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)

REPLY BRIEF

William Mulligan, Bar Counsel
The Florida Bar, Miami Branch Office
444 Brickell Avenue, Suite M-100
Miami, Florida 33131-2404
(305) 377-4445
Florida Bar No. 956880
wmulliga@flabar.org

Adria E. Quintela, Staff Counsel
The Florida Bar
Lakeshore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 897000
aquintel@flabar.org

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390
jharkness@flabar.org

Joshua E. Doyle
Executive Director Designate
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 25902
jdoyle@flabar.org

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INTRODUCTION

This case involves a very simple matter. The ABBRC firm was never adequately capitalized, and more importantly, the trust account was not properly monitored. This resulted in numerous improper transfers and massive trust account shortages over a period of thirteen months.

This case has become extremely complicated due to Respondent's attempts to blame everyone but himself for his firm's trust account problems. As a result, the case has become like a pointillist painting; if you stand too close, all you see are the dots. In order to clearly see this picture, you must stand back.

THE BAR CONDUCTED A FAIR AND UNBIASED INVESTIGATION

In Respondent's Response to Petition for Review ("Resp. Br."), he states that, "In its investigation and prosecution of Alters, the Bar did not pursue the overarching goal of justice or proceed in a fair and just manner." (Resp. Br. 1-2).

Consolidation

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. (Index #4). The importance of this filing cannot be underestimated. The Bar's Motion to Consolidate was set for hearing and counsel for both Respondent and Boldt argued in opposition to the Bar's request to have these cases tried together. Unfortunately,

the Bar's Motion to Consolidate was denied and the matters proceeded independently before different referees. (Index #22).

Considering that the Bar was the *only* party in both of these cases to seek a joint trial before one referee, it stands in direct contravention to Respondent's baseless accusations that the Bar had an agenda and did not fairly prosecute these matters. Surely, if the Bar was attempting to do all the shameful and scandalous things that Respondent accuses it of, moving to consolidate would not have been a good strategy. Yet, in the interest of seeking justice, that is what the Bar did.

Differences in Culpability

The record in this case clearly reflects stark differences in culpability between Respondent and Boldt:

- Respondent argues as to Boldt's undeniable guilt, but fails to explain exactly what she is guilty of. Assuming for a moment that Boldt drafted the self-reporting letter (that was never sent to the Bar), the letter clearly states that she authorized Salpeter to pay bills, under the mistaken impression that the "M" funds had been paid to the firm. The testimony of Respondent and Rogow confirm that she made mistakes and only authorized Salpeter to pay bills. (TFB Ex. 53-373:7-10; Tr. 3646:5-10; 3770:6-8; 3771:20-24). There is absolutely no evidence that Boldt authorized Salpeter to make a single improper transfer from the trust account.

- Once Respondent, the firm's controlling shareholder from its inception in 2007, became aware of the improper transfers and massive trust account shortage, he did not implement any of the actions that Rogow, his attorney and mentor recommended. He did not replace the funds (until approximately 13 months

later), he did not hire a CPA firm to audit the trust account, and he did not report the problem to the Bar.

- Respondent admits that he reassumed the managing partner role no later than June 22, 2010, and at that point, he was the lawyer fully responsible for the supervision of the trust account. But again, he did not implement any procedures or controls over the trust account and the improper transfers continued. From July 26, 2010 to October 13, 2010, there were 8 improper transfers in the amount of $280,000. (TFB Ex. 30).

- After Respondent became aware of the improper transfers in January/February 2010, he received approximately **$1,182,933** up through December 30, 2010. During this period, Boldt only received $147,403.

- When Respondent returned to the firm after his illness and fired Salpeter prior to Thanksgiving of 2010, Salpeter told him that "the trust account was way upside down." (Tr. 3934:22-3935:5; 3935:22-3936:10; 3937:25-3938:2; 3939:7-14).[1] Rather than retaining an independent reviewer, Respondent enlisted Cindy Russell, to whom he was heavily indebted, to take over the firm's bookkeeping responsibilities.

- In spite of Salpeter's warning, Respondent still authorized the December 7, 2010 check issued to Client #2 using a large portion of funds belonging to Client #1.[2]

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[1] Respondent's ninth affirmative defense from Respondent's Answer and Affirmative Defenses acknowledges that he became aware in November 2010 of the continuation of unauthorized withdrawals from the trust account. (Index #43).

[2] The Bar's exhibit 47 illustrates this misuse of client funds. Respondent acknowledges that the firm misused client funds: "It is a **logical certainty** that if funds were removed from a trust account that was depleted, money in trust for client #1 would be used to pay client #2 if there were insufficient funds to cover both and client #2 was paid first." (Emphasis added.) (Resp. Br. 44-45). Additionally, there has been no evidence presented in these proceedings that any

- Thirteen months after Respondent initially became aware of the massive trust account shortage, the deficit had increased.

Respondent's arguments regarding the Bar's failure to fairly investigate and prosecute Boldt are based upon speculation and conjecture. Respondent was not privy to any of the proceedings in the Boldt matter.

The Bar acknowledges a difference in the disciplinary treatment of Boldt and Alters-but it is fully supported by the facts of this case.

NO SIGNIFICANT FINANCIAL BENEFIT TO BOLDT OR SALPETER

Respondent has gone to great lengths to place all the blame for his firm's trust accounting woes at the doorstep of Boldt and Salpeter. (Resp. Br. 8-12, 18-23). Yet, Respondent presented no evidence of any financial, and/or other type of benefit, received by Salpeter as a result of the improper transfers (Tr. 425:1-15), and there was scant evidence that Boldt received any significant benefit.[3]

Accordingly, it is crucial to consider the following questions:

- Why would Salpeter unilaterally make improper trust account transfers?
- Why would Salpeter unilaterally fabricate the trust account records provided to the Searcy firm, text messages and/or other documentation?

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client was advised that their settlement funds were being deposited into a seriously underfunded trust account.

[3] Except for the receipt of $147,403.

- Why would Boldt unilaterally direct repeated improper trust account transfers?

Respondent stated, that between September 2009 and March 2011, he "[D]eposited $11,300,000 into the ABBRC **operating** account and took out only a fraction of that for himself, consistent with his past practice in working at the firm." (Resp. Br. 48). While at first glance, Respondent's statement appears honorable, in fact, it is just the opposite.[4] It emphasizes that Respondent was not willing to cut back on his lifestyle, even during a time when the firm's trust account was in dire straits.

FALSE RECONCILIATIONS

Throughout this case, the Bar has repeatedly argued that Respondent's defenses lack credibility. One clear example is Respondent's testimony that Salpeter gave him false reconciliations for the months of July and August 2010. (Tr. 3858:12-20; 3904:1-3905:1). Respondent has argued this position vociferously, although he never raised it prior to the instant case. (Resp. Br. 20, 21, 38, 45, 57, and 69).

Respondent testified that Salpeter had provided him with reconciliations in July and August 2010 that evidenced the reduction of the trust account deficit. (Tr.

[4] In the period from February 12, 2010 through December 30, 2010, there were operating account checks made payable to Respondent in the total amount of **$1,182,933**. (Tr. 2523:6-16).

3857:24-3858:20). Thereafter, Respondent testified that he was shocked to learn in December 2010 that the trust account deficit was still greater than $1,000,000. (Tr. 3906:25–3908:16; 3911:3-6; 3913:2-5).

Based on Respondent's own testimony, it is undeniable that as of December 2010, he knew of Salpeter's purportedly false documentation regarding the status of the firm's trust account. Yet, Respondent made **no mention** of this at the January 2012 emergency suspension hearing. How can it be that he would not bring that up at the emergency suspension hearing when his Bar license was on the line? A review of the emergency suspension hearing transcript shows that Respondent brought up everything "including the kitchen sink" in his defense, but made no mention of this false documentation. (TFB Ex. 53). Simply put, there is no reasonable excuse for the glaring absence of any mention of this "explanation", and this Court is urged to take pause and question its credibility and reliability. Moreover, it should be noted that while Respondent filed his detailed Answer and Affirmative Defenses in the instant case there is **no** reference whatsoever to Salpeter providing him with false reconciliations. (Index #43).

Respondent testified that Boldt was managing the firm up until June 22, 2010 and that, "in July it would have been, by default, my responsibility." (Tr.

3851:2 -25). Additionally, Respondent testified as to his illness in September 2010 that extended into November 2010. (TFB Ex. 53-235:2-9; 236:1-5).

It is quite clear that Respondent perceived July and August as his most vulnerable months in 2010. Could it be that Respondent devised the story of the false reconciliations to account for the time that he felt most vulnerable, after Boldt was no longer managing the firm and prior to his illness?

RESPONDENT'S FLEXIBLE VIEW OF TRUST FUNDS

Incredibly, Respondent attempted (and continues to attempt) to downplay the *type* of trust funds that were in his trust account as noted below:

- 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).

- In his response brief, Respondent noted that trust funds moved by Boldt were for other matters, predominantly hold backs . . . that had been in trust for a while. (Resp. Br. 9).

These qualifying statements evidence Respondent's flexible view as to the monies he held in trust. Trust funds are trust funds. There is no distinction.

JANUARY AND FEBRUARY 2010 TRANSFERS

To accept Respondent's explanation for the January/February 2010 improper transfers, one must believe that Salpeter, the firm's Vice President of Finance and

an MBA, was told by Boldt to pay bills over a four (4) week period, and transferred monies improperly on 20 different occasions totaling $1,102,000. (Resp. Br. 9). It defies logic to believe that Salpeter, who had daily access to Respondent's firm's accounts online, would make transfer after transfer when it was obvious that there were no trust monies available to be disbursed. (Tr. 310:18-311:14).

It is simply inexplicable that Respondent could argue that it was reasonable for him to leave Salpeter and Boldt in position to oversee something as critical as the trust account with no additional safeguards in place.

RESPONDENT'S REPEATED FAILURES TO PLACE A RESPONSIBLE PERSON IN CHARGE OF MONITORING THE TRUST ACCOUNT

Respondent had numerous opportunities to enlist others to assist him in instituting procedures and controls that would have prevented future improper transfers and insured that the funds he brought into the firm were utilized for their intended purposes. (Resp. Br. 17-18). He did nothing as evidenced below:

- When the January and February improper transfers occurred, Rogow recommended that Respondent bring in someone to audit the trust account. *This was not done.*

- Respondent left Salpeter, the individual who had clearly demonstrated incredible ineptitude and a basic lack of understanding of trust accounting rules, in charge of the trust account and did not institute changes in internal controls or supervision.

- Respondent did not enlist the help of his partners, David Rash or Bob Brown, in monitoring the trust account. In fact, he never told them of the firm's trust account problems.

- After Boldt's management of the firm ended (no later than June 22, 2010), Respondent did not take an active part in reviewing the trust accounting records. Grosz testified that after Boldt left, there was a time period where "[T]he natives were running the shop." (Tr. 3573:1-11).

- When Respondent became ill in September 2010, he did not appoint anybody to assume his responsibility to supervise the trust account.

- When he returned to the firm and fired Salpeter prior to Thanksgiving of 2010, Salpeter told him that "the trust account was way upside down." (Tr. 3934:22-3935:5; 3935:22-3936:10; 3937:25-3938:2; 3939:7-14). Yet, Respondent still authorized the December 7, 2010 check issued to Client #2 in the amount of $229,875.32.

- After the December 2010 discovery that none of the funds he had deposited in the trust account specifically to reduce the shortage had been applied to that purpose, Respondent *still* failed to bring in a CPA firm to audit the firm's books to find out where the funds went-had they been stolen?

RULE 4-8.4(c)

It is undisputed that as of February 9, 2010, Respondent was on notice of a *massive* trust account deficit; yet, one year later, the trust account deficit *had increased*. Respondent's "safe harbor" argument fails in regard to both Boldt and Salpeter. (Resp. Br. 55-56). In Respondent's Response to Bar's Motion to Tax Costs, he "[A]dmitted that he did not take affirmative steps to prevent a recurrence of the problems created by Kimberly Boldt, instead continuing to blindly trust his

partner and bookkeeper that the problems would not recur." (Emphasis supplied.) [5] Once Respondent was on notice in February 2010, the "safe harbor" closed, and he could not delegate this monumental problem to others without constant supervision, *particularly to those that he claims caused the problem.*

Respondent cites to *The Florida Bar v. Rousso,* 117 So.3d 756 (Fla. 2013), *The Florida Bar v. Riggs,* 944 So.2d 167 (Fla. 2006), and *The Florida Bar v. Johnson,* 132 So.3d 32 (Fla. 2013), claiming they support his position that he did not violate rule 4-8.4(c). (Resp. Br. 56-58). In **all** of these cases, the respondents did not have notice of the trust accounting problem or they were not previously aware of the magnitude of the shortage. Further, once the magnitude of the trust accounting deficits in these cases became apparent to these respective respondents, the deficits did not increase.

Also, unlike the instant case, the *Rousso* and *Johnson* cases involved either misappropriation or theft by a non-lawyer employee. In the instant case, there was no finding that either Boldt or Salpeter misappropriated trust funds. Respondent is the *only* one who received a significant benefit from the improper trust account transfers, yet he claims to be the "fall guy."

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[5] Respondent filed this on December 13, 2016 as reflected on this Court's docket. This filing occurred subsequent to the Referee filing her Index of Pleadings with this Court on November 28, 2016.

In light of this Court's rulings in *Rousso, Riggs,* and *Johnson*, the Referee's finding that Respondent was not guilty of rule 4-8.4(c) was clearly erroneous.

RULE 5-1.1(a)

Respondent is trying to create a new rule in order to absolve himself of any responsibility for his commingling violations. (Resp. Br. 58-61). Simply put, Respondent is "trying to have his cake and eat it too." He seeks to side step the application of either the current or prior version of the rule. The Bar respectfully requests that this Court apply one of the versions of this rule, ***in its entirety***, and rule accordingly.

PROFFER

Respondent argues that he did not have a "chance to develop a defense and respond to the proffer. . . ." (Resp. Br. 40). This statement is completely disingenuous. The Referee heard extensive argument on the issues that led to the proffer and issued a ruling over eight (8) months before the proffer was made. As a result of this ruling, the Bar was not permitted to ask Respondent or any witness questions related to Respondent's personal tax status at the final hearing. (Tr. 183:5-11;185:22-186:1, February 27, 2015; Tr. 3925:2-3926:7).

Respondent stated that the proffer was made outside the Referee's presence, yet it was Respondent, not the Bar, who made that request. (Tr. 1987:1-18). The

Referee was well aware of the type of information and documentation that the Bar sought to proffer. (Tr. 158:5-187:12, February 27, 2015; Tr. 1986:4-1999:7; 3986:25-4017:21). Respondent was not precluded from cross-examining Duarte, calling witnesses, or making a statement during the proffer. He chose not to pursue any of these options. (Tr. 4010:5-25).

In his attempts to discount the proffer, Respondent contends that the Bar's argument as to F.S. 90.405(2) fails as "Dishonesty is not an 'essential element' of a trust account violation." (Resp. Br. 42). This was not the Bar's argument. The Bar's argument remains that dishonesty is an essential element of rule 4-8.4(c). (Am. Initial Br. 38-39).

Respondent's misrepresentation to the Searcy firm is valid evidence and crucial for this Court's consideration. He had ample time and opportunity to respond to the proffer, but tellingly, did not. The Referee's ruling excluding records and communications as to Respondent's tax status was an abuse of discretion; the proffer, in its entirety, should be accepted as evidence in this case.[6]

REPORT OF REFEREE –MISSTATEMENTS/OMISSIONS

Respondent noted the extensive number of hours that the Referee devoted to this case and that she "dedicated seven months for preparation of her 71 page

[6] The Bar would respectfully request the opportunity to file the excluded documents as it noted in footnote no. 10 of its Amended Initial Brief.

report." (Resp. Br. 2). Regardless, it is crucial that this Court not confuse the Referee's *lengthy* report with a *comprehensive* report. In the Summary of Proceedings section of the ROR, the Referee included a summary of "the relevant portions of the witnesses' testimony." (ROR 4). Some clear examples of omissions and/or misstatements in the summaries of witness testimony are listed below:

- Searcy, a long-standing, well respected member of the Bar, testified that, "And as things progressed it seemed like every time that I would speak with Jeremy, things would be different than last time. . . ." (Tr. 145:8-12). Further, he testified that Respondent was not always truthful with him. (Tr. 147:11-14). While the Referee made no reference to Searcy's testimony as to Respondent's truthfulness, she deemed it appropriate to note that Searcy "was friendly to the Respondent and his team." (ROR 5).

- The Referee stated that, "Mr. Salpeter admitted that he authorized the improper transfers from the Respondent's firm's trust account on January 12 and 20, 2010." (Emphasis supplied.) (ROR 7). Rather, it was Salpeter's testimony that Respondent directed him to make each and every improper transfer in 2010. (Tr. 331-13-18; 343:6-10; 450:13-20; 706:5-9).

- The Referee included reference to the falsified documents that were provided to the Searcy firm noting that Salpeter testified that he prepared the falsified documents. (ROR 9, 35). Yet, she made no mention that it was also Salpeter's testimony that the falsified documents were prepared at Respondent's direction. (Tr. 419:2-12; 420:3-10; 421:6-423:17).

- The Referee noted that Duarte testified that he knew that Boldt knew about several transfers despite her testimony that she only knew of one improper transfer (ROR 38). Yet, Duarte never testified as such. Further, the Referee noted, "Mr. Duarte did not tell The Florida Bar that he had evidence against Ms. Boldt and that they should not enter into a consent judgment with her." (ROR 39). Yet, Duarte never testified as such. (Tr. 2930-3013).

Further, in the Recommendations as to Guilt section (ROR 66), the Referee included the following statement regarding rule 4-8.4(c):

> The evidence was clear that the fraudulent trust records that were given to the Searcy firm were prepared by Mr. Salpeter. There was **no evidence** that Respondent knew about the altered documents or that he had ordered Mr. Salpeter to create the false documents. There was also **no evidence** that he deliberately created any false documentation in connection with these proceedings or that he ordered or directed others to do so. (Emphasis supplied.)

This statement is indefensible as the Bar presented evidence through Salpeter's testimony (as noted above), that Respondent had directed him to fabricate the documents presented to the Searcy firm.

As addressed in the Bar's Amended Initial Brief, despite the Referee's prior rulings, the ROR contained misstatements and/or omissions in attributing delay to the Bar and in finding that the Bar breached its own confidentiality rules.[7]

While the Referee had the responsibility of evaluating the credibility of the witnesses and evidence presented, she also had the responsibility to provide a fair and accurate rendering of the testimony and evidence to this Court. As evidenced above, the ROR included various glaring omissions and misstatements.[8]

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[7] The Bar would refer this Court back to its Amended Initial Brief as to delay (pp. 44-46) and breach of confidentiality (pp. 46-49). The Bar would further note that, to date, the Referee still has not entered a ruling on either the Bar's costs motion or Respondent's costs/fees motion.

[8] These are just some examples of inaccuracies, not a complete listing.

CONCLUSION

On July 19, 2010, in the midst of his firm's trust accounting woes, Respondent advised Salpeter, "Let me remind you this is not a democracy." (TFB Ex. 21). Respondent made this statement to Salpeter in regard to an issue concerning firm photographs, but clearly this statement was a microcosm of Respondent's management style of his firm. Is it reasonable to believe that Respondent, the controlling shareholder and largest individual recipient of firm funds, would not have his finger on the pulse of the firm's finances?

Respondent has failed to maintain the integrity required of a member of The 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. 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. l(a), and accept the Bar's proffer. The Florida Bar further submits that disbarment is the appropriate sanction.

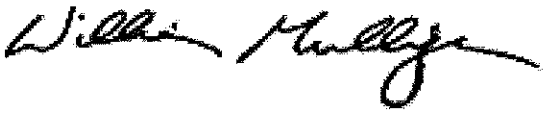
CERTIFICATE OF SERVICE

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 18th day of September, 2017.

William Mulligan, Bar Counsel
The Florida Bar
Florida Bar No.: 956880
Miami Branch Office
444 Brickell Avenue, Suite M-100
Miami, Florida 33131-2404
(305) 377-4445
wmulliga@flabar.org

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