

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

SUPREME COURT CASE

Complainant,

No. SC05-2221

v.

ALFONSO SALCINES,

Respondent,

RESPONDENT'S ANSWER BRIEF

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ARGUMENT

(I) The Referee’s Findings And Recommendations As To Count I of the Complaint Should Be Approved

(A) The Bar, By Failing To Advance Any Particularized Argumentation Sufficient To Establish Respondent’s Guilt As To Any Of The Specific Items Of Misconduct Charged In Count I, Has Failed To Carry Its Burden Of Overcoming The Presumption Of Correctness Enjoyed By The Referee’s Findings

As this Court has previously noted, “the referee’s findings of fact as to items of misconduct charged ‘shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding.’” *The Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994); *see also* Rule 3-7.6(m)(1)(A) of the Rules Regulating the Fla. Bar (same). Accordingly, the onus to demonstrate reversible error falls squarely on the appellant. *See* Rule 3-7.7(c)(1)(5) of the Rules Regulating the Fla. Bar (“Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified.”): *see also, e.g., Applegate v. Barnett Bank*, 377 So.2d 1150, 1152 (Fla. 1979). “Such burden can only be met by making reversible error clearly, definitely, and fully appear.” *Castellanos v. Hialeah-Miami Springs First State Bank*, 330 So.2d 100, 101 (Fla. 3d DCA 1976); *see also Ruppenthal v. Wood*, 425 So.2d 194, 196 (Fla. 3d DCA 1983) (“[T]he burden is on appellant in all proceedings before the reviewing court to make error clearly appear.”).

To meet this burden, an appellant must negate any possible basis of support for the adverse determination. *See, e.g., Fuller v. Olive*, 158 So.2d 547, 548 (Fla. 3d DCA 1963); *see also Valdes v. Miami Herald Publishing Co.*, 782 So.2d 470 (Fla. 3d DCA 2001) (trial court's decision will be upheld where the record reveals any reason or basis to support it). Not surprisingly, an appellant's burden on appeal has been described as a "heavy" one. *See Reinhold Construction v. Vero Beach*, 429 So.2d 699 (Fla. 4th DCA 1983).

In this case, the Bar has fallen far short of carrying its heavy burden of overcoming the presumption of correctness attached to the Referee's determination in Respondent's favor as to Count I of its Complaint against Respondent. During its presentation to the Referee in support of Count I, the Bar argued that Respondent's alleged conduct in connection therewith violated a total of eight separate Florida Bar Rules of Professional Conduct, specifically Rule 3.4.3 (Misconduct and Minor Misconduct); Rule 3-4.4 (Criminal Misconduct); Rule 4-1.7 (Conflict of Interest); Rule 4-2.1 (Adviser); Rule 4-4.1 (Truthfulness in Statements to Others); Rule 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another); 4.84 (b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a

lawyer in other respects); and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). *See* (Tr. at 18-20). The Bar has failed to carry its onerous burden because nowhere in its argumentation calling for reversal as to Count I does the Bar specifically argue or establish how or why Respondent is guilty of violating any of the aforementioned Rules. *See* Initial Brief at 9-12. In fact, none of the Rules of Professional Conduct underlying Count I are even specifically mentioned by name. *See Id.*

Admittedly, although Rule of Professional Conduct 4.1.7 is not specifically and expressly mentioned by name, the Bar's argumentation as to Count I reveals the crux of the Bar's position: that that the Referee "simply ignored the conflict [of interest] issue."¹ Initial Brief at 12.

However, a perusal of the Bar's argument as to Count I establishes that, while the Bar indeed complains that the Referee ignored the conflict of interest issue, nowhere in its Initial Brief does the Bar ever actually establish

¹ Accordingly, the Bar has waived all other Rule violations originally set forth in Count I. *See Mazza v. Rose Media Group, Inc.*, 937 So.2d 307 (Fla. 4th DCA 2006) (Points will not be considered by an appellate unless they are properly raised and discussed in the brief); *Raskin v. Community Blood Centers of South Fla., Inc.*, 699 So.2d 1014 (Fla. 1997) (It is the duty of counsel to prepare appellate briefs so as to acquaint the reviewing court with the material facts, points of law involved, and legal arguments supporting position of respective parties, and when points, positions, facts and supporting authorities are omitted from brief, court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy).

that a conflict of interest or even a potential conflict of interest ever existed. *See generally* Initial Brief; *see especially Id.* at 9-12 (Argument I).

