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)

SUPPLEMENTAL INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

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. References to Recommendation on The Florida Bar's Amended Motion to Assess Costs may be referred to as "Recommendation on Bar's Costs" followed by the corresponding page number(s) and Recommendation on Respondent's Amended Motion to Tax Attorney's Fees and Costs and to Amend This Motion may be referred to as "Recommendation on Respondent's Costs" followed by the corresponding page number(s).

Additionally, the Referee prepared two Indexes of Record. References to the Indexes of Record will be "Index" or "Second 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 Florida Bar's exhibits for the costs hearing conducted on February 9, 2017 and February 24, 2017 will be "TFB Cost Ex." followed by the exhibit number(s). References to the Respondent's exhibits will be by "Resp't Ex." followed by the exhibit number(s). References to Respondent's exhibits for the costs hearing conducted on February 9, 2017 and February 24, 2017 will be "Resp't Cost Ex." followed by the exhibit letter(s).

STATEMENT OF CASE AND FACTS

(The Bar would incorporate its Statement of Case and Statement of Facts contained on pp. 1- 29 of the Bar's Amended Initial Brief.)

On November 14, 2016, the Bar timely filed its Motion to Assess Costs (Index #243 and Second Index #1) and Respondent filed his Motion to Tax Attorney's Fees and Costs and to Amend this Motion (Index #244 and Second Index #2). On November 23, 2016, Respondent filed his Response in Opposition to Bar's Motion to Tax Costs.[1] On November 28, 2016, the Bar filed its Amended Motion to Assess Costs (Second Index #3). On December 1, 2016, Respondent filed his Amended Motion to Tax Attorney's Fees and Costs and to Amend this Motion (Second Index #4). On February 7, 2017, Respondent filed his Notice of Errata and Notice of Filing. [2]

Ultimately, the Bar sought costs totaling $305,360.03 for computer forensics investigation, its staff auditor's forensic investigation, court reporting expenses, staff investigator costs, a witness fee for deposition, and the administrative fee pursuant to rule 3-7.6(q)(1)(I). Respondent sought costs totaling $143,913.35 for

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[1] This filing is not reflected on Referee's first or second index. However, it does appear on this Court's docket with a filing date of December 13, 2016 and reflecting a service date of November 23, 2016.

2 These filings are not reflected on Referee's first or second index, but they reflect a service date of February 7, 2017.

computer forensics investigation and polygrapher expenses. In addition, Respondent sought attorney's fees.

The hearing on the Bar's costs and Respondent's costs/fees was scheduled for February 9, 2017. The aforesaid hearing was conducted on February 9 and 24, 2017. No testimony was taken at this hearing, but both sides entered documentary evidence. Neither party challenged the authenticity of the other party's costs.

The Bar's exhibits consisted of the following:

- TFB Cost Composite Ex. 1 - included the staff auditor's affidavit listing his costs, court reporting invoices, the Bar's check for a witness deposition fee, invoices regarding the Bar's computer forensics investigation and a listing of the staff investigative costs. (Tr. 13:3-17, February 9, 2017);

- TFB Cost Ex. 2 – Deposition of Jeremy Alters – February 13, 2015 (Tr. 22:25 – 24:4, February 9, 2017; 52:1-5, February 24, 2017);

- TFB Cost Ex. 3A and 3B – Deposition of Yalkin Demirkaya - February 19, 2015 and October 21, 2015, respectively (Tr. 28:1 – 11, February 9, 2017; 52:6-53:2, February 24, 2017);

- TFB Cost Ex. 4 – Trial Transcript Volume XXI – trial testimony of Yalkin Demirkaya - November 4, 2015 (Tr. 28:16 – 22; 29:17-21, February 9, 2017; 53:3-5, February 24, 2017).

Respondent's exhibits consisted of the following:

- Resp't Cost Composite Ex. A – Letters from Respondent's counsel to the Bar dated November 2, 7 and 14, 2011, January 14, 2012 [3] and February 7, 2013;

- Resp't Cost Ex. B – This Court's order of February 12, 2015 in The Florida Bar v. Kimberly Lynn Boldt, Supreme Court case no. SC14-118;

- Resp't Cost Ex. C – Report of Referee Recommending Diversion to Practice and Professionalism Enhancement Program in The Florida Bar v. Kimberly Lynn Boldt, Supreme Court case no. SC14-118, dated November 21, 2014.

(Tr. 78:5 – 79:5, February 24, 2017).

On September 26, 2017, the Referee entered her Recommendation on Bar's Costs (Second Index #8) and awarded the Bar only the administrative fee pursuant to rule 3-7.6(q)(1)(I) of $1,250.00. On same date, the Referee entered her Recommendation on Respondent's Costs (Second Index #9) and assessed the entire amount of Respondent's costs ($143,913.35) against the Bar and declined to award attorney's fees.

On October 5, 2017, Respondent filed his Request for Judicial Notice or to Supplement Record or Notice of Supplemental Authority. On October 9, 2017, the Bar filed its Response to Respondent's Request for Judicial Notice or to

[3] Letter of January 14, 2012 appears to be misdated. The accurate date of the letter appears to be January 14, 2013.

Supplement Record or Notice of Supplemental Authority. On November 1, 2017, the Bar noticed this Court by letter that it would be seeking review of the two costs orders entered by the Referee. On November 15, 2017, this Court entered the following orders:

- Order removing this case from the oral argument calendar (and advising that it will be reset) and directing the parties to file supplemental briefs addressing costs in this matter;

- Order denying Respondent's Request for Judicial Notice or to Supplement Record or Notice of Supplemental Authority as moot.

On November 21, 2017, both parties jointly requested an extension for the filing of the supplemental briefs as to costs. On November 28, 2017, this Court granted the extension request.

SUMMARY OF THE ARGUMENT

The Bar was successful in its prosecution of Respondent as the Referee found Respondent guilty of violating two of the rules charged, both involving serious trust account violations. The Bar timely filed its motion to assess costs and all of the costs sought by the Bar (totaling $305,360.03) are properly taxable under rules 3-7.6(q) and 5-1.2(g)(h). The Referee did not find that the Bar failed to properly authenticate its costs, but excepting the administrative fee of $1,250.00 [rule 3-7.6(q)(I)], found all of the Bar's costs to be unnecessary and excessive.

The Referee's denial of the assessment of the Bar's costs (excluding $1,250.00) against Respondent constituted an abuse of discretion.

The Referee assessed Respondent's costs (totaling $143,913.35) against the Bar in their entirety finding that, "On the issue of whether Respondent actually authorized the improper transfers . . . there was no justiciable issue of law or fact from the beginning." (Recommendation on Respondent's Costs, 4). As this Court entered a split decision on the recommendation to lift Respondent's emergency suspension and the Referee found Respondent guilty of violating two rules involving serious trust accounting violations, there clearly were justiciable issues in the instant case. The Referee's ruling assessing Respondent's costs against the Bar was in direct contravention of rule 3-7.6(q)(4) and constituted an abuse of discretion since there were clearly justiciable issues present.

REFEREE'S DENIAL OF THE ASSESSMENT OF THE FLORIDA BAR'S COSTS (EXCLUDING THE ADMINISTRATIVE FEE) WAS AN ABUSE OF DISCRETION

Pursuant to Rule 3-7.6(q)(3), "When the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated." Rule 3-7.6(q)(2) states that absent an abuse of discretion, the referee's award of costs shall not be reversed. All of the costs included in the Bar's Amended

Statement of Costs (attached as Exhibit A to its Amended Motion to Assess Costs) are taxable pursuant to Rules 3-7.6(q) and 5-1.2(g)(h). The referee abused her discretion in concluding that the Bar's costs were unnecessary and excessive, and further, in not assessing those costs against Respondent.[4]

As mandated by Rule 3-7.6(g), "Bar counsel shall make such investigation as is necessary and shall prepare and prosecute with utmost diligence any case assigned." Accordingly, Bar counsel must assess the facts and make good faith decisions at the inception of an investigation as to the scope and its path. If this Referee's ruling is permitted to stand, it will create a chilling effect on the scope of bar counsel investigations in the future.

In the Recommendation on Bar's Costs, the Referee stated:

> In addition to having no trouble finding that Respondent was the prevailing party on the substantial issues in this case (which is itself sufficient to deny most costs of the Bar), this Referee also finds that the Bar's costs were unnecessary and excessive in connection with the rules violations found to have occurred. They required no forensic review, no thousands of hours trying to prove misappropriation and no significant expenditure of costs by the Bar. The essence of this case was never a dispute over how much was improperly transferred from trust to operating, but over who was responsible. (Emphasis supplied.)

(Recommendation on Bar's Costs, 3).

[4] The Referee made no finding that the Bar's costs were improperly authenticated.

The Referee further stated that, "From the almost four weeks of testimony and the presentation of mounds of evidence, it was clear to this Referee that the Bar stridently pursued the wrong lawyer." (Recommendation on Bar's Costs, 7).

The Bar has previously sought review of the Referee's report's findings and recommendations and encourages this Court to look carefully at all of the testimony and evidence presented in this case to determine if "the Bar stridently pursued the wrong lawyer." It is axiomatic that if this Court agrees with the Bar's position on the more substantive issues in this matter, a reversal of both of the Referee's rulings regarding costs will likely follow.

The Bar maintains that a careful review of the testimony and evidence in this case will bear out that the evidence of Respondent's guilt for all of the rule violations charged in the Complaint of The Florida Bar is **overwhelming**. The Bar would refer this Court back to its Amended Initial Brief ("AIB") in its entirety, and would highlight certain pages of the following sections:

- *Respondent's Control of the Firm* – pp. 13-14 of AIB
- *Respondent's Failure to Take Appropriate Remedial Measures* – pp. 18-19 of AIB
- *Improper Transfers from March 2010 through June 2010; Who Was the Managing Partner of the Firm After Boldt's Departure?;*

Improper Transfers During the Period from July 2010 through October 2010 – pp. 21-22 of AIB

- *Absence of Dishonest or Selfish Motive* – pp. 43-44 of AIB
- *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* – pp. 49–56 of AIB
- *Disbarment is the Only Appropriate Discipline for Respondent's Dishonest Actions and Failure to Supervise His Firm's Trust Account* – pp. 56-58 of AIB

Further, the Bar would refer this Court back to its Reply Brief ("RB") in its entirety, and would highlight certain pages of the following sections:

- *Differences in Culpability* – pp. 2-4 of RB
- *No Significant Financial Benefit to Boldt or Salpeter* – pp. 4-5 of RB
- *Respondent's Repeated Failures to Place a Responsible Person in Charge of Monitoring the Trust Account* – pp. 8-9 of RB

By the filing of its Petition for Review in the underlying matter, the Bar has made it clear that it disputes the Referee's findings and recommendations regarding culpability, knowledge and guilt. While the Bar takes issue with numerous findings of fact and recommendations of guilt of the Referee as evidenced above, it is undeniable that the Referee made serious findings with respect to Respondent's wrongdoing by her recommendation that Respondent be found guilty of violating rules 4-1.15 and 5-1.1(b).

The Referee found that once Respondent "[D]iscovered the initial improper transfer and improper use of the trust funds, he failed to take reasonable remedial actions to avoid a re-occurrence. He failed to implement reasonable safeguards . . . ." (ROR 66-7). The seriousness of this finding cannot be ignored. When Respondent unquestionably became aware of the trust account deficit it exceeded $1,000,000.00 and thirteen months later it was actually greater. (Tr. 2476:18-24; 3769:5-10; TFB Ex. 53 – 259:4-6; Respondent's Answer and Affirmative Defenses, para. 12-13). To conclude that Respondent was not guilty of serious misconduct in this case is simply to disregard an enormous body of evidence. Without question, the Bar was successful in part, in its prosecution of this matter.

The Referee's ruling on the Bar's costs amounts to a classic example of "Monday morning quarterbacking." After presiding over a trial in 2015 that lasted approximately one month, the Referee used that perspective to evaluate what the Bar should or should not have done in its investigation subsequent to the emergency suspension hearing in 2012.

The Referee seems to suggest that the Bar should have shut down its investigation after the emergency suspension hearing based on the self-serving

testimony of Respondent, the testimony of Bruce Rogow ("Rogow") [5], and a controversial purported "draft confession letter and email." As the emergency suspension hearing was a preliminary injunctive proceeding in which discovery had not been exchanged, the Bar determined that it was necessary to investigate this matter further.

As previously noted, the Referee deemed that the Bar's costs were unnecessary and excessive finding that this case didn't warrant the Bar's forensic review and she stated that, "The essence of this case was never a dispute over how much was improperly transferred from trust to operating, but over who was responsible." (Emphasis supplied.) (Recommendation on Bar's Costs, 3). What the referee apparently fails to comprehend is that virtually every aspect of the Bar's investigation subsequent to the emergency suspension was conducted to determine who was responsible.

In February 2012, the Bar's Staff Auditor, Thomas Duarte ("Duarte") took over the financial investigation of this case. He testified as to the complex nature of the situation and his need to conduct a comprehensive investigation to determine, "[W]hat happened, why it happened, how it happened, who might be responsible, who might not be responsible, because there were different issues with

[5] Respondent owed Rogow approximately $2.2 million at the time of the hearing (TFB Ex. 53 – 381:14-382:2).

regard to who may have done it." (Tr. 2125:22-2126:12). While Respondent did admit that in excess of $1,000,000 had been missing from his firm's trust account, he never admitted to culpability.

The Bar's forensic auditor was required to investigate the entirety of the situation. The Referee seems to be operating under the misguided perception that the forensic auditor's role was to merely audit the trust account. While clearly this is part of the auditor's responsibility, the circumstances surrounding this case made it necessary for the auditor to conduct a full forensic audit of the firm and its operation.

The shortage in the trust account was the symptom, but not the illness and the Bar was trying to figure out what the illness was, what was causing this problem, and how it arose. To accomplish this, the Bar had to perform an extensive investigation of the firm's finances including the trust account.

In his efforts to objectively investigate this situation, Duarte testified to the extensive auditor's report he generated to help frame the issues in this case and his detailed analysis of the issues (Tr. 2130:4 -2132:8; 2142:20-2179:7; 2241:17-2272:13; 2477:1-2503:12; 2539:16-2549:20; 2686:7-2691:25).

In order to gain a complete understanding of the situation, Duarte's investigation encompassed the periods before, during and after the improper

transfers from the trust account that resulted in a massive shortage in Respondent's firm's trust account for a period in excess of 13 months. Whether or not Respondent disputed the numbers, he most certainly disputed culpability and the vast majority of the staff auditor expenses related to attempting to determine who was culpable. [6]

Duarte testified as to the detailed summaries and exhibits he prepared for trial in this matter, some of which are referenced below:

- TFB Ex. 28: "Halley Miller Timeline" (Tr. 2182:25–2222:9).
- TFB Ex. 30: "Improper Trust Account Transfers" (Tr. 2241:23–2275:6).
- TFB Ex. 31: "Improper Transfers Used to Cover Operating Account Disbursements to Respondent" (Tr. 2275:11–2296:5; 2302:15–2311:3).
- TFB Ex. 32: "Text Messages Related to Improper Transfers" (Tr. 2374:10–2379:24; 2411:24–2426:1).

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[6] The Referee stated that Respondent admitted to the improper trust account transfers from his trust account from day one (Recommendation on Bar's Costs, 7). Yet, a review of Respondent's Answer and Affirmative Defenses (Index #43) and Response to Request for Admissions (Index # 42), will reveal that Respondent failed to admit to various allegations related to the improper transfers from Respondent's trust account contained in the Complaint of The Florida Bar (Index #1) and the Bar's Request for Admissions. (Index #2). Also, at the time of Respondent's deposition taken on February 13, 2015, Respondent still was unwilling to fully admit to the numbers contained in the Complaint of The Florida Bar [TFB Cost Ex. 2 – 147:8-158:11].

- TFB Ex. 34: "Text Message Analysis" (Tr. 2426:2 –2445:24).

- TFB Ex. 36: "Trust Account Shortage at End of Month January 2010 through March 2011" (Tr. 2468:24–2476:24).

- TFB Ex. 38: "Monthly Trust Account Shortage Compared to Trust Account Deposits by Mr. Alters February 2010 through March 2011" (Tr. 2503:17- 2508:20).

- TFB Ex. 39: "Monthly Trust Account Shortage Compared to Monthly Deposits by Mr. Alters February 2010 through February 2011" (Tr. 2508:25 –2513:16).

- TFB Ex. 40: "Monthly Amounts Paid to Mr. Alters February 11, 2010 through December 31, 2010" (Tr. 2513:21 –2523:16).

- TFB Ex. 41: "Funds Deposited by Mr. Alters and How They Were Used for the Period from February 1, 2010 through February 28, 2011" (Tr. 2523:21–2535:22).

- TFB Ex. 42: "Checks with Forged Signatures" (Tr. 2539:16–2549:18; 2686:7–2691:25).

- TFB Ex. 46: "Response to Subpoena Duces Tecum Received from Searcy Denney Scarola Barnhart & Shipley P.A. with The Florida Bar's Supplemental Information" (Tr. 2673:17–2686:5; 2713:6–2720:18).

- TFB Ex. 47: "Funds Actually in ABBRC Trust Account-October 31, 2010 through December 31, 2010" (Tr. 2727:1–2742:24).

The scope of the Bar auditor's investigation, as evidenced by his initial report, extensive trial testimony and the summaries and exhibits prepared for trial provide

clear evidence that these costs were necessary to the Bar's presentation of its case and were not excessive.

In order to assess the scope and necessity of the Bar's investigation subsequent to the emergency suspension, one needs only to consider the following facts:

- At the emergency suspension hearing, Respondent entered an email chain and letter as his composite exhibit no. 6 ("REX 6") using this as a cornerstone piece of evidence to purportedly establish that Kimberly Boldt ("Boldt") admitted responsibility for improper trust account transfers in January and February 2010 (TFB Ex. 53- 263:2-9; 372:12-373:5). At the final hearing in 2015, the Bar entered this same composite exhibit in evidence as TFB Ex. 1. In the Recommendation on Bar's Costs, the Referee refers to this composite exhibit as the "draft confession letter and email" (Recommendation on Bar's Costs, 4). This exhibit is comprised of 4 pages:

    - The first three pages are purportedly a draft confession letter created by Boldt; and

    - The fourth, and last page, the email chain to which it was purportedly attached.

    All that one needs to do to grasp the suspicious nature of the email chain attached as the last page of REX 6 (TFB Ex. 1 in the instant matter) is to compare it to the *actual* email message (TFB Ex. 29). Yet, the Referee determined that REX 6 was authentic.

- Neither Boldt nor Marc Salpeter ("Salpeter") testified at the emergency suspension hearing. However, as the Bar had received information in direct contradiction with the allegation that Boldt was responsible for directing improper transfers from Respondent's firm's

trust account, it was incumbent upon the Bar to investigate the authenticity of REX 6, the "draft confession letter and email."

- The Bar received text messages from Salpeter that evidenced that Respondent directed numerous improper transfers out of the firm's trust account.

Accordingly, in an effort to fully investigate who was responsible for the improper transfers and trust account shortage, the Bar made a good faith determination that it was necessary to retain a computer forensics expert to investigate the issues surrounding REX-6 and the authenticity and authorship of the text messages between Respondent and Salpeter.

Subsequent to the emergency suspension hearing and after the Bar retained its computer forensics expert, Respondent's own computer forensics expert testified that the letter and email that comprised REX 6 did not go together. [TFB Cost Ex. 3A – 29:7 – 30:11; 57:17 – 59:9; TFB Cost Ex. 4 - 3392:25 -3396:10.] Yet, at the emergency suspension hearing Respondent had presented this as his cornerstone piece of evidence.

During the course of the Bar's computer forensics investigation, the Bar obtained an email chain dated February 17, 2010 that the Bar placed into evidence in the instant case as TFB Ex. 29. The email chain in TFB Ex. 29 is the same email chain as REX 6 (TFB Ex. 1 in the instant matter) except that REX 6 is

missing the top email from Rogow at 5:33 p.m. that is contained in TFB Ex. 29. In this email from Rogow, he clearly states that the excuses provided as to why the funds that were improperly transferred from the firm's trust account in January and February 2010 did not hold water.[7] Obviously, this was a compelling email, that would likely have been problematic for Respondent at the emergency suspension hearing.

Based on the Referee's Recommendation on Bar's Costs, the Bar should have accepted the "draft confession letter and email" at face value and should not have questioned it further. First, at best, the "draft confession letter and email" only addressed the time frame of January of 2010 and a portion of February 2010, and in fact, did not evidence a "confession" to directing improper trust account transfers. It merely authorized Salpeter to transfer money to pay bills. Further, the improper transfers from Respondent's firm's trust account extended *well* beyond February of 2010 and encompassed a significant period of time when it is clear that Boldt was no longer associated with the firm. Second, this matter involved diametrically opposed positions regarding a serious trust accounting violation.

[7] Respondent did not give Rogow the benefit of the full email chain reflected in TFB Ex. 29 when he testified at the emergency suspension hearing almost two years after the email communications. (Tr. 372:12-373:5). Rogow was only provided with REX 6. As previously noted, REX 6 did not include the detailed email from Rogow on February 17, 2010 at 5:33 p.m.

Quite simply, it would have been irresponsible if the Bar did not attempt "to leave no stone unturned" in its investigation to determine who was responsible for the improper trust account transfers and the trust account deficit that exceeded $1,000,000.00 for more than 13 months.[8]

In Respondent's Response in Opposition to Bar's Motion to Tax Costs, he stated,

> At every step of the way, the Bar ignored the truth that was positioned right under its nose. As a result, Alters was forced to hire experts to conclusively prove that (1) Kimberly Boldt was a liar – by demonstrating the origin and authenticity of the confession letter and email chain transmitting it to Alters and Rogow – and (2) the text messages relied upon by the Bar were tampered with and fake.

If Respondent was "forced to hire to experts to conclusively prove" the authenticity of the "confession letter and email" as well as to show that the text messages "were tampered with and fake" doesn't it follow that the Bar would need to have an expert to "conclusively prove" whether or not the aforementioned documents were authentic? Also, it should be noted that Respondent's computer forensics experts' costs were considerably greater than those of the Bar's computer forensics expert. Undoubtedly, the Bar's computer forensics expert costs were necessary and not excessive.

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[8] The month of September 2010 was the only exception. The end of the month trust deficit for that month was $890,940.57.

It is clear from the Referee's order that she made judgments regarding the necessity and excessiveness of the bar's investigation based on the conclusions she reached after a month-long trial. Utilizing this perspective for the determination of the necessity and excessiveness of the costs incurred by the Bar is misguided. The determination should be made based on the situation that existed at the time the Bar made its initial decisions with respect to the scope of its investigation.

Moreover, the Referee's orders ignore the breadth of the expert witnesses' testimony which, in fact, encompassed more than just what is addressed in her orders. Finally, and inexplicably, the Referee fails to even address how it is that she did not assess court reporter costs, the Bar's staff investigator costs and Respondent's expert's witness fee for an appearance at a deposition, despite the fact that Respondent was found guilty of two rule violations. In essence, it appears that this Referee decided that the Bar had no business going to trial in this case.

In the Recommendation on Bar's Costs, the Referee made reference to her January 2012 report recommending the dissolution of the emergency suspension:

> In summary there was no evidence that Respondent is causing or has caused harm to anyone. It is unlikely the Bar will be able to prove at a plenary hearing that Respondent misappropriated trust funds or that he authorized any improper transfers by clear and convincing evidence.

(Recommendation on Bar's Costs, 9).

The Referee then noted that "the end result, as this Referee correctly predicted, was the same." (Recommendation on Bar's Costs, 9).

Essentially, it appears that the Referee prejudged this case based on her findings at the emergency suspension hearing, pre-determined what the Bar's strategy should have been going forward, and failed to objectively view the Bar's evidence presented at the final hearing. [9, 10]

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[9] To further illustrate, the Referee's pre-disposition in the instant case, she included a reference in her Recommendation on Bar Costs to the Bar's first auditor on this case, Carlos Ruga ("Ruga"). Ruga has not been assigned to this matter since January 2012, yet the Referee found it appropriate to include a quote from a November 7, 2011 letter from Respondent's counsel disparaging Ruga,

> I can tell you from experience in another recent case that Mr. Ruga draws improper inferences adverse to lawyers based upon an incomplete understanding of the facts and records and he scrupulously avoids asking questions of respondents to explain things.

(Recommendation on Bar's Costs, 5)

Said November 7, 2011 letter was contained within Respondent's Composite Exhibit "A" to the costs hearing. The second page of that letter contains the quote referenced above and it specifically identifies that case to which he was referring involving attorneys, Messrs. Roth and Rousso. What is particularly disturbing about this reference is that since the time of this letter, this Court disbarred both Messrs. Roth and Rousso [*See The Florida Bar v. Rousso*, 117 So.3d 756 (Fla. 2013)] related to the same investigation for which Respondent's counsel criticized Ruga. Quite simply, it was irresponsible for this Referee to include such an erroneous disparaging reference to Ruga in her Recommendation on Bar Costs, when in fact, this Court disbarred both Messrs. Roth and Rousso largely due to the extensive work performed by Ruga.

On January 25, 2012, this Court entered its order lifting Respondent's emergency suspension and reinstating him to the practice of law. Clearly, this Court did not view this matter with the same mind as the Referee since there was a split decision on the Referee's recommendation to lift Respondent's emergency suspension. By entry of its order lifting the emergency suspension, this Court never suggested that the Bar discontinue its investigation of this matter, but rather stated that the Bar should continue its investigation through its normal course.

Further, it should be noted that the assigned grievance committee found probable cause for the referenced rule violations in the Complaint of The Florida Bar *even after* considering the Referee's ruling on the emergency suspension hearing and reviewing the responses that Respondent provided to the grievance committee.

As this Court stated in *The Florida Bar v. Lechtner*, 666 So.2d 892, 894 (Fla. 1996),

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[10] The Referee also drew improper conclusions as to Bar counsel's objectivity. On p. 6 of the Recommendation on Bar's Costs, the Referee alluded to Bar counsel having had an inherent bias towards Boldt. Yet, it is undisputed that Boldt and Bar counsel had never communicated prior to the investigation in this matter (Tr. 1909:14-1910:10). Further, the Referee made no mention of the testimony that Respondent's partner and counsel, Justin Grosz, and Bar counsel had formerly worked together and had an amicable relationship (Tr. 3579:1-9).

> This Court has found that, generally, when there is a finding that an attorney has been found guilty of violating a Rule Regulating The Florida Bar, the Bar should be awarded its costs. *See Florida Bar v. Davis*, 419 So.2d 325 (Fla. 1982). Assessment of costs against a respondent who has violated the Rules of Discipline is a policy decision. The choice is between imposing the costs of discipline on those who have violated our Rules of Professional Conduct or on the membership of the Bar who have not. *See Florida Bar v. Gold*, 526 So.2d 51 (Fla. 1988). In these situations, it is only fair to tax those costs against the member who has violated the rules. *See Florida Bar v. Miele*, 605 So.2d 866 (Fla. 1992).

Undisputedly, Respondent was found guilty of rules 4-1.15 and 5-1.1(b), as there was a massive deficit in his firm's trust account for over thirteen months. The Referee specifically found that once Respondent became aware of the massive deficit in his firm's trust account he "failed to implement any safeguards to avoid it from reoccurring" and "failed to take reasonable remedial actions" (ROR 65-66). How this could be viewed as involving anything other than *extremely* serious trust accounting violations is incomprehensible. In line with *Lechtner*, it is only fair that Respondent should be taxed the entirety of the Bar's costs, rather than the membership of the Bar who have not engaged in serious trust accounting violations.

In *The Florida Bar v. Wilson*, 616 So.2d 953 (Fla. 1993), this Court found that it was not an abuse of discretion for the referee to assess the full amount of the bar's costs incurred in a disciplinary matter against the respondent even though the

respondent was not found guilty of all of the charged rule violations. In *Wilson*, this Court found that it was appropriate to assess the full amount of the bar's costs against the respondent even though the bar's auditor and court reporting costs pertained to both proven and unproven charges since these costs could not be readily segregated and because it was the misconduct of the respondent that initiated the disciplinary charges.

As in *Wilson*, Respondent was not found guilty of all the charged rule violations in the instant case. However, as Respondent was found guilty of two rules relating to serious trust account violations, the Bar's costs of the extensive investigation conducted could not be readily segregated as to the guilt findings and those of not guilty, and it was Respondent's misconduct that initiated the disciplinary charges, all of the Bar's costs should be assessed against Respondent.

In *Miele* and *Gold*, the Court found that the referees did not abuse their discretion by awarding all of the bar's costs against the respective respondents even though the respondents were not found guilty of all of the charged rule violations. In both cases, this Court found that it was only fair to impose the bar's costs against the misbehaving respondent rather than the other members of the bar who had not misbehaved. Additionally, this Court found in both cases that if the

respondents had not engaged in misconduct there would have been no complaint, and accordingly, no costs.

Similar to *Miele* and *Gold*, had Respondent not committed serious trust account violations, he would not have been subject to disciplinary proceedings, and in turn, costs would not have been incurred. Further, as costs were incurred due to his violations, other members of the Bar who have not engaged in misconduct should not have to pay for Respondent's misdeeds.

In *Davis*, the respondent was found not guilty of two of the three charged rule violations. The referee awarded the Bar just less than 1/3 of its total costs in the case. In upholding the referee's recommendation, this Court noted,

> We hold that the discretionary approach should be used in disciplinary actions. Generally, when there is a finding that an attorney has been found guilty of violating a provision of the code of professional responsibility, the bar should be awarded its costs. At the same time the referee and this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable. *The amount of costs in these circumstances should be awarded as sound discretion dictates.* (Emphasis supplied.) *Davis,* 419 So.2d at 328.

While the referee in *Davis* was found to exercise sound discretion in the reduction of costs since the respondent was only found guilty of 1 of 3 charged rule violations, there was no such exercise of sound discretion in the instant case. While the referee in *Davis* awarded nearly 1/3 of the Bar's total costs ($5,026.39

awarded of the total costs of $16,977.36), the Referee in the instant case only awarded **.4 %** of the Bar's total costs ($1,250 awarded of the total costs of $305,360.03) even though she found 2 serious rule violations of the 6 rules charged. The Referee's infinitesimal award of costs here is simply indefensible.

In *The Florida Bar v. Martinez-Genova*, 959 So.2d 241 (Fla. 2007), this Court specifically awarded the Bar its appellate costs in addition to other costs it incurred. Martinez-Genova's misconduct involved misappropriation of trust funds as well as three arrests for possession of cocaine. This Court found, "[T]hat the Bar's appellate costs were reasonable and necessary to correct the referee's erroneous recommendation of discipline for such serious misconduct. We further agree that these costs should be borne by the respondent as a matter of policy." *Martinez-Genova*, 959 So.2d at 249.

As in *Martinez-Genova*, the award of appellate costs would be in order in the instant case as the Bar is firmly convinced that this Court will find that the Referee's recommendation of no discipline was erroneous. There is no reasonable basis in either existing case law or the Florida Standards for Imposing Lawyer Sanctions as Respondent's extremely serious trust account violations warrant disbarment. *See Martinez-Genova*, 959 So.2d at *246*.

In *The Florida Bar v. Whitney*, 132 So.3d 1095, 1109 (Fla. 2013), the referee found the respondent guilty of violating numerous rules and not guilty of numerous others. The Court found that the referee abused his discretion by failing to award any of the Bar's investigative costs and particular costs related to expert fees where there was no showing that these costs were unnecessary, excessive or improperly authenticated.

In the case at hand, all of the costs listed on the Bar's Amended Statement of Costs in the instant case are permitted as taxable costs by rule 3-7.6(q) and 5-1.2(g)(h). Further, while this Referee did rule that the Bar's computer forensics costs and staff auditor costs were unnecessary and/or excessive, the Referee made no such specific finding as to the court reporting costs, staff investigator costs and the fee for the appearance of Respondent's witness at deposition. Although, the Bar is entitled to all of its costs here, undeniably, the Referee abused her discretion by not awarding the court reporting costs, staff investigator costs and the witness fee for Respondent's witness, at the very least.

Pursuant to rule 3-7.6, the Bar timely filed for the assessment of its costs against Respondent. As noted above, the Referee made no finding that any of the Bar's costs were improperly authenticated. For all of the reasons detailed above, the referee abused her discretion in concluding that the Bar's costs were

unnecessary and excessive, and for failing to assess these costs against Respondent. Accordingly, the Bar's total costs of $305,360.03 should be assessed against Respondent.

REFEREE'S ASSESSMENT OF RESPONDENT'S COSTS AGAINST THE BAR WAS AN ABUSE OF DISCRETION

Pursuant to rule 3-7.6(q)(5), the Bar timely filed its motion to assess costs. Inherent in the Bar's filing of its motion to assess costs is an objection to Respondent's motion seeking costs and attorney's fees.[11] As there were dueling motions for costs in this case, it was obvious that each party was objecting to the opposing side's costs.

From the outset, the Bar diligently pursued having both parties' costs motions heard. The earliest available date provided for hearing was February 9, 2017 and the hearing commenced on that date. At the costs hearing, the Bar made argument opposing Respondent's motion seeking costs and attorney fees.

As previously noted, rule 3-7.6(q)(2) states that a referee's recommendation to award costs shall not be reversed so long as the referee does not abuse his/her discretion.

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[11] The Referee appropriately denied Respondent's motion for attorney's fees. *See The Florida Bar v. Chilton*, 616 So.2d 449 (Fla. 1993).

In regard to the assessment of a respondent's costs, rule 3-7.6(q)(4) states:

> When the bar is unsuccessful in the prosecution of a particular **matter**, the referee may assess the respondent's costs against the bar in the event that there was no justiciable issue of either law or fact raised by the bar. (Emphasis supplied.)

Apparently, the Referee confused the meaning of the word "matter" in this rule. Clearly, the reference to "matter" means a case in its entirety, not a portion thereof. This is evident upon comparing the language in rules 3-7.6(q)(3) and 3-7.6(q)(4). Rule 3-7.6(q)(4) includes no such language as "in whole or in part" as is referenced in rule 3-7.6(q)(3) regarding the assessment of Bar costs. Clearly, for an assessment of a respondent's costs to be appropriate, there must be no justiciable issue of either law or fact in the Bar's case in its entirety.

In her ruling, the Referee stated, "On the issue of whether Respondent actually authorized the improper transfers, this Referee finds there was no justiciable issue of law or fact from the beginning." (Recommendation on Respondent's Costs, 4). Accordingly, she awarded Respondent all of his costs for the computer forensics expert and polygrapher that assisted him in defense of this charge.

While the Bar has already sought review of the Referee's finding of fact that Respondent did not authorize improper transfers, the fact remains that Respondent

was found guilty of violating two rules involving serious trust account violations, clearly establishing the presence of a justiciable issue in this case.

By the Referee's ruling awarding Respondent's costs, she essentially rewrote rule 3-7.6(q)(4) to read that if there is no justiciable issue of either law or fact **in any portion** of the Bar's case, assessment of a respondent's costs is appropriate. The Referee's reading of rule 3-7.6(q)(4) is flawed and there is no basis for the award of Respondent's costs in this case. If this Court intended for such a result regarding the assessment of a respondent's costs, it would have included the language "in whole or in part" in rule 3-7.6(q)(4) as it did in rule 3-7.6(q)(3) with the assessment of Bar costs. If the Referee's unconventional interpretation of this rule is found to be reasonable, this most certainly would also have a chilling effect on the prosecution of Bar disciplinary cases.

To further establish the presence of a justiciable issue in the case at hand, the Bar would note the following:

- This Court's decision was split on whether to lift Respondent's emergency suspension.

- A grievance committee made a finding of probable cause as to all rule violations charged in the Complaint of The Florida Bar even after considering the Referee's report recommending that the emergency suspension be lifted and Respondent's responses to the committee.

- Respondent filed a Motion for Partial Summary Judgment (Index #93) that was scheduled for hearing, and then cancelled by Respondent, after the Bar filed its voluminous Response in Opposition (Index #105).

Additionally, in Respondent's argument for costs and the Referee's recommendation assessing Respondent's costs against the Bar, there was no Bar case law cited to support this recommendation. The reason being, no such case law exists to support awarding a respondent his/her costs when the Bar has proven rule violations.

As noted in *The Florida Bar v. Lechtner*, 666 So.2d 892, 894 (Fla. 1996), *The Florida Bar v. Gold*, 526 So.2d 51 (Fla. 1988) and *The Florida Bar v. Miele*, 605 So.2d 866 (Fla. 1992), this Court has stated that it is a "policy decision" to assess costs against a misbehaving respondent rather than those members of the Bar who have not misbehaved. Clearly, the Referee has abused her discretion by assessing Respondent's costs against the Bar in a case where he was found guilty of serious violations regarding two trust accounting rules. Accordingly, this Court should reverse the Referee's recommendation awarding Respondent's costs in the amount of $143,913.35 and uphold the Referee's ruling denying Respondent's attorney's fees in her Recommendation on Respondent's Costs.

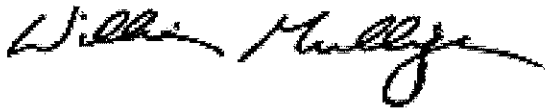
CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court:

1) Reject the Referee's recommendation denying the assessment of the Bar's costs against Respondent (excepting the administrative fee) and award the Bar its total costs of $305,360.03;

2) Reject the Referee's recommendation assessing Respondent's costs against the Bar, and

3) Accept the Referee's recommendation denying Respondent's attorney's fees.



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 29th day of December, 2017.

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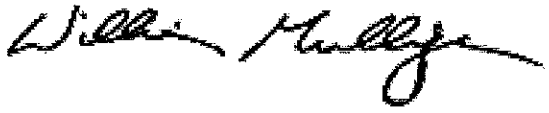
CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

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