4169). During the proffer, the Bar submitted 2 documents that were marked for identification, Proffer Exhibits "1" and "2." (Index #252, Tr. 4158:4-23). The Bar sought to mark a third proffer exhibit, but the Referee declined to allow the Bar to mark same for identification (Tr. 4001:16-4003:8). The guilt phase of the final hearing concluded on November 9, 2015.

On or about November 9, 2015, both the Bar and Respondent submitted an Agreed Stipulation as to Identification of Confidential Matters to the Referee (Index #229). On November 9, 2015, the Referee entered an Order Accepting Agreed

Stipulation as to Identification of Confidential Matters requiring that the Agreed Stipulation shall remain under seal (Index #230).

On September 7, 2016, the Referee issued her initial report of referee which did not include any recommendation as to discipline. The sanctions phase of the hearing occurred on September 9 and 21, 2016.

On September 20, 2016, the day prior to the conclusion of the sanctions hearing, Respondent filed his Motion to Dismiss Charges Due to the Bar's Deviation from the "Overarching Goal of Justice" and Memorandum on Sanctions ("3rd Motion to Dismiss") (Index #238). On October 14, 2016, the Bar filed its Response in Opposition (Index #239). On October 18, 2016, Respondent filed his Reply in Support of Respondent's Motion to Dismiss (Index #241). The Referee did not conduct a hearing on this third motion to dismiss filed by Respondent and did not enter an order as to same.

On October 28, 2016, the Referee filed her Report of Referee with this Court (Index #242). On November 14, 2016, the Bar filed its Motion to Assess Costs and Respondent filed his Motion to Tax Attorney's Fees and Costs and to Amend this Motion (Index #243 and 244). On November 28, 2016, the Bar filed its Amended Motion to Assess Costs ("Bar's costs motion") On December 1, 2016, Respondent filed his Amended Motion to Tax Attorney's Fees and Costs and to Amend this Motion ("Respondent's costs/fees motion").

The Referee scheduled the hearing on both the Bar's costs motion and Respondent's costs/fees motion for February 9, 2017. The aforesaid hearing was conducted on February 9 and 16, 2017. To, date the Referee has not entered a ruling on either the Bar's costs motion or Respondent's costs/fees motion.

Due to the extremely voluminous nature of the record of these proceedings, it would not be feasible to compile a complete listing of the procedural history. While there were many other filings and communications in this matter that were not referenced herein, the matters of particular import for this Court's consideration have been included.

STATEMENT OF FACTS

Organization of the Firm and Its Financial History

Alters, Boldt, Brown, Rash and Culmo, P.A. ("ABBRC" or "the firm") was formed on July 30, 2007. Respondent testified that when the firm was formed, fees earned on seven (7) cases were transferred from his previous firm to ABBRC (Tr. 3693:20-22). Thomas Duarte, the Bar's auditor ("Duarte"), testified that funds used to operate the firm came from loans from the Bank of Miami ("BOM") (Tr. 2147:1-3). The firm had a $1,000,000 term loan (Tr. 2147:3-6) that was utilized to build out the firm's office (Tr. 2147:11-14). The second loan was a $4,000,000 revolving line of credit ("RLOC") that was primarily utilized for operating expenses and client cost advances (Tr. 2160:7-16). Additionally, the partners loaned money to the firm, but

at the same time were taking loans from the firm which exceeded what they had contributed (Tr. 2146:3-24).

The Bar subpoenaed records from BOM regarding the firm's loans (Tr. 2163:13-18). In April, 2008 the bank advised the firm that the outstanding balance of the RLOC needed to be reduced from $4 million to $3 million (Tr. 2167:22-2168:1). In May, 2009 the firm was required to pay down the RLOC balance from $3 million to $2 million (Tr. 2170:24-2171:12).

The firm was not profitable in any year from its inception in July 2007 through December 31, 2010 (Tr. 2151:21-2152:4). During that period, the firm's losses totaled $3,177,292 (Tr. 2151:16-20).

ABBRC's Financial Issues

Respondent testified that in late 2008 or 2009, the firm became involved in Chinese dry wall ("CDW") and bank overdraft ("BOD") cases (Tr. 3736:6-9). Respondent testified that when they became involved in the CDW case "...that's when the drain began." (Tr. 3737:3-5). The firm couldn't keep up with expenses, even with funds they were receiving from a co-counsel agreement (Tr. 3738:17-23).

Carlos Perez ("Perez"), who worked for BOM and was responsible for managing all aspects of the bank's relationship with ABBRC, testified that as a courtesy, if the firm's operating account was overdrawn a bank representative would advise ABBRC and obtain their strategy to cover the overdrawn balance. If the

situation was not resolved, the bank would have returned the checks (Tr. 167:1-10). The firm was generally given until late in the morning or early afternoon to cover the overdrawn position (Tr. 3870:14-20). When asked whether the daily overdrawn balances concerned the bank, Perez responded affirmatively and stated, "Because overdrafts are typically a red flag of issues with a customer or borrower, specifically the lack of liquidity and working capital to operate on a daily basis" (Tr. 173:18-22).

Marc Salpeter ("Salpeter"), ABBRC's comptroller and at that time Respondent's brother-in-law, testified that after mid-January of 2010, he would go online every night or morning to check the status of the firm's bank accounts (Tr. 311:2-19). Salpeter stated that if the firm had not been able to cover the overdrawn position, the bank would return the checks. This would have hurt relationships with vendors or whoever the checks were issued to (Tr. 316:17-317-3). Respondent testified that it was the norm for the firm to have these positions (Tr. 3884:25-3885:2) and that he didn't doubt that during this period there may have been 1,000 or 2,000 instances of an overdrawn positon (Tr. 3885:8-11).

Several witnesses testified regarding the firm's financial difficulties. Clell Calvin Warriner, III, Esq. ("Warriner"), a partner at the Searcy Denney law firm ("Searcy firm") testified that after meeting with Respondent he believed that Respondent was in arrears on some assessments in the BOD case and faced being removed from leadership (Tr. 824:16-825:7). Patrick Landy ("Landy"), financial

controller for the Searcy firm, testified that after meeting with Respondent in May or June of 2010, it was his opinion that the firm's financial condition was dire (Tr. 155:22-25). Respondent agreed with Landy's assessment of the firm's dire financial condition (Tr. 156:6). Respondent testified that he told the Searcy firm that his firm was financially broke and that the situation was desperate (Tr. 3924:7-11).

Kimberly Boldt's Tenure and Responsibilities as Managing Partner

Kimberly Boldt ("Boldt") was a founding partner of ABBRC. On September 28, 2009, an email message was distributed to members of the firm announcing, among other things, the appointment of Boldt as managing partner. In part, the email message stated that Boldt "…will oversee the firm's operations from its finances to its day to day operations and the movement and handling of cases" (TFB Ex. 3).

Boldt testified that her involvement with the firm's finances were focused on regular meetings with Salpeter and Cindy Orlinsky ("Orlinsky"), an executive vice president, to review the amounts owed by the firm to outside vendors (Tr. 917:6-918:8). At that time, the amounts owed to vendors was about $1,000,000 and it was becoming a very big problem (Tr. 917:6-918:4).

Boldt, Salpeter and Orlinsky would prioritize the amounts due to vendors. Boldt and Orlinsky would then meet with Respondent to obtain his decision as to which vendors would be paid (Tr. 919:8-920:4). Respondent testified that the statement in Boldt's affidavit that Respondent made all decisions regarding vendor

payments was untruthful (TFB Ex. 53-250:5-20). Boldt also testified that she would handle other financial responsibilities if Respondent asked her to (Tr. 918:20-919:2; 926:6-25).

Boldt testified that her managing partner responsibilities concluded at the end of December 2009 or early January 2010 (Tr. 920:10-18), but that she continued to assist lawyers at the firm with their cases (Tr. 928:11-20). Respondent testified that he took back the managing partner reins from Boldt sometime in June 2010 (Tr. 3851:2-18). Respondent entered a number of exhibits into evidence contending that they demonstrated Boldt's financial responsibilities were more extensive than Boldt indicated. (Resp't Ex.: B, C, D, E, F, G, H, K, P, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, KK, LL, MM, NN, OO, QQ, SS, TT, BBB).

Perez confirmed that he had never dealt with Boldt nor had he ever met her (Tr. 185:12-19). Respondent conceded that although Boldt was appointed managing partner, she did not deal with the firm's bank because the relationship with the bank was his (Tr. 3899:7-25).

Firm partners David Rash ("Rash") and Robert Brown ("Brown") testified about Boldt's financial responsibilities. Rash testified that he observed Boldt dealing with past due vendor expenses, but did not see her involved in any other financial capacity (Tr. 756:3-9). Brown testified that whenever he had any financial issues at the firm he never went through Boldt (Tr. 859:21-23). Neither

Rash (Tr. 807:14-808:3) nor Brown (Tr. 868:2-4) were involved in the financial management of the firm.

Firm paralegals Marta Esteves ("Esteves"), Annette Feurtado ("Feurtado) and Cindy Russell ("Russell") testified regarding Boldt's management of the firm. They testified that Boldt instituted changes in employee benefits and administrative procedures, ran case meetings, managed cases, and approved check requests for vendor costs. They acknowledged that Boldt had meetings with Orlinsky and Salpeter but none were privy to the actual meetings (Tr. 3445:25-3446:16; 3469:15-19; 3721:15-21; 3722:1-4; 3184:5-6; 3209:4-17).

Matthew Moore ("Moore") was employed as an attorney after passing the bar and worked directly for Boldt. He testified that Boldt was involved in firm finances and met frequently with Salpeter and Orlinsky to provide guidance on those issues (Tr. 3493:15-25) and that Boldt told him that she was in charge of and oversaw the accounts (Tr. 3052:22-24). On cross examination, he testified that he was not aware of the specifics of Boldt's meetings with Salpeter and Orlinsky (Tr. 3500:13-20) and that he was not involved in any discussions of firm finances (Tr. 3508:17-24).

Neil Birenbaum ("Birenbaum") was the firm's vice president of operations and was employed from mid-2008 through mid-2010. He testified that he did not observe Boldt being involved in a major way with the financial side of the firm (Tr.

100:22-25). On cross examination, he testified that he was not at all involved in the finances of the firm.

Salpeter testified that in early February 2010 Respondent instructed him not to speak to Boldt about the trust account (Tr. 331:19-332:21). Orlinsky testified that Salpeter advised her that they were no longer allowed to discuss finances with Boldt (Tr. 123:1-8).

The Bar introduced email messages between Respondent, Orlinsky and Birenbaum in April and May of 2010 regarding a reduction in staffing and overhead. Boldt was not included in any of these messages (TFB Ex. 4,5,6).

Respondent's Control of the Firm

In June of 2008, following Thomas Culmo's ("Culmo") entry into the firm as an equity partner, Respondent's ownership in the firm was reduced to 36%. On June 8, 2008, the firm's partners executed an agreement (TFB Ex. 22) setting forth the new ownership percentages for each partner. That agreement reflects that "Jeremy Alters shall maintain 51% voting rights/share for all decisions in the firm". The agreement was retroactive to August 1, 2007.

Partner David Rash testified that in his experience, he did not think that Respondent relinquished control of the firm in any manner after Boldt's appointment as managing partner (Tr. 754:21-25). Beth Tyler Vogelsang ("Vogelsang"), a non-equity partner at ABBRC, testified that from where she stood, Respondent always

had ultimate decision making authority (Tr. 209:6-10). Orlinsky testified that during her employment, Respondent had the final say in all decisions and this did not change at any time (Tr. 131:7-15). Birenbaum testified that based on his observations, Respondent had final say on all decisions and this did not change at any time during his employment at ABBRC (Tr. 104:16-105:2).

Perez testified that it appeared that Salpeter made all financial decisions after convening with Respondent (Tr. 185:9-11) and that larger, global type issues were handled by Respondent (Tr. 188:20-24).

Christian Searcy ("Searcy") testified that it was his impression that Respondent was head of the firm, was in charge and called the shots (Tr. 139:19-23). He indicated that he did not find Respondent to be truthful in all the representations that were made (Tr. 147:11-14). Searcy testified that he did not meet Boldt at the time the co-counsel agreement was being negotiated (Tr. 139:4-14).

The Bar entered its Exhibit 21 into evidence. Salpeter explained that this email pertained to photographs to be posted on the firm's website (Tr. 430:21-23) and Salpeter thought he was being helpful by asking the attorneys to select their own photographs (Tr. 430:23-431:5). Respondent objected, indicating in the email: "Let me remind you this is not a democracy" (TFB Ex. 21).

Improper Transfers from ABBRC's Trust Account (In General)

Duarte testified that between September 2009 and October 2010 there were a total of forty-nine (49) improper transfers from ABBRC's trust account to its operating account (Tr. 2242:1-7), totaling $2,097,474.32 (TFB Ex. 30). He prepared a schedule reflecting the date and amount of each improper transfer with an explanation of what the improperly transferred funds were used for (TFB Ex. 30). He testified that most of the improper transfers were used to cover overdrawn positions in the operating account (Tr. 2258:24-2259:8). The improper transfers and shortfalls are generally undisputed.

Salpeter testified that Respondent was aware of and directed him to make each and every improper transfer and that he did not make any improper transfer without express permission from Respondent (Tr. 331:13-18; 343:6-10; 450:13-20; 706:5-9). Respondent denies ever authorizing any improper transfer of funds out of the firm's trust account (Tr. 3824:11-14).

Improper Transfers from the Trust Account in January & February 2010

On February 9, 2010, Perez at BOM sent an email to Salpeter, the subject of which was "Alters balance of the IOTA today very low" and indicated that the balance in the account was $26,688 (TFB Ex. 17). Duarte testified regarding the improper transfers that occurred in January and February 2010 (Tr. 2251:10-2254:23) and that each of the improper transfers was utilized in whole or in part to cover an overdraft position in the operating account at the end of the prior business

day (Tr. 2253:17-2254:23). In January and February 2010, there were a total of twenty improper transfers totaling $1,102,000.00 (TFB Ex. 30).

February 9, 2010 Meeting Between Respondent, Rogow and Boldt and Rogow's Advice to the Firm

The February 9, 2010 email message from BOM resulted in a meeting between Respondent, Rogow and Boldt. Rogow recommended that the firm self-report to the Bar, get the money back into the trust account, hire someone to audit the trust account and draft a letter to the Bar explaining the circumstances of what had occurred (Tr. 3618:24-3619:13). Rogow summarized his recommendations in an email message to Respondent and Boldt on February 11, 2010 (Resp't Ex. K).

When questioned about the firm's compliance with Rogow's recommendations, Respondent testified that they considered everything but didn't agree with some of it because of the situation (Tr. 3864:7-22). ABBRC prepared a self-reporting letter but decided not to send it (Tr. 3685:1-10) and an external CPA audit was not performed (Tr. 3862:12-18).

Respondent testified that Rogow told him that if he self-reported the trust account shortage, the Bar would shut the firm down (Tr. 3791:13-22). Respondent disagreed with the Bar's rule regarding self-reporting (Tr. 3878:5-7). He testified that his reading of the rule was that there was no duty to self-report if the problem could be fixed and it was entrusted to a person who could do it (Tr. 3878:14-17).

Draft Self-Reporting Letter and Forensics

In response to Rogow's request, a self-reporting letter was drafted (TFB Ex. 1), but never sent to the Bar (Tr. 3685:1-10). Boldt denies drafting TFB Ex. 1 and testified that she only drafted the sections marked with a "check" mark in Resp't Ex. YY (Tr. 1686:16-1713:23).

Forensics testimony indicated that this letter (TFB Ex. 1) was both sent from and received at Boldt's computer terminal. Although the Referee found that the letter reflected Boldt's direction to initiate the initial improper transfers, in fact the letter does not say that. Rather, it merely reflects approval of transfers from trust to operating under the mistaken belief that settlement funds and attorney fees in the Miller case had been received.[4]

In this regard, both Respondent's and Rogow's testimony reflect that Boldt thought the money was in trust and only authorized Salpeter to pay bills (TFB Ex. 53-373:7-10; Tr. 3646:5-10; Tr. 3770:6-8; Tr. 3771:20-24).

After his meetings with Boldt and Salpeter and a review of the draft letter, Rogow sent an email to Respondent and Boldt on February 17, 2010 (TFB Ex. 29). In the email, Rogow commented "…the fact that at least as of December 29 it was

4 The Miller case was a matter primarily handled by Culmo while he was at ABBRC. After the case was settled, Culmo directed a significant portion of the proceeds to his new firm. Culmo retained the amount he was due pursuant to the terms of his contract with ABBRC and disbursed the full amount due ABBRC and a referral firm in late December 2009.

clear that the Miller money was not forthcoming makes reliance on it beginning with transfers of January 12 (and all the ensuing transfers) a hollow excuse".

Respondent's Failure to Take Appropriate Remedial Measures

At his emergency suspension hearing, Respondent's assessment of where he stood after the January and February 2010 improper transfers was: "I've got a partner who's a disaster in terms of her personal life and needs to figure it out, and I've got this trust account problem and don't have the money to fix it" (TFB Ex.53-265:13-16). Nonetheless, Respondent testified that he left Boldt in charge of the firm's operations and finances (Tr. 3787: 13-15). Respondent testified that he wasn't going to ask any of ABBRC's other partners or attorneys to oversee the firm's financial operations related to the trust account. In fact, firm partners Rash (Tr. 795:12-15) and Brown (Tr. 864:8-11) testified that Respondent never even advised them there was a problem with the trust account.

After discovering the improper transfers and trust account shortage Respondent did not bring in any CPA firm to review what happened or to recommend changes in the firm's internal controls (Tr. 3861:12-22). Only after a bar grievance was filed did Respondent bring in a CPA firm to review the trust account (Tr. 3196:6-9).

Respondent conceded that after Boldt's departure in late June 2010, he did not have a formal process for reviewing the firm's trust account with Salpeter (Tr. 3857:22-3858:2).[5]

Salpeter's employment was terminated in late November 2010 (Tr. 3188:14-20). Russell offered to help with the firm's accounting and Respondent accepted her offer (Tr. 3189:4-14). After Russell completed a review of the firm's accounting records, she determined that the trust account had not been reconciled since January 2010 (Tr. 3196:10-16) and the trust account still had a deficit of over $1,000,000 (Tr. 3906:25-3907:14). Respondent testified that he was shocked by this information (Tr. 3907:15-17). Still, he did not engage a CPA firm to review the firm's trust accounting records (Tr. 3913:2-3914:7).

Text Messages and Forensics

Salpeter responded to a Bar subpoena (Resp't Ex. M) by providing a schedule of approximately 530 text messages he received from Respondent (TFB Ex. 13) and a schedule of improper trust account transfers (TFB Ex. 14). At trial, Salpeter explained the process he undertook to create this schedule of text messages (Tr.

5 Respondent contends that Salpeter showed him documents which matched Respondent's expectations as to what the balances should have been based on the money Respondent had deposited (Tr. 3858:2-8). However, no such documents were produced or placed into evidence (Tr. 3858:8-11).

702:10-705:23). Salpeter testified that he did not tamper with, alter, or modify any of the text message content at any time (Tr. 252:9-25; 253:1-15; 255:2-5; 378:6-22).

Salpeter was questioned regarding why the schedule of text messages provided to the Bar only included Respondent's messages and not his. He testified that he was concerned about the fraud that had been committed and being prosecuted for something he had been asked to do (Tr. 301:4-16).[6]

Both the Bar and Respondent retained computer forensics experts to analyze the PIM backup files and text messages maintained by Salpeter. The developer of the PIM Backup software also testified. While Respondent's forensic experts disputed Salpeter's recollection of the methodology he used to save his text messages, none of the experts' testimony could establish that the content of any message was changed in any way. In fact, Frederic DeClercq ("DeClercq), the developer of the PIM Backup software, was asked if his review of the PIM backup files produced any evidence that the content of any individual text message was changed. His response was "Nope. Not a clue." (Tr. 3274:8-3275:8). Yalkin Demirkaya ("Demirkaya") was the computer forensics expert retained by

6 After Salpeter obtained immunity from the Miami-Dade County State Attorney's office he provided the Bar with a full set of the PIM backup files (Tr. 706:15-21). The Bar then converted the PIM backup files to a readable format (TFB Ex. 19). PIM Backup is the computer program he utilized to save his text messages.

Respondent. Demirkaya testified that he had no forensic evidence that any of the words in any of the text messages were changed (Tr. 3377:18-21).

Duarte reviewed all the text messages received from Salpeter (Tr. 2366:18-2367:22; 2368:4-9). He then went to the financial records the Bar had received from banks and Respondent to see if there was a correlation between the message and the financial documents (Tr. 2342:15-2343:16). After concluding his review, Duarte prepared TFB Ex. 34 which summarizes 57 examples of Respondent and Salpeter clearly communicating about different firm financial issues (Tr. 2426:16-19), with financial documents that support the content of those text messages (Tr. 2426:20-24; 2429:19-2430:5). His review probably could have documented 157 transactions (Tr. 2427:6-13). Duarte performed the same analysis of the text message exchanges between Respondent and Salpeter as they related to improper trust account transfers and prepared TFB Ex. 32. Nonetheless, the Referee did not find the text messages as a whole to be credible.

Improper Transfers from March 2010 through June 2010

During the period from March 2010 through June 2010 there were seventeen (17) improper transfers, totaling $520,474.32 (TFB Ex. 30). The first of these improper transfers occurred on March 10, 2010, approximately one month after the discovery of the initial improper transfers and trust account shortage. On that day, BOM sent an email to Salpeter advising that the firm's operating account was

overdrawn by $132,242.37. It was Respondent who replied to the bank, advising them that the account would be covered (TFB Ex. 33).

Respondent was questioned about this email and overdrawn operating account balance occurring on the heels of the trust account shortage. He responded that he was not concerned as this was very normal at that time and had been normal for a long time (Tr. 3869:24-3870:3). On that same day, an improper transfer of $53,583.33 was made from the trust to the operating account (Tr. 2365:1-3).

Who Was the Managing Partner of the Firm After Boldt's Departure?

Respondent testified that after taking back back the managing partner role from Boldt in June 2010, no other attorney was appointed managing partner (Tr. 3852:3-12). By default, he was responsible for overseeing the trust account (Tr. 3852:13-3853:1). Respondent testified that he was back actively managing the firm in mid-December of 2010 (Tr. 3853:14-23).

Improper Transfers During the Period from July 2010 through October 2010

During the period from July 2010 through October 2010 there were eight (8) improper transfers from the firm's trust account to its operating account (Tr. 3035: 24-3036:9). The total of the improper transfers during this period was $280,000.00 (TFB Ex. 30). These improper transfers occurred during a period when all agree that Boldt was no longer associated with ABBRC.

Misuse/Misappropriation of Client Funds

Paragraphs 20-26 of the Bar's Complaint described how funds deposited in the ABBRC IOTA trust account for Client 1 were utilized to make disbursements to Client 2.[7] Duarte testified that these transactions occurred in November and December 2010 and reflect a misuse/misappropriation of client funds (Tr. 2740:4-5) (TFB Ex. 47) and clearly indicate that due to the shortages in the trust account, ABBRC used one client's funds to pay another client's settlement (Tr. 2741:10-15).[8]

Respondent's Efforts to Replenish the Trust Account

After he became aware of the January and February improper transfers and trust shortages, Respondent's focus turned to securing funds to replenish the trust account (Tr. 3787:8-12). He began selling personal assets (Tr. 3789:16-18), borrowed money (Tr. 3789:25-3790:3), sold property (Tr. 3790:4-17) and entered into co-counsel agreements (TFB Ex. 53-269:21-23; Tr. 3793:11-3798:6).

The Bar introduced several exhibits regarding the funds deposited into the firm's bank accounts through Respondent's efforts. TFB Ex. 38 provides a

7 Due to the Order Accepting Agreed Stipulation as to Identification of Confidential Matters (Index #229), the Bar is unable to mention the names of these respective clients. Therefore, they will be identified as Clients #1 and #2. (*See* Tr. 772-779.)

8 On October 31, 2010, the total amount of trust funds owed to 19 of ABBRC's clients (including Client #2) was $1,110,015.37 and the trust account had a balance of $82,237.74. This indicates a trust account shortage of $1,027,777.63 (TFB Ex. 47). Client #1's settlement funds were not distributed to the client until March 15,2011 (Tr. 2742:4-10, 20-24).

comparison of the monthly trust account shortage from February 2010 through March 2011 to the amounts deposited that were specifically designated to reduce the trust account deficit. However, Duarte testified that none of the deposits prior to March of 2011 permanently reduced the trust account shortage (Tr. 2508:9-15).

Respondent testified that he believed he was reducing the trust account deficits with the deposits he made (Tr. 3819:4-9). Respondent testified that he had no knowledge that money he deposited in the trust account was being improperly transferred out by others (Tr. 3824:15-24). Respondent admitted that he knew there were problems in the operating account in terms of meeting obligations, money was tight, and that it would have been ludicrous for him to put money in the trust account knowing that it would have to come back out shortly thereafter (Tr. 3942:9-17).

TFB Ex. 39 provides a comparison of the monthly trust account shortages from February 2010 through February 2011 to all amounts deposited by Respondent in the firm's bank accounts. However, Duarte testified that none of these funds permanently reduced the trust account shortage (Tr. 2511:6-18).

TFB Ex. 41 provides an analysis of how the funds deposited into the firm's bank accounts were used during the period from February 1, 2010 through February 28, 2011 (Tr. 2523:21-2526:6). The legend on the right side of the exhibit summarizes the amount spent for each category (Tr. 2528:20-2529:3). Of the $7,307,624 brought in during this period, $5,788,498 was disbursed for firm

expenses and obligations, $1,279,381 was disbursed to Respondent, and $256,132 was disbursed to ABBRC's other partners.

Monthly Trust Account Shortages

The Bar introduced TFB Ex. 30 into evidence. Duarte testified that this exhibit summarized the trust account shortage at the end of each month from January, 2010 through March, 2011 (Tr. 2469:6-10). From the time it was discovered in February 2010 through February 2011, the trust account shortage was never reduced substantially (Tr. 2473:14-21). Duarte testified that the trust account shortage in February 2010 was $1,002,049 and in February 2011, thirteen months later, it had actually increased to $1,018,436 (Tr. 2476:18-24).

Polygraph Examination

Respondent voluntarily submitted to polygraph examinations by John Palmatier ("Palmatier") on November 11, 2011 and February 27, 2013 (Resp't Ex. JJJ). Palmatier testified that it was his opinion that Respondent was being truthful in responding to the questions posed (Tr. 3415:2-6).

Improper Transfers Resulted in Direct Financial Benefits to Respondent

The Bar introduced TFB Ex. 31 into evidence. Duarte testified that this exhibit demonstrates that ten (10) improper transfers from the firm's trust account covered operating account checks to Respondent. The bank could not have covered the

checks to Respondent if the improper transfer had not been made (Tr. 2203:1-2304:2; 2305:4-11).

Duarte testified that there were many more instances where an improper transfer was made, with a check issued to Respondent being included in the batch of checks covered by the improper transfer. These transactions were not included in the exhibit because there were enough funds to cover Respondent's check in the operating account before the improper transfer and the bank could have decided to honor only the check payable to Respondent and not used the improperly transferred funds (Tr. 2304:3-2305:3).

Duarte testified that while TFB Ex. 31 does not specifically establish Respondent's knowledge of the improper transfer, it does establish a direct financial benefit to Respondent (Tr. 2306:14-2307:6). All the operating account checks issued to Respondent were deposited in Respondent's personal bank account (Tr. 2305:12-2306:9).

Documents Given to the Searcy Firm and Other Law Firms

At the end of May or beginning of June 2010, Respondent was negotiating a co-counsel arrangement with three law firms, one of which was the Searcy firm (Tr. 137:17-138:4). During negotiations, ABBRC provided the Searcy firm with a three-ring binder that included financial records, banks statements and other documents. The Bar subpoenaed a copy of the binder from the Searcy firm (TFB Ex. 8).

Duarte testified that many of the documents in the binder were different from the records the Bar had previously received from ABBRC and the firm's bank (Tr. 2553:8-16). The trust account reconciliations given to the Searcy firm were completely different from those given to the Bar by ABBRC (Tr. 2557:23-2558:2).

Salpeter testified that he changed the firm's bank records at Respondent's direction (Tr. 518:3-6). Respondent instructed him to remove the improper transfers from the bank statements (Tr. 537:12-13) so that the records looked like the improper transfers were never there in the first place (Tr. 538:18-20). Salpeter testified that he reviewed the entire process and notebook with Respondent and that Respondent approved all the changes to the trust account and bank records (Tr. 719:20-720:8; 726:14-727:5).

Landy testified that he did not believe that he asked ABBRC to provide trust account reconciliations (Tr. 155:14-15). Salpeter testified that the Searcy firm had requested them (Tr. 420:15-21). When questioned about the discrepancy between his testimony and Landy's, Salpeter stated "…based on what was going on with the trust accounts, we certainly would not have provide (sic) any information if they hadn't asked" (Tr. 421:2-5).

Respondent testified that he never instructed Salpeter to doctor the records (Tr. 3941:17-20) and did not know if Salpeter fabricated documents on his own (Tr.

3941:21-24). A comparison of the two disparate sets of records can be found in TFB Ex. 46 (Tr. 2255:17-25)

Funds Received from Third Parties

Respondent testified that after the February 9, 2010 meeting regarding the improper transfers, he and Boldt approached Russell to determine whether she would loan funds to the firm. They wanted to show that they were making efforts right away to put funds back into the trust account (Tr. 3774:16-22). Russell had previously loaned Respondent and Boldt $800,000 (Tr. 3170:10-11; 3201:11-16). She advised them she was unwilling to make any additional loans (Tr. 3201:9-11).

At Respondent and Boldt's request, Russell contacted her brother, John Russell, who had previously made a loan to Respondent and Boldt (Tr. 3203:18-3204:4). On February 10, 2010, he agreed to lend them $150,000 (Resp't Ex. BBB). All communications regarding the loan were through Cindy Russell (Tr. 3202:10-16). She did not tell her brother about ABBRC's trust account shortage (Tr. 3201:24-3202:9). John Russell had difficulty getting repaid, but the loan was finally paid back (Tr. 3203:1-10). Respondent testified that $100,000 from John Russell's loan was utilized to replenish the trust account (Tr. 3776:12-14; 3777:19-20) and $45,000 of the loan was used to pay back part of his sister's loan (Tr. 3776:17-20).

Respondent testified that he had a moral obligation to notify people of the trust account deficit if they were seeking to borrow money for the trust account (Tr.

3889:19-24). Respondent testified that he never spoke to John Russell (Tr. 3890:24-3891:3) and he didn't know what Cindy Russell told John Russell about the trust account (Tr. 3891:4-7).

Landy testified that during the negotiations for the co-counsel agreement, no mention was made of the firm's trust account problem (Tr. 155:18-21). Respondent confirmed that he did not tell anyone from the Searcy firm about the trust account problem (Tr. 3925:2-5).

SUMMARY OF ARGUMENT

Respondent was the majority shareholder in a law firm which, excepting one month, had a $1,000,000 trust account deficit for a period of thirteen months. The Referee found that Respondent was aware of the shortage and failed to take reasonable remedial measures to the safeguard the account and to avoid a reoccurrence. It took in excess of thirteen months for Respondent to replenish the shortfall. During this entire period, more than 96% of the proceeds coming into the firm inured to the benefit of Respondent personally or were applied and towards the operation of Respondent's law firm. None of the funds were permanently applied to the trust deficit. As a result of Respondent's conduct and in consideration of this Court's precedent, disbarment is the only appropriate sanction.

The Bar maintains that the Referee erred in finding numerous mitigating factors which the record reflects are unsupported by competent, substantial evidence.

They include, delay, timely effort to make restitution, breach of confidentiality by the Bar, and absence of dishonest or selfish motive. Additionally, the Referee erroneously failed to find dishonest or selfish motive as an aggravator despite the financial benefit received by Respondent from the improper trust transfers. Also, the Referee erred in failing to address Respondent's misconduct in paying settlement funds belonging to one client to a second client whose funds had already been misused.

The Referee gave great weight to what was described as Respondent's "heroic" efforts to replace the approximately $1,000,000 trust shortage. However, she erred in excluding the Bar's proffered evidence of misrepresentation in the course of securing monies to keep the law firm afloat. The proffered evidence should have been admitted pursuant to Florida Statute 90.405(2). Thus, despite the relaxation of the evidentiary rules in Bar proceedings, the Referee imposed an even more stringent standard than is required by the rules of evidence.

Finally, the Referee erred in not finding a violation of rules 4-8.4(c) and 5-1.1(a). The evidence is undisputed that Respondent used one client's funds to pay another client whose funds had previously been improperly used. Additionally, Respondent's failure to properly supervise the trust account, particularly when on notice of serious trust violations, constitutes a violation of 4-8.4(c) pursuant to existing case law. Lastly, the Referee erroneously concluded that there was no co-

mingling violation [5-1.1(a)] despite the undisputed evidence of Respondent's deposit of non-client funds into the trust account and his failure to inform the Bar of both the deficit in and the replenishment of the trust account.

I. PROFFER

THE REFEREE ERRED IN EXCLUDING RECORDS AND COMMUNICATIONS CONCERNING RESPONDENT'S TAX STATUS

"[I]t is well established that Bar disciplinary proceedings are quasi-judicial rather than civil or criminal. The referee is not bound by the technical rules of evidence. On review, a referee's decision regarding the admissibility of evidence will not be disturbed absent an abuse of discretion." *The Florida Bar v. D'Ambrosio*, 25 So.3d 1209, 1215 (Fla. 2009). It was an abuse of discretion for the Referee to grant Respondent's motion to exclude, thereby precluding the Bar from introducing testimony and documents related to Respondent's personal tax status at final hearing. Both testimony and documents clearly establish that Respondent misrepresented his tax status to a law firm while he was in the process of procuring financial assistance for his firm through a co-counsel agreement.

Respondent testified that on February 9, 2010 he first discovered the improper transfers from his firm's trust account and has admitted that the trust account shortage at that time was in excess of $1,000,000.00 (Tr. 3769:5-10; TFB Ex. 53 – 259:4-6; Respondent's Answer and Affirmative Defenses, ¶ 12-13). A large

component of Respondent's defense centered on the efforts that he made subsequent to February 9, 2010 to keep the firm operational and to replenish the trust account.

At the emergency suspension, hearing Respondent testified:

- "[I]'ve got this trust account problem and I don't have the money to fix it. I put in every penny I had. So my mission at that moment was to get that money back in that account. And there was only one way to do it. And I know the Bar would like me to report it and shut down. Well, it doesn't work that way in this world. Because if you do that, the clients don't get their money, and the Bar, through their insurance credit or whatever it's called, has to pay the money. I didn't want to put this on anybody else." (TFB Ex. 53 - 265:12-25).

- "So the decision had to be made what we'd do. . . . If we self report, we can't protect the clients and we can't give the money back. So I had what we've referred to as a Hobson's choice. And it was do you shut down and tell the clients their money's gone or do you fix it? And I'm a moral human being and I wanted it fixed. And that is what I did. . . . And I'm proud that I fixed it. And I'm very comfortable with that." (TFB Ex. 53 - 266:22-25; 267:1-11).

As noted below, Respondent's efforts to keep the firm operational and replace the trust funds was highlighted in the instant case as well:

- "Mr. Rogow said that he was aware of the efforts by the Respondent to replace the funds. . . . . He knows . . . that he had talked to others to try to get the money. He said that the Respondent's efforts were heroic . . . . He opined that the Respondent had always been honest with him in professional dealings." (ROR 47).

- Respondent testified that, upon discovering the trust account deficit, "He felt that he had to raise the money and fix the firm." (ROR 52).

One of the firms that helped Respondent's firm with its finances by entering into a co-counsel arrangement was the Searcy firm. Searcy testified that his firm and

two other firms each agreed to initially contribute $200,000.00 and $66,666.00 per month. It was his belief that the plan would be to advance those monies for up to 22 months. (Tr. 144:11-19). Landy testified that it was his recollection that the Searcy firm paid Respondent's firm approximately $666,667.00. (Tr. 156:17-157:1). At the emergency suspension hearing, Respondent testified that his firm paid $668,000.00 back to the Searcy firm. (TFB Ex. 53 – 281:22-23).

While performing their due diligence to determine whether to enter into a co-counsel arrangement with Respondent's firm, the Searcy firm inquired as to the status of Respondent's personal taxes. In the course of discovery, the Bar received documentary evidence that clearly established that in response to an email from the Searcy firm, Respondent blatantly misrepresented his personal tax status to them. At a hearing on Respondent's motion to exclude the testimony of lawyers from the Searcy firm conducted on February 27, 2015, the Referee ruled that the Bar would not be permitted to make any reference to Respondent's personal tax status at the final hearing.

During the hearing on the aforementioned motion to exclude, Respondent argued that the Bar's attempt to address the misrepresentation of his personal tax status to the Searcy firm was irrelevant and constituted inadmissible character evidence. (Tr. 152:1-153:8; 175:1-7; 181:2-5, February 27, 2015).

In support of the admissibility of evidence related to Respondent's false statement to the Searcy firm as to his tax status the Bar argued that,

- "[T]he key is also that the character trait of dishonesty should be something that's appropriate for the Bar to address as well, when a character of a person is an essential element of the charge, or the defense, proof may be made of specific instances of the person's conduct." (Tr. 176:24-177:6, February 27, 2015).

- [I]t's a character trait of his dishonesty . . . it's completely relevant in this situation." (Tr. 185:18-21, February 27, 2015).

The Bar also argued that since Respondent put forth a defense emphasizing the efforts he made subsequent to February 9, 2010 to keep the firm operational and to replenish the trust account, the Bar should be allowed to offer evidence of Respondent's dishonest behavior in obtaining some of the financial assistance. (Tr. 173:3-8; 185:5-16, February 27, 2015).[9]

In granting the motion to exclude which precluded the Bar's introduction of records and communications related to Respondent's personal tax status at the final hearing, the Referee stated,

9 At the motion hearing on February 27, 2015, the Bar presented argument that the issue pertaining to Respondent's tax status was within the scope of the Bar's complaint, particularly because rule 4-8.4(c) had been charged. The Bar will forgo this argument on appeal. Also, during its proffer, the Bar presented testimony as to Duarte's expert opinion and as to the admission of notebooks he prepared that were referenced as The Florida Bar's Proffer Exhibit "2." The Bar will not pursue those issues on appeal.

- "[H]is personal taxes and all, I think that's outside of what the complaint alleges and I don't think that's, you know, falls within any - - I understand your argument as to dishonesty. This is something that he wasn't on notice of - -" (Tr. 183:6-11, February 27, 2015).

- "But his efforts to - - I don't think that's really relevant to the complaint, what he did to try to replace the - -" (Tr. 185:1-4, February 27, 2015).

- "[I] think that goes beyond what's been pled, so I'm going to sustain the motion to exclude as to his individual tax records . . . ." (Tr. 185:23-186:1, February 27, 2015).

As noted above, at the hearing on Respondent's motion to exclude, the Bar argued that it should be able to address Respondent's efforts to replenish the trust account and the Referee stated, "But his efforts to - - I don't think that's really relevant to the complaint, what he did to try to replace the - -" (Tr. 184:8-15; 185:1-4, February 27, 2015). Yet, the Referee made reference to testimony concerning Respondent's efforts to replace the missing trust funds in her Report of Referee. (ROR 47, 52-53). Furthermore, as noted below, the Referee made reference to the replacement of trust funds within the mitigating factors included in her report:

- Timely good faith effort to make restitution or to rectify consequences of misconduct – the evidence was clear that Respondent secured loans, sold assets, and continually deposited funds into the trust account and upon discovering that the problem remained unresolved when he took over the financial operations of the firm he resolved the shortage in the trust account within a short period of time . . . ." (ROR 69).

- Remorse – The Respondent . . . met his obligations and those of Ms. Boldt's [sic] with regards to the loans . . . . [M]r. Rogow described his efforts as heroic." (ROR 70).

If what Respondent did to replace the funds, wasn't "really relevant to the complaint," why did the Referee make reference to the replacement of funds in her report and include it as a mitigating factor?

As a result of the Referee's ruling, the Bar made a proffer through Duarte at the final hearing. In the proffer, Duarte testified that during the course of discovery in this matter, the Bar received a letter dated June 2nd or 3rd , 2010 drafted by Steven Habib ("Habib"), a CPA that performed services for Respondent's firm and prepared his personal tax returns. The letter was addressed to the Internal Revenue Service and requested a payment program for Respondent's personal income taxes due for 2008. The approximate amount of the tax liability due for 2008 was $310,000 - $318,000. Attached to Habib's letter were forms requesting a payment program signed by Respondent and dated May 31, 2010. (Tr. 4140:5-21; 4143:2-6, 16-25; 4144:12-20; 4145:21-4146:19).

The Bar sought to include the Habib letter along with the attached forms signed by Respondent in its proffer. However, over the Bar's objection, the Referee refused to allow the Bar to include these documents in the proffer as the tax matter involved a joint filing with Respondent's ex-wife. In *Porro v. State*, 656 So.2d 587 (Fla. 3d DCA 1995), the court noted that "The trial court has discretion over the method of making an offer of proof." While recognizing the Referee's discretion, the Bar made clear that the Habib letter with the attached forms was crucial to the

Bar's proffer and offered to redact any reference to Respondent's ex-wife and her personal information. The Referee still would not permit the Bar to include the Habib letter and attachments as an exhibit for its proffer and precluded the Bar from marking these documents for identification (Tr. 1989:19-1993:1; 1994:24-1995:3; 3987:1-4003:7; 4009:1-14). In *Brantley v. Snapper Power Equipment*, 665 So.2d 241 243 (Fla. 3d DCA 1995), the court found that even excluded documents should be marked for identification and become part of the record so that the documents are "available to an appellate court so it can determine if error was committed in excluding the evidence . . . ."

Duarte further testified in the proffer as to an email chain that the Bar received from Respondent in the course of discovery (Tr. 4147:6-17; 4148:2-7). Included within this email chain was a June 4, 2010 exchange between Landy, Respondent and Salpeter. Amongst other things, Landy inquired as to whether Respondent had any personal tax issues with the IRS (Tr. 4150:10-24). Respondent responded to Landy's email stating, "I have no outstanding tax obligations. I owed money in 2008 but it has been paid. Got a refund in 2009." (Tr. 4151:23-4152:10). The email chain was included in the proffer as The Florida Bar's Proffer Exhibit "1." (Tr. 4157:23-4158:7).

As Duarte summarized, Habib's letter to the Internal Revenue Service requesting a payment plan on Respondent's behalf for 2008 taxes owed (including

the forms signed by Respondent requesting a payment program) was in direct contradiction with Respondent's email to Landy that his 2008 taxes had been paid. (Tr. 4155:12-4156:6). This blatant misrepresentation occurred during the crucial period of Respondent's quest to keep the firm operational and to replenish the trust account - less than 4 months after Respondent contends he first became aware of the firm's massive trust account deficit and over 8 months before the trust account deficit was essentially resolved. (*See* The Florida Bar's Proffer Exhibit "1.")

It is well established that the rules of evidence are relaxed in Bar proceedings. *See In re Calvo*, 88 F.3d 962, 967 (11th Cir. 1996); *The Florida Bar v. Rood*, 620 So.2d 1252, 1255 (Fla. 1993); *The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla. 1986). Yet in the instant case, in regard to the Referee's ruling precluding any reference to Respondent's personal tax status at the final hearing, not only were the rules not relaxed, but rather the Referee held the Bar to a more stringent standard than that required by Florida Statute 90.405(2).

"When character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of that person's conduct." West's F.S.A. section 90.405(2). *See Todorovich v. Wolfner*, 555 So.2d 372 (Fla. 3d DCA 1989).

In *Beal v. State*, 620 So.2d 1015 (Fla. 1st DCA 1993), the state charged appellant with multiple counts of grand theft in connection with alleged fraudulent

business transactions involving appellant's failure to perform on construction contracts. In his defense, appellant attempted to offer the testimony of a witness that was satisfied with the construction work that appellant performed. The trial court refused to allow the testimony of said witness finding that it would constitute, "character evidence inadmissible to prove that appellant acted in conformity with this character trait (honesty) on the particular occasions in question, citing Section 90.404, Florida Statutes."

In reversing the trial court, the First DCA referenced FS 90.405(2) and found that, "Because dishonesty is an essential element of the crimes for which appellant was charged, the trial court erred in refusing to admit the proffered testimony of appellant's witness who would have testified to a specific instance of appellant's honest conduct and faithful performance of a construction contract."

In the instant case, the Bar's complaint charged Respondent with numerous rule violations, including rule 4-8.4(c). Dishonesty, fraud, deceit or misrepresentation are each alternative essential elements of rule 4-8.4(c). Respondent's misrepresentation to the Searcy firm as to his tax status was dishonest, fraudulent, deceitful, and a misrepresentation. Every possible element of rule 4-8.4(c) was met, yet the Bar was precluded from making any reference to Respondent's personal tax status at the final hearing.

The significance of Respondent's false statement to the Searcy firm cannot be understated as it occurred squarely within the subject time frame of a massive shortage in the firm's trust account and when Respondent's firm, by his own admission, was "financially broke and . . . the situation was desperate." Tr. 3923:21-3924:11. Undoubtedly, Respondent understood the significance of his response to the Searcy firm and he chose to be untruthful. This Court must reject the Referee's ruling precluding the Bar from making reference to Respondent's personal tax status at the final hearing as it constituted an abuse of discretion and accept the Bar's proffered testimony including the Bar's Proffer Exhibit "1" as evidence of record in this case.[10]

II. REFEREE ERRED IN NOT FINDING THAT RESPONDENT MISUSED CLIENT FUNDS AND IMPROPERLY APPLIED MITIGATING AND AGGRAVATING FACTORS

A referee's factual findings and recommendations as to guilt carry "a presumption of correctness and should be upheld unless clearly erroneous or without support in the record." *The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla. 1986). "[I]f a referee's findings of fact and conclusions concerning guilt are

10 The Bar would also respectfully request that this Court allow the Bar to file the Habib letter along with the attached forms signed by Respondent as part of its proffer since the Bar was precluded from including this information in its proffer. If the Court deems it appropriate, the Bar will redact all reference to Respondent's ex-wife as it relates to these documents and/or take any other measures required by this Court.

supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee." *The Florida Bar v. Shoureas*, 913 So.2d 554, 557 (Fla. 2005). In the instant case, the Referee's findings of fact as listed below are clearly erroneous, without support in the record, and therefore, must be reversed.

Clients #1 and #2 [11]

On October 31, 2010, ABBRC owed Client #2 $229,875.32 and the balance in the firms trust account on that date was $82,237.74. [12] (TFB Ex. 47; Tr. 2734:4-18). Client #2's settlement funds had been deposited in the firm's trust account on July 30, 2009 and September 28, 2010 and had been previously misappropriated by ABBRC (Tr. 2741:16-2742:3).

In November and December of 2010, ABBRC received and deposited two settlement checks into its trust account for Client #1, totaling $1,505,645.27 (Tr. 2734:23-25; 2737:2-5). The firm proceeded to disburse $285,777.00 to itself for fees and costs and $425,176.68 to referral law firms (Tr. 2735:18-20; 2737:11-20). It did

11 See Footnote 7.

12 On October 31, 2010, the total amount of trust funds owed to 19 of ABBRC's clients (including Client #2) was $1,110,015.37 and the trust account had a balance of $82,237.74. This indicates a trust account shortage of $1,027,777.63 (TFB Ex. 47).

not disburse any funds to Client #1 at this time. This left $794,691.59 in the trust account for Client #1[13] (Tr. 2738:7-13).

On December 7, 2010, ABBRC issued check #1267 in the amount of $229,875.32 to Client #2 in full payment of the amount due said client (Tr. 2739:7-9). At least $169,058.40 of this disbursement came from the funds it had previously received for Client #1[14] (Tr. 2739:19-21). Without question, this check was issued at a time when Boldt and Salpeter were no longer with the firm. Respondent was responsible for executing and issuing this check; he is unable to cast blame elsewhere for this misuse of Client #1's funds. (The specific details of these transactions, including check #1267, are contained in TFB's Ex. 47.)

In her report, the Referee made no reference to this series of transactions in her "Findings of Fact"; rather, she only included this passing reference in the "Summary of Proceedings" section:

> [M]r. Duarte testified as to the funds that were actually held in the firm's trust account from October 31, 2010 and December 31, 2010 using another exhibit that was introduced as Petitioner's Exhibit No. 47. His chart showed how money held in trust for a client was used for another client (ROR 35).

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13 Client #1's settlement funds were not distributed to the client until March 15, 2011 (Tr. 2742:4-10, 20-24).

14 This difference reflects the fact that there were funds in the trust account on October 31, 2010 (before these transactions occurred) and there were incidental trust account receipts and disbursements for other clients in November and December.

These transactions evidence multiple instances of misuse of client funds and show that Respondent, himself, was directly responsible for the misuse of Client #1's funds through his authorization and issuance of check #1267 on December 7, 2010. The Referee's failure to include any reference to this critical series of transactions in her "Findings of Fact" is clearly erroneous.

Absence of Dishonest or Selfish Motive

In mitigation, the Referee found the "absence of dishonest or selfish motive" [standard 9.32(b) of the Florida Standards for Imposing Lawyer Sanctions] (ROR 69). In making this finding, the Referee ignored the tremendous personal benefit that Respondent received from many of the improper transfers. Ten (10) improper transfers from the firm's trust account covered operating account checks in the total amount of $257,200 that were issued to Respondent. [15] The bank could not have covered these checks to Respondent, but for the improper transfers. All of the operating account checks issued to Respondent were deposited into his personal bank account. Further, during the period from February 1, 2010 through February 28, 2011, when the firm's trust account shortage as a general rule was over

15 This figure does not include various other operating account checks that were issued to Respondent that were also covered by improper transfers. Said checks were ones that were included within a batch of checks covered by an improper transfer. In these instances, there were enough funds to cover Respondent's check in the operating account before the improper transfer; hence, the bank could have decided to honor the check payable to Respondent solely and not use the improperly transferred funds.

$1,000,000, Respondent received disbursements totaling $1,279,381 from the firm. The trust account shortage actually increased by $16,387 during this period.

The Referee's finding that there was an "absence of dishonest or selfish motive" was clearly erroneous and should be reversed. In turn, the Referee should have found that Respondent had a "dishonest or selfish motive" [9.22(a) from the Florida Standards for Imposing Lawyer Sanctions] since there is ample support in the record for this factor and it was clearly erroneous for the Referee to not include it as an aggravator.

Restitution

The Referee referenced "Timely good faith effort to make restitution or to rectify consequences of misconduct" in mitigation [9.32(d) from the Florida Standards for Imposing Lawyer Sanctions] (ROR 69). Clearly, Respondent took no serious steps to resolve a massive trust account deficit once he was on notice. The deficit essentially remained in excess of $1,000,000.00 for over thirteen months (excepting September 2010); the shortage was actually greater a year after Respondent was on notice. This finding in mitigation is clearly erroneous, without support in the record, and therefore, must be reversed.

Delay

In the Referee's report, the Referee considered "the length of time it took to bring the complaint formally against him and then to try the case through no fault of the Respondent" as a mitigating factor (ROR 67). She stated as follows:

> Unreasonable delay in disciplinary proceeding provided that the Respondent did not substantially contribute to the delay and provided further that the Respondent has demonstrated specific prejudice resulting from delay – From the date that the Respondent was notified of the Bar complaint against him by Ms. Sullivan through the conclusion of this trial it has been approximately 5 years (ROR 70). [Reference to Standard 9.32(i) of the Florida Standards for Imposing Lawyer Sanctions is underlined.]

In finding this mitigator, the Referee completely disregarded a prior ruling and attributed delay to the Bar when it in fact was diligent in its prosecution of this matter.

On February 28, 2014, Respondent filed his "1st Motion to Dismiss" (Index #10). On May 22, 2014, the Bar filed its response in opposition (Index #28). Therein, the Bar explained that both Respondent and Boldt were responsible for significant delays in the case prior to the Bar having filed its complaint with this Court. As indicated in the Bar's response in opposition, at the very least, Respondent and Boldt were responsible for delays in excess of 7 months, with Respondent responsible for the lion's share of them.

On June 5, 2014, the Referee entered an oral ruling denying the 1st Motion to Dismiss (Index #59, Tr. 8:6-8, June 5, 2014). At that time, she stated, "As to the time delay argument, Mr. Alters has conceded that he was partially responsible for

the delay, *so I cannot find that there have been unjust delays*." Emphasis Supplied. (Index #59, Tr. 7:1-5, June 5, 2014).

Neither is the Bar responsible for any delays subsequent to the filing of its complaint. Rather, two other major factors interwoven into the fabric of this case extended the time frame significantly. First, Boldt filed a Petition for Writ of Certiorari with this Court on April 15, 2015. On September 25, 2015, this Court entered an order denying Bolt's Petition for Writ of Certiorari. All parties agreed that the final hearing could not proceed in the absence of this Court's ruling. Second, the Referee took an extensive amount of time to draft her report in this matter. The guilt phase of the final hearing concluded on November 9, 2015, but the first draft of the report was not provided until September 7, 2016 (Tr. 7:1-25, September 9, 2016). Thus, over fifteen months of delay is attributable to Boldt's petition and the time taken for the issuance of the Referee's initial report.[16]

The Referee's finding of delay as a mitigator is clearly erroneous, without support in the record, and therefore, must be reversed.

Breach of Confidentiality

Also clearly erroneous and contributing to her "downward departure," was the Referee's finding in mitigation that the Bar violated its own rules regarding

16 Subsequently, further hearings were conducted and the Referee issued her final Referee's report on October 28, 2016. At present, the Referee still has not entered a ruling on either the Bar's costs motion or Respondent's costs/fees motion.

confidentiality leading to numerous articles being published involving Respondent. The Referee stated:

- [H]e . . . has already suffered . . . through the numerous articles written about him beginning with articles that were published based upon a confirmation by The Florida Bar to a newspaper of the nature of the complaint while the matter was to be treated confidentially by The Florida Bar pursuant to their own rules (ROR 68).

- Imposition of other penalties or sanctions – The emergency suspension effective December 28, 2011 through January 25, 2012 for misappropriation, along with the premature disclosure to the press and the ensuing barrage of publicity regarding the allegations of misappropriations have irreparably damaged the Respondent's legal career (ROR 70). [Reference to standard 9.32(k) of the Florida Standards for Imposing Lawyer Sanctions is underlined.]

In fact, whether the Bar breached its own rules of confidentiality was dealt with at length on more than one occasion in these proceedings. Respondent's 1st Motion to Dismiss, filed on February 28, 2014, included an argument that the Bar had breached its own confidentiality rules by its disclosures to the news media, causing Respondent harm as a result. In denying that motion, the Referee made no findings that the Bar violated any of its confidentiality rules, but denied it without prejudice (Index #59, Tr. 5:21-6:3, June 5, 2014).

On September 19, 2014, following the deposition of Francine Walker ("Walker"), the Bar's Director of Public Information and Bar Services, Respondent filed his Renewed Motion to Dismiss ("2nd Motion to Dismiss"). The 2nd Motion to Dismiss focused solely on the argument that the Bar breached its confidentiality

rules. On October 30, 2014, the Referee entered her oral ruling denying the motion, noting that she had reviewed Walker's deposition in its entirety. (Tr. 3:17-4:5, October 30, 2014). The Bar inquired as to whether the confidentiality issue had "been resolved once and for all." (Tr. 46:2-12, October 30, 2014). The Referee conclusively responded,

> This issue has been resolved. . . . [I] find that the case should not be dismissed. It's properly pled . . . there doesn't appear to be any violation of the Florida Bar rules. . . . Of course, they always have, if there's other grounds, to file a motion to dismiss at some later date, they have the right to do . . . . But as to this issue as to the Bar violating its own rules of confidentiality, I don't find that there was a violation . . . . (Tr. 46:13-47:14, October 30, 2014).

On September 20, 2016, the day prior to the conclusion of the sanctions hearing, Respondent filed his Motion to Dismiss Charges Due to the Bar's Deviation from the "Overarching Goal of Justice" and Memorandum on Sanctions ("3rd Motion to Dismiss"). The Referee did not conduct a hearing on the 3rd Motion to Dismiss and did not enter an order as to same. Within the 3rd Motion to Dismiss, Respondent included "premature disclosure to the press" leading to an "ensuing barrage of publicity" which "irreparably damaged" Respondent's firm, as a proposed mitigator.

Despite never having ruled on the 3rd Motion to Dismiss, on October 28, 2016, the Referee filed her Report of Referee which for the *very first time* found that the Bar breached its own confidentiality rules and included same as a mitigator. In doing so, the Referee disregarded her prior rulings, particularly her ruling on the 2nd Motion to Dismiss, where she specifically found, "This issue has been resolved. . . . [A]s to

the Bar violating its own rules of confidentiality, I don't find that there was a violation . . . ." (Tr. 46:13-47:14, October 30, 2014). The Referee's unexplained and unsupported finding that the Bar breached its own confidentiality rules and that such breach should be considered in mitigation is simply mystifying, clearly erroneous, without support in the record, and therefore, must be reversed.

III. REFEREE'S RECOMMENDATION THAT RESPONDENT DID NOT VIOLATE RULES 4-8.4(c) and 5-1.1(a) WAS CLEARLY ERRONEOUS, WITHOUT SUPPORT IN THE RECORD AND SHOULD BE REVERSED

The same standard of review applicable to findings of facts applies to recommendations of guilt. (See *Vannier,* and *Shoureas, supra*). In the instant case, the Referee's recommendations that Respondent was not guilty of rules 4-8.4(c) and 5-1.1(a) are clearly erroneous, without support in the record, and therefore, must be reversed.

It is the Bar's position that Respondent engaged in dishonest and deceitful conduct in violation of rule 4-8.4(c) by using one client's funds to pay obligations owed to another client and by failing to implement reasonable remedial measures once on notice of massive trust account shortages.

Intent is a necessary element of proving a violation of rule 4-8.4(c). This Court has stated, "[I]n order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." *The Florida Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla. 1999). In *Fredericks*, this Court makes clear that motive

need not be established for intent. Rather, the issue is whether the attorney deliberately or knowingly engaged in the activity in question.

As indicated by the following, it is readily apparent that Respondent's action/inaction in regard to the firm's trust account shortage was certainly "deliberate or knowing" and thereby satisfying the requisite intent for a violation of rule 4-8.4(c):

- Respondent was the majority shareholder and/or maintained "51% voting rights/share for all decisions in the firm" (TFB Ex. 22).

- Respondent was the managing partner of the firm from the onset until Boldt took over that title in the summer of 2009 (TFB Ex. 53 – 220:12-14; Tr. 3753:3- 3755:25).

- Respondent turned over the title of managing partner to Boldt in June 2010 knowing that the firm was experiencing severe financial difficulties (Tr. 3734: 14-17, Tr. 3738: 14-23, Tr. 3851: 2-18, Tr. 3885: 8-11).

- After learning of the trust shortages and being advised by Rogow as to the measures the firm needed to implement (TFB Ex. 53 – 371:12-17; Tr. 3618:24-3619:13), Respondent did not follow any of his advice.

- According to Respondent, Boldt and Salpeter were responsible for the trust shortfall, yet, he knowingly left them in continued charge of the trust account while knowingly failing to implement any system to avoid a reoccurrence.

- In March 2010, approximately one month after learning of improper trust transfers, Respondent is informed that the firm's operating account is significantly overdrawn. Respondent, not Boldt, advised the BOM that the overdrawn position would be covered. That same day, an improper transfer in the amount of $53,585.33 was made from the trust to operating account (TFB Ex. 33, Tr. 2363:6-2365:10).

- Respondent testified that there may have been 1,000 or 2,000 overdrawn positions in the operating account. Yet, he didn't see any relation between this issue and the trust account shortage (Tr. 3884:14-3885:11).

- At the emergency suspension hearing, Respondent testified that the money in trust at that time was mainly for Medicaid and Medicare liens. He stated, "It wasn't going to be paid to a client tomorrow. And that's not an excuse by any stretch of the imagination, but it's context for what was going on." (TFB Ex. 53 – 264:14-265:3).

- Respondent conceded that he took back the managing partner role no later than June 22, 2010 and, by default, was responsible for overseeing the trust account (Tr. 3852:3-3853:1).

- Respondent never advised his other partners, Rash and Brown, of the trust account shortage (Tr. 795:12-15, 864:8-11).

- Eight (8) improper transfers totaling $280,000.00 were made from July through October 2010, a period when Boldt was no longer managing partner and when Respondent, by default, was responsible for overseeing the trust account. (TFB Ex. 30, Tr. 3035: 24-3036:9).

- Although the Referee found Salpeter not to be credible, he did testify that all improper transfers in 2010 were at Respondent's direction. (Tr. 343:1-10; 450:14-20). There is no evidence in the record that Salpeter received any direct financial benefit from these improper transfers.

- A minimum of ten (10) improper transfers from the firm's trust account were applied to cover operating account checks issued to Respondent and deposited into his personal bank account totaling $257,200. (TFB Ex. 31, Tr. 2203:1-2304:2; 2305:4-2306:9).

- Respondent terminated Salpeter right before Thanksgiving in 2010 (TFB Ex. 53 – 225:14-226:1). In December 2010, Respondent was informed that the trust account had not been reconciled since January 2010 and still had a deficit of over $1,000,000; *still,* he did not engage the services of an auditing firm. (Tr. 3196:10-16, 3907:15-17, 3911:3-6, 3913:2-3914:7).

- On December 7, 2010, Respondent authorized and executed a trust account check utilizing one client funds to pay another (TFB Ex. 47, Tr. 2730:1-2742:24).

- Between February 1, 2010 through February 28, 2011, Respondent brought in $7,307,624 to the firm (TFB Ex. 41; Tr. 2528:11-2529:3). Of those monies $5,788,498 was disbursed for firm expenses and other firm obligations, $1,279,381 was disbursed to Respondent and $256,132 was disbursed to ABBRC's other partners (TFB Ex. 41).

- The trust account shortage in February of 2010 was $1,002,049 and in February of 2011, thirteen months later, it had actually increased to $1,018,436 (Tr. 2476:18-24).

- If the Court is inclined to reverse the Referee's ruling on the proffer, (Point I on Appeal) this would be an appropriate area for its consideration.

In *The Florida Bar v. Rousso,* 117 So.3d 756 (Fla. 2013), the respondents, partners in a law firm, had over $4,000,000 misappropriated from the firm trust account by their bookkeeper. This Court noted that in the process of trying to manage these massive shortages, "[R]espondents accepted funds from clients when Respondents knew the account was underfunded. . . . [T]hey were using this 'fresh money' from some clients to satisfy past due client liabilities." In this respect, this Court found the respondents violated rule 4-8.4(c) "by taking money from clients and depositing it into the trust account, and continuing to represent those clients, without disclosing to the clients that the trust account was seriously underfunded." *Id. at 767.*

Like *Rousso*, Respondent used 'fresh money' belonging to Client #1 in the amount of $169,058.40 to cover a portion of a payment to Client #2 in the amount

of $229,875.32. (TFB Ex. 47). Respondent's actions in this regard constitute a violation of rule 4-8.4(c) based on this Court's ruling in *Rousso*.

In *The Florida Bar v. Riggs*, 944 So.2d 167 (Fla. 2006), Riggs assigned trust account responsibilities to a non-lawyer employee, Tammy Campbell ("Campbell"), and claimed that certain shortages in his trust account were due to Campbell's theft of trust funds. This Court did not find that a theft occurred, but did find Riggs in violation of rule 4-8.4(c) noting that, "failure to supervise his employee constitutes intent because he knowingly assigned his trust account responsibilities to Campbell and then failed to manage her activities. Knowingly or negligently engaging in sloppy bookkeeping amounts to intent under rule 4-8.4(c)." *Id. at 171.*

Conversely, in *The Florida Bar v. Johnson*, 132 So.3d 32 (Fla. 2013), this Court did not find that Johnson violated rule 4-8.4(c) by failing to properly supervise a non-lawyer employee to whom significant trust account responsibilities had been delegated. First, the Court found that Johnson did not participate in the non-lawyer's activities and was unaware of her actions. Second, the employee was found to have stolen from Johnson.

As of February 9, 2010, Respondent was on notice of the magnitude of the trust account deficit at his firm, yet, he left the responsibility to fix this monumental problem to those same individuals that he claims caused the problem.

Consequently, the conduct is even more egregious than in *Riggs* because Respondent was on notice of the serious problems. Unlike *Johnson*, who was unaware of the trust accounting problem and was the victim of a theft, the instant Respondent was well aware of the problem, but implemented no supervisory measures.

Like *Riggs*, as opposed to *Johnson*, there is no finding of theft in the instant case by Boldt or Salpeter. But, there is a finding of notice to Respondent of shortages and a resulting failure to implement appropriate remedial measures. Consequently, given this Court's prior precedent in *Riggs*, Respondent must be deemed guilty of rule 4-8.4(c).

In consideration of all of the above, it is readily apparent that Respondent's inaction, once on notice of the firm's trust account issues, was "deliberate or knowing" and satisfies the element of intent. Accordingly, the Referee's recommendation that Respondent did not violate rule 4-8.4(c) was clearly erroneous, without support in the record, and should be reversed.

Similarly, the Referee's finding that Respondent was not guilty of rule 5-1.1(a) is also clearly erroneous and without support in the record. Respondent admittedly placed monies from loans, co-counsel agreements and/or personal funds into the firm's trust account repeatedly (TFB Ex. 53 – 266:2-6; 268:14-269:3; 269:18-271:19; 277:18-278:25; 365:4-366:1; Tr. 3776:12-14; 3777:19-20).

As this Court stated in *Rousso*,

> The record clearly demonstrates that Respondents knowingly engaged in commingling, which violates rule 5-1.1(a)(1). They placed their personal funds and loans from others into the trust account. . . . The referee found that Respondents 'sense of personal honor' to correct the theft of funds justified the commingling. Case law, however, does not support the referee's conclusion." *Id.* at 764. *See The Florida Bar v. Cox*, 718 So.2d 788, 791 (Fla.1998); *The Florida Bar v. Brownstein*, 953 So.2d 502, 509-512 (Fla.2007).

In the first draft of her report, the Referee accurately found Respondent guilty of rule 5-1.1(a) (Tr. 7:1-25, September 9, 2016). Subsequently, Respondent essentially urged the referee to reverse her finding arguing that rule 5-1.1(a) was amended in 2015 to encourage lawyers to put money back in trust when there was a deficit (Tr. 8:1-12, September 9, 2016). At this hearing, Respondent's counsel did note that the amended version required that "if you put money back in trust you have to notify the Bar." (Tr. 8:17-23, September 9, 2016).

At the next hearing, the applicability of rule 5-1.1(a) was revisited before the Referee (Tr. 181:22-196:5, September 21, 2016). Respondent's counsel argued that replenishing the trust account would not constitute a violation under the amended version of the rule (Tr. 186:16-19, September 21, 2016). The Bar argued that Respondent's actions were subject to the rule in effect at the time of the misconduct and that he was clearly in violation of the rule at that time (Tr. 190:5-14, September 21, 2016). Further, the Bar argued that even if the amended version of rule 5-1.1(a) was to be applied, Respondent would still be in violation since he never reported his trust account shortage to the Bar (Tr. 191:7-21, September 21, 2016).

Essentially, Respondent sought and obtained a complete exemption from the application of either version of rule 5-1.1(a). However, there was no basis in law or fact for the Referee's change of heart and not guilty finding. Her decision was clearly erroneous, without support in the record and should be reversed.

IV. DISBARMENT IS THE ONLY APPROPRIATE DISCIPLINE FOR RESPONDENT'S DISHONEST ACTIONS AND FAILURE TO SUPERVISE HIS FIRM'S TRUST ACCOUNT

Disbarment is the only appropriate sanction for an attorney who is aware of the desperate state of his law firm's financial health, learns of massive shortages in his trust account and fails to promptly implement emergency remedial measures to rectify the problem; instead, leaving in place to safeguard the massively shorted account those same individuals he blames for its mismanagement.

Apart from one month in which the shortage fell to approximately $891,000, the shortage in Respondent's trust account for a period of thirteen months was over $1,000,000. The clear and convincing evidence establishes that from its inception and throughout the period of the trust account shortage, the firm itself was desperately underfunded, had an overdrawn operating account on 1000- 2000 occasions, and was constantly the subject of communications from the bank regarding that overdrawn status. Respondent testified to being very aware of the firm's dire financial situation. In the light most favorable to Respondent, he learns of the $1,000,000 trust account shortage in February 2010, and yet implements none

of the safeguards recommended to him by his attorney whom he deeply respects and trusts. Incredibly, according to Respondent, he leaves in place those he points to as the cause of the shortages. He does not implement any semblance of checks and balances to ensure that future defalcations are avoided at all costs. Rather, business continues as usual.

Respondent purports to be shocked by the discovery of the massive shortfall. But one must ask, why? His own testimony established his absolute awareness of the firm's inadequate financial foundation. Where did he think the money was coming from to finance the firm's continued existence? This question must be asked as to the time periods both before and after February 2010. Although Respondent testified to setting on a path to replenish the trust account once he learned of the shortage, there is no significant evidence of any measures taken by him to ensure that the approximately $7,000,000 he gathered in that year was being applied to the trust deficit. Where was the review? Where was an outside CPA? Where was a system of checks and balances? There were none because Respondent implemented none even though he was the majority shareholder and/or had majority voting rights in the firm throughout the relevant time. Even accepting Respondent's testimony that Boldt was "managing partner" through June 2010, what did Respondent do from July through November 2010 when Boldt was gone? There is no evidence that he did anything.

Respondent's position seems to be that Boldt mistakenly authorized the initial transfers in February 2010, and that after June 2010, Salpeter was responsible for the improper transfers. After Salpeter departs in November 2010, Respondent again attempts to avoid responsibility by pointing to his absences from the firm due to some personal challenges he was facing. Yet, except for Respondent's own testimony, there is scant evidence that anyone but Respondent himself exerted financial control over the firm's finances. Other partners in the firm were unaware of Boldt having any such control. Even Respondent's paralegals could not point to any financial authority exerted by Boldt. Rather, the overwhelming evidence indicated that Respondent was the controlling authority in the firm over which he exerted majority voting rights, if not ownership. One cannot discount Respondent's own words, as reflected in his July 19, 2010 email communications with Mark Salpeter directing which firm member photographs could appear on the firm's website, "Let me remind you this is not a democracy". Although the referee did not find Boldt or Salpeter to be credible, the fact remains that the only constant during the entire period of the defalcations was Respondent and no evidence was presented of financial benefit to Saltpeter, and scant evidence as to Boldt. Finally, one cannot ignore the powerful weight of the proffered evidence and testimony should this Honorable Court overrule the Referee's ruling and consider this evidence. Were

Respondent's efforts to replenish really "heroic" as he would like this Court to believe?

It is well established that in reviewing a referee's recommendation as to discipline, the scope of this Court's review is broader than that for findings of fact as it is this Court's ultimate responsibility to order the appropriate sanction. *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989). Nonetheless, the recommendation will generally not be disturbed so long as there is a reasonable basis for it in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Temmer*, 753 So.2d555 (Fla. 1999). In the instant case, the Referee's recommendation has no basis in existing case law or the Florida Standards and it should be reversed.

While Respondent has sought to distance himself from the massive trust account deficit at his law firm, this Court has made it clear that it rejects such excuses.

In *Rousso,* the respondents, Roth and Rousso, were partners in a law firm from which their bookkeeper was found to have stolen over $4,000,000 in trust monies. Roth learned of the trust problems in April 2008, but did not fully comprehend the cause and scope until months later. Rousso became aware of the problem in December 2008. At that point, they hired outside counsel and an accountant to conduct an audit. They funded the trust deficit

from multiple sources including their insurance carrier, personal funds and loans, including one loan from a client, and contacted police and the ethics hotline. The referee found that while the theft could not have been anticipated, damage could have been contained had the two lawyers complied with minimum accounting procedures. In short, had they done so, the shortages would have been discovered sooner. In addition to noncompliance with required trust account procedures and conflict of interest rules, the respondents were ultimately determined to be guilty of comingling and dishonesty. On appeal, this Honorable Court reversed the referee's recommended sanction of fifteen and twelve months, respectively, and imposed disbarment on both attorneys.

In *Rousso*, this Court definitively stated:

> Respondents had tried to delegate their responsibilities to a non-lawyer employee in the firm, and did not effectively monitor the employee or the trust account. . . .[T]he ultimate responsibility for the trust account monies rests with Respondents. They are the lawyers. *See Fla. Bar v. Watson*, 76 So.3d 915, 923 (Fla. 2011) (attorneys are responsible for managing the trust accounts). In *Florida Bar v. Ward*, 599 So.2d 650 (Fla. 1992), the Court stated that lawyers have a 'unique fiduciary duty,' individually and as a profession. 'Never is an individual's trust in attorneys more evident, or more at risk, than when he places funds or property into the hands of his attorney.' *Id.* at 652. Respondents abandoned their professional duty to safeguard their clients' funds." *Rousso* at 767. Moreover, the Court further noted that, "[O]nce Respondents were aware of the financial shortages in the trust account, it took them an excessive length of time to seriously deal with the issues." 117 So.3d at 767.

In the instant case, Alters not only took an inordinate amount of time to

replenish the trust account, but even more alarming, he left the same individuals he blames for the shortfall in charge of the trust account. He implemented no measures to ensure the safety of his clients' funds going forward. According to Cindy Russell, a nonlawyer employee who took over the firm's accounting responsibilities in December 2010 and to whom Respondent and Boldt were financially indebted, no trust account reconciliations had been performed on the trust account since January, 2010. Neither did Respondent follow any of the advice given to him by Rogow. The foregoing is all in direct contravention of the actions taken by Rousso and Roth, both of whom were disbarred on appeal. Finally, in a similar fashion to *Rousso*, Respondent continued to accept client funds in trust and represent clients without informing them of the huge trust deficit; such conduct having been found to be a dishonest act pursuant to Rule 4-8.4(c). Ultimately, with neither Boldt nor Salpeter anywhere in sight, Respondent authorizes the issuance of and signed a trust account check to one client using funds received for another client.

In *Riggs*, the respondent received a three year suspension primarily as a result of trust account shortages which Riggs contended stemmed from a nonlawyer employee's theft of trust funds and an accidental overpayment to a client. Notably, the referee did not find that the employee stole the money. Thus, the Court concluded that Riggs' failure to supervise his employee and the sloppy bookkeeping was an intentional act. Neither did the instant Referee find that Boldt

or Salpeter stole money. Rather, she concluded that there were improper transfers. The evidence indicated that Respondent and/or ABBRC benefitted from those improper transfers. It is the Bar's position, as argued earlier in this Brief, that Respondent acted intentionally when he knowingly continued to abdicate his responsibility to supervise even after being on notice of trust shortages. Worse than *Riggs*, there were numerous instances in which Respondent was on notice could have taken steps to prevent further harm, but did not. Rather, he implemented no safeguards at all after purportedly first discovering the shortages in February 2010, or after Boldt left the firm in June 2010, or even after Salpeter left the firm in November 2010. The trust account improprieties continued before, during, and after each of these events. Consequently, disbarment is in order as it is well settled that misuse of client funds is one of the most serious violations a lawyer can commit. *The Florida Bar v. Travis*, 765 So.2d 689 (Fla. 2000).

In *The Florida Bar v. Johnson*, 132 So.3d 32 (Fla. 2013), the respondent pointed to the misconduct of a nonlawyer employee as the reason for trust account shortages. The Bar appealed the referee's finding of not guilty as to Rule 4-8.4 (c), specifically challenging the referee's conclusion that there was an absence of intent, a necessary element of dishonesty. The court, however, upheld the referee's findings of fact in this regard, concluding that although responsibilities were delegated to the employee and *Johnson* failed to properly supervise her extremely

negligent conduct, the employee was found to have stolen money and mismanaged the trust account, resulting in shortages and premature payments of client recoveries and attorney fees. The lawyer, however, was not found to have participated in the employees activities, and they were deemed to have been conducted without his knowledge. Under these circumstances, this Court determined that there was no intent to misappropriate client funds in violation of Rule 4-8.4(c). While Johnson was disbarred, it was due to other findings.

In the instant case, however, Respondent was on absolute notice of the shortages as of February 2010. He was also well aware of the dire condition of his operating account. He knew the firm was struggling to stay afloat. Still, he did not scrutinize what was happening with the accounts. By hiding behind those he blames for the improper transfers, he attempts to create plausible deniability. However, this attempt must fail because not only was he admittedly on notice, but he benefitted from the improper transfers, both personally and by his majority ownership and/or control. Also see *The Florida Bar v. Whigham*, 525 So.2d 873 (Fla. 1988) where the attorney received three years suspension for gross negligence in managing his trust account despite the fact that the violations stemmed from prior errors which had never been fully resolved and for which he had previously been sanctioned. It should also be noted that W*higham* was not demonstrated to have willfully misappropriated client funds.

In the instant case, the evidence clearly and convincingly demonstrates that both Respondent and the firm ultimately received the majority of the funds initially deposited to cover the trust shortfall. [17]

When addressing the Florida Standards for Imposing Lawyer Sanctions ("Florida Standards"), standard 5.11(f) is the most applicable to the instant case. Other standards that may be taken into consideration are 4.11 and 4.12.

The practice of law is a conditional and revocable privilege, not a right. *The Florida Bar v. St. Louis*, 967 So.2d 108 (Fla. 2007). Lawyers must hold property of others with the care required of a fiduciary. *The Florida Bar v. Watson*, 76 So.3d 915 (Fla. 2011). Lawyers have a unique fiduciary duty both individually and professionally. *The Florida Bar v. Ward*, 599 So.2d 650 (Fla. 1992). A lawyer is an essential component of the administration of justice and as such is an officer of the court, subject to judicial scrutiny and supervision. *The Florida Bar v. Evans*, 94 So.2d 730 (Fla. 1957).

Respondent has failed to maintain the integrity required of a member of The

17 See *The Florida Bar v. Wynn*, 2017 WL 632871 (Fla. 2017) for a recent example of this Court's sanctioning of a lawyer's misappropriation. In *Wynn*, the respondent received a one year suspension for depositing in his operating account $500 in client funds earmarked for the purchase of a transcript. Respondent then used the funds to pay law firm expenses unrelated to the representation. Respondent finally refunded the $500 to the client after a Bar grievance was initiated. At that time, Respondent had the client sign a receipt requesting that the Bar grievance be dismissed. Respondent also failed to disclose the grievance to his employer and misrepresented the fact of his employment. Respondent had no priors.

Florida Bar by failing to safeguard his law firm's trust account once he was admittedly aware of massive shortages. Even the Referee concluded that when faced with these shortages, Respondent failed to implement any safeguards to avoid it from reoccurring. The precedent dictated by the *Rousso* case and others makes clear that the deposit of client funds into the trust account to satisfy prior liabilities to other clients is conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct is indicative of an abandonment of the professional duty to safeguard client funds. Disbarment is the appropriate sanction for a lawyer who is on notice of serious mishandling of the trust account and takes no remedial action to rectify the conduct or prevent such re-occurrences. The evidence clearly and convincingly established Respondent's willful violation of the Rules Regulating The Florida Bar and Respondent should be disbarred.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court reject the Referee's aforementioned findings of facts, not guilty findings as to Rule 4-8.4(c) and 5-1.1(a) and accept the Bar's proffer. The Florida Bar further submits that disbarment is the appropriate sanction.

William Mulligan, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been e-filed using the E-filing Portal with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida; with copies provided via email using the E-filing Portal to Jeremy W. Alters, c/o Andrew Scott Berman, Esq. at aberman@ybkglaw.com and mherrera@ybkglaw.com; and to Adria E. Quintela, Staff Counsel, The Florida Bar, at aquintel@flabar.org, on this 13th day of April, 2017.

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

William Mulligan, Bar Counsel