The following excerpt from Argument I of the Initial Brief is the closest the Bar comes to actually raising an argument on this point: “Based on the foregoing, The Florida Bar argued to the trial court that Respondent never explained to his ‘clients’ that there was a potential conflict of interest and what their respective rights and roles....” Initial Brief at 10-11. This nebulous statement, however, is manifestly insufficient to overcome the presumption of correctness attached to the Referee’s determination as to Count I or to otherwise establish that the Referee committed reversible error. This Court can peruse the Bar’s Initial Brief page-by-page, but it will not find any articulation or elaboration as to specifics or details of the alleged conflict of interest. Nowhere has the Bar explained how or why the interests of the Ex-Owners were adverse or conflicting with those of Gross and Benitez. Under such circumstances, the Bar has clearly failed to meet its burden of overcoming the presumption of correctness attached to the Referee’s findings and recommendations as to Count I, which should remain undisturbed.²

² The Bar cites two cases, *The Florida Bar v. Rosenberg*, Case No. SC05-38, and *The Florida Bar v. Goldfarb*, Case No. 93,272, in support of its contention that a conflict of interest existed and that the Referee erred in declining to find Respondent guilty of the

(B) The Bar’s Attacks On The Referee’s Factual Findings And Conclusions Are Unavailing.

(1) The Bar’s Factual Attacks Are Insufficient To Carry Its Burden Under The Circumstances

In the proceedings below, the Referee rejected the Bar’s contention that Respondent was associated with Gross and Benitez and that he otherwise participated in a scheme to defraud clients out of a portion of surplus funds that they were entitled to receiving after foreclosure proceedings. (ROR at 2). Specifically, the Referee recommended that Count I of the Bar’s Complaint against Respondent be dismissed, finding that the ex-homeowners willingly and voluntarily agreed to pay Gross and Benitez for their assistance in recovering the surplus funds, that Respondent was not associated with Gross and Benitez in the alleged scheme, that no

charges against Respondent. Neither case carries the day for the Bar. First, *Rosenberg* does not even involve an underlying charge or conviction for conflict of interest. Second, the facts of *Goldberg* are significantly more egregious than the fact of this case and *Goldberg* is therefore clearly distinguishable on the facts. In fact, the actions of the attorney in that case were so egregious that during the hearing below, the Bar stated that, “in fairness to [respondent], Mr. Rosenberg was quite a monster, quite a bit different [than Respondent]....” (Tr. at 57). Third, *Rosenberg* is merely an unpublished report of another referee lacking in binding precedential authority. *Goldfarb* is also a nonbinding unpublished report of a referee distinguishable on the facts because the ex-homeowner in that case did not voluntarily hire the attorney in question to collect the surplus funds on the homeowner’s behalf. *Goldfarb* has even less precedential value than *Rosenberg* because the opinion was based on a guilty plea. Neither of these cases carries more weight than the Referee’s implicit determination in this case that there was no conflict of interest problem under the circumstances. Finally, this very same conflict of issue question was adjudicated in Respondent’s favor in connection with the Bar complaint filed on behalf of Marie Hilton. *See* Opinion Letter in Case No. 2000-71,573(11J) (Appendix at 1).

clients lost money as a result of Respondent's actions, that Respondent received only minimal compensation for the services he provided, that no Bar complaints were filed against Respondent in connection with 33 out of the 34 surplus fund cases in question, and that Respondent long ago discontinued his limited involvement in the surplus recovery cases once a question was raised regarding the propriety thereof. *See* (ROR at 2-4).

In Argument I of its Initial Brief, the Bar contends that the Referee committed reversible error in connection with his factual findings and recommendation as to Count I. *See* Initial Brief at 9-12. In a nutshell, the Bar's argument for reversal on appeal consists of a regurgitation of the testimony and arguments advanced by the Bar during the hearing below, followed by the Bar's conclusion that the Referee erred by not ruling in the Bar's favor. *See Id.* The Bar's attacks on the Referee's factual findings and recommendation as to Count I are insufficient to warrant disapproval thereof.

“The party contesting the referee's findings or fact and conclusions on guilt must demonstrate that there is no evidence in the record to support the findings or that the evidence clearly contradicts the conclusions.” *The Florida Bar v. Pellegrini*, 714 So.2d 448, 451 (Fla. 1998); *see also The Florida Bar v. Frederick*, 756 So.2d 79, 86 (Fla. 2000) (same); *The Florida Bar v. Vining*, 761 So.2d 1044, 1047 (Fla. 2000) (same); *The Florida Bar v.*

Lange, 711 So.2d 518, 520 n.5 (Fla. 1998). A party cannot meet “this burden by simply repeating testimony and arguments thereon that the referee heard and rejected below.” *The Florida Bar v. Frederick*, 756 So.2d 79, 86 (Fla. 2000); *see also The Florida Bar v. Schultz*, 712 So.2d 386, 388 (Fla. 1998) (“A party does not satisfy his or her burden of showing a referee’s findings are clearly erroneous by simply pointing to the contradictory evidence where there is also competent, substantial evidence in the record that supports the referee’s findings.”); *The Florida Bar v. Broome*, 932 So.2d 1036, 1042 (Fla. 2006) (same); *The Florida Bar v. Frederick*, 756 So.2d 79, 86 (Fla. 2000) (same); *The Florida Bar v. Glick*, 693 So.2d 550, 552 (Fla. 1997) (same).

However, this is exactly what the Bar has done, simply repeated the very same arguments that the Referee previously heard and rejected. *See* Initial Brief at 9-12. Accordingly, this Court should approve the Referee’s findings and recommendations as to Count I.

(2) The Referee’s Findings As To Count I Challenged By The Bar Must Be Approved Because They Are Supported By Competent, Substantial Evidence And Are Appropriately Based On The Referee’s Unassailable Credibility Determinations

“A referee’s findings of fact are not subject to attack unless they are without support in the evidence.” *The Florida Bar v. Aaron*, 529 So.2d 685,

686 (Fla. 1988). Accordingly, “[i]f the referee’s findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.” *The Florida Bar v. Vining*, 761 So.2d 1044, 1047 (Fla. 2000); *see also The Florida Bar v. Summers*, 728 So.2d 739 (Fla. 1999) (same); *The Florida Bar v. Pellegrini*, 714 So.2d 448, 451 (Fla. 1998) (same); *The Florida Bar v. Rubin*, 323 So.2d 257, 259, n.9 (Fla. 1975) (“Fact findings in [Bar] disciplinary matters should not be overturned unless wholly lacking in evidentiary support.”).

In this case, the Referee rejected the Bar’s allegations that Respondent participated in a scheme along with Jaime Gross (“Gross”) and Miguel Benitez (“Benitez”) to defraud Respondent’s clients (the “Ex-homeowners”) out of a portion of surplus funds remaining after the sale of their foreclosed homes and being held in the Registry of the Court. The factual determinations made by the Referee as to Count I are supported by competent, substantial evidence and are therefore not subject to attack and must be upheld. This record evidence includes Respondent’s testimony³

³ Although Respondent’s testimony was not under oath, this Court has made it abundantly clear that, because Bar disciplinary proceedings are quasi-judicial and are not governed by the technical rules of evidence, a referee is empowered to admit and consider unsworn testimony and does not commit reversible error in relying thereupon. *See, e.g., The Florida Bar v. Centurions*, 801 So.2d 858, 862 (Fla. 2000); *The Florida Bar v. Clement*, 662 So.2d 690 (Fla. 1995).

during the hearing on this matter regarding the circumstances and specifics of Respondent's involvement in the surplus fund cases, as well as factual stipulations reached by the Parties and certain critical pieces of documentary evidence.

During his testimony, Respondent stressed that his intentions were never to defraud anyone or to be a part of any scheme or scam. (Tr. at 21). Respondent stated that he read the underlying contracts between the Ex-homeowners and Gross or Benitez, did some research on his own which revealed that no one was advising the Ex-homeowners regarding their potential entitlement to surplus funds, and came to the conclusion that there was nothing improper or illegal about the agreements in question. *Id.*

Respondent's testimony established that his actions with respect to his Ex-homeowner clients in the surplus funds cases were, at all times, honest, above board and in the open, and that he was diligent in the prosecution of their cases and always earned his modest fee. In every one of the cases except one in which he was paid \$750, the modest fee in question was either \$250 or \$500, depending on the amount of the recovery. (Tr. at 21 & 23-24). As stipulated in this matter, the services provided by Respondent in each case involved, at minimum, filing a motion for disbursement of the surplus funds held in the court registry and attending a hearing thereupon.

See (SOF at 2, ¶6). Respondent testified that some of the proceedings were adversarial, with parties holding second mortgages making claims on the surplus funds and attorneys filing motions for additional fees and costs therefrom. (Tr. at 23).

Moreover, it is stipulated that, in each case, the Ex-homeowner executed an Affidavit/Special Power of Attorney (the “Contingency Agreements”) authorizing either Gross or Benitez to act as the Ex-homeowner’s “Attorney in Fact” for the purpose of attempting to recover certain surplus funds possibly being held in the Court Registry from the foreclosure sale of the ex-homeowner’s home in exchange for a contingent percentage fee to be deducted from any eventual recovery. *See* (SOF at p.2, ¶¶4-6; p.5, ¶18; p.8, ¶41; p.9, ¶46; p.10, ¶52; p.11, ¶¶57 & 63; p.12, ¶69; p.13-14, ¶¶74 & 80; p.14, ¶85; p.15, ¶95; p.16, ¶102; p.17, ¶107; p.18, ¶113; p.19, ¶122; p.20, ¶128). A copy of the typical Contingency Agreement is attached to the Stipulation of Facts as Exhibit “A.”

In each case, the Ex-Homeowners also signed a Retainer Agreement provided to them by Gross or Benitez which expressly authorized Respondent to petition the Court on the Ex-homeowner’s behalf to release the surplus funds and disburse said funds in accordance the underlying Contingency Agreement. *See* (SOF at p.2, ¶6; p.5, ¶19; p.8, ¶41; p.9, ¶46;

p.10, ¶52; p.11, ¶58; p.12, ¶69; p.13-14, ¶¶74 & 80; p.14, ¶85; p.15, ¶95; p.16, ¶102; p.17, ¶107; p.18, ¶113; p.19, ¶122; p.20, ¶128. In each case, it is undisputed that Respondent disbursed the funds in accordance with the underlying Contingency Agreements. *See* (SOF at p.9, ¶43 & ¶48; p.10, ¶53; p.11, ¶60; p.12, ¶¶66 & 71; p.13, ¶76; p.14, ¶82; p.15, ¶89; p.16, ¶97; p.16-17, ¶104; p.17, ¶109; p.20, ¶125; p.20, ¶130.

Despite levying general accusations of fraud and accusing Respondent, Gross and Benitez of orchestrating a “scam” and a “scheme”, the Stipulation of Facts exclusively relied upon by the Bar to prove its case below fails to identify a single misrepresentation purportedly made to the Ex-homeowners by any of those individuals. *See generally* (SOF). Similarly, the Bar failed to adduce any evidence whatsoever to establish duress or overreaching in connection with the execution of any of the Agreements in any of the 34 underlying surplus funds cases. *See generally Id.* Instead, a review of the Agreements and the express language therein establishes that Gross and Benitez made truthful disclosure to the Ex-homeowners and belies any assertion of fraud, duress or overreaching.

For example, each Contingency Agreement expressly disclosed that the Clerk of Court was holding surplus funds in connection with the foreclosure sale of the Ex-homeowner’s property and that the Ex-

Homeowner was likely entitled to some or all of said funds. *See* (Exh. “A” to SOF at ¶3. Each Agreement also specifically set forth that the agreed upon contingency fee was “IN CONSIDERTION OF [THE] INVESTIGATOR’S TIME AND EFFORT IN LOCATING AFFIANT, WHO IS BELIEVED TO BE THE LAWFUL OWNER OF THE AFORESAID PROPERTY...” *Id.* at ¶5.

Accordingly, the face of the Contingency Agreement affirmatively disclosed to the Ex-homeowner that the surplus funds were being held by the Clerk of Court and also disclosed the consideration the Ex-Homeowner was receiving under the circumstances. Therefore, prior to signing the Agreement, the Ex-homeowner had already been advised that the Clerk was possibly holding surplus funds belonging to the Ex-homeowner. Armed with such information, the Ex-homeowner could simply decline to sign the Agreement if they believed the contingency sought by Gross or Benitez was too high, and either directly retain a lawyer regarding the matter or simply contact the Clerk and inquire regarding what needed to be done to obtain release of the surplus funds. They voluntarily chose not to do so. This is precisely what the Referee concluded, that they “willingly” agreed to pay the contingency amounts. *See* (ROR at 2).

Also supporting the Referee's determination on this point is Respondent's testimony that, at the beginning when he began to do work on the surplus funds cases, he would speak to the clients regarding his representation in connection therewith. (Tr. at 24). Over time, Respondent found that all of the Ex-homeowner clients he would speak to were happy with the arrangement and there were no problems. *See Id.* Respondent's testimony also established that he always sent out notices to everyone involved whenever there was a hearing in any of the cases, that frequently the Ex-homeowner clients would attend the hearings and that Respondent would always speak with them regarding their cases at that time. *See Id.* Furthermore, Respondent would, at times, once again meet with them when they would come to his office to pick up their checks after the surplus funds were disbursed. *See Id.* All of Respondent's testimony was uncontradicted. "[A] fact-finder should not arbitrarily reject unrebutted testimony." *The Florida Bar v. Clement*, 662 So.2d 690, 696 (Fla. 1995).

In light of this evidentiary support, the Referee's conclusions regarding Count I should be approved. This is especially so given that "[t]he [R]eferee, as finder of fact in Bar disciplinary proceedings, is in a unique position to assess the credibility of witnesses and appraise the circumstances

surrounding alleged violations.” *The Florida Bar v. Lecznar*, 690 So.2d 1284, 1287 (Fla. 1997). “Oftentimes, the referee has an opportunity to evaluate first-hand the forthrightness and character of the respondent.” *Id.* Accordingly, “[b]ecause the referee is in the best position to judge the credibility of the witness, [the Supreme Court] defer[s] to the referee’s assessment [on credibility issues].” *The Florida Bar v. Batista*, 846 So.2d 479 (Fla. 2003); *see also The Florida Bar v. Pellegrini*, 714 So.2d 448, 451 (Fla. 1998) (“Determination of the credibility of witnesses is a function better left to the referee. The referee heard and observed the witnesses first hand and thus is in a unique position to assess their credibility.”); *The Florida Bar v. Aaron*, 529 So.2d 685 (Fla. 1988) (“Because the referee is in the better position to evaluate the demeanor and credibility of the witnesses, the referee’s findings of fact should be upheld if they are supported by competent, substantial evidence.”); *The Florida Bar v. Marabelle*, 645 So.2d 438, 442 (Fla. 1994) (“[T]he referee is in the better position to evaluate the demeanor and credibility of the witnesses....”).

This general rule applies to a referee’s factual findings regarding whether particular conduct was intentional and deliberate as opposed to unintentional or neglectful, which are not second guessed, reweighed, or revisited by this Court as they are supported by the record. *See, e.g., The*

Florida Bar v. Forrester, 818 So.2d 477, 484 (Fla. 2002); *The Florida Bar v. Schultz*, 712 So.2d 386, 387-88 (Fla. 1998); *The Florida Bar v. MacMillan*, 600 So.2d 457, 459-60 (Fla. 1992); *see also Burch v. Sun State Ford, Inc.*, 864 So.2d 466, 473 (Fla. 5th DCA 2004) (A question involving “state of mind ... will ordinarily be a question of fact for the jury.”); *MHI, Inc. v. DeCamp Realty, Inc.*, 726 So.2d 305, 305 (Fla. 4th DCA 1999) (“[D]isputed issues of fact concerning intent [in case involving fraud and civil theft claims] should be resolved by the finder of fact.”); *Taylor v. Wellington Station Condominium Assoc. Inc.*, 633 So.2d 43, 44 (Fla. 5th DCA 1994) (Motion for summary judgment filed by defendant in action for breach of fiduciary duty “should have been denied since willfulness was placed into issue by the [defendant] and the issue is one for the jury.”); *Whittmore v. Cruce*, 479 So.2d 761, 763 (Fla. 1st DCA 1985) (“Intent ... is a question for the jury.”). In this case, the Referee determined that Respondent’s testimony regarding his good-faith was credible, and that determination is not properly subject to attack on appeal.

(C) **No Conflict Of Interests Existed**

Not only has the Bar failed to articulate anywhere in its Initial Brief the basis of the purported conflict of interest the Bar insists existed between Gross/Benitez and the Ex-homeowners, no such conflict in fact exists.

During the hearing below, the Bar argued that a conflict of interest existed because Respondent was somehow obligated to advise the Ex-Homeowners that they had cut a bad deal, that the amount of work required to obtain the release of the surplus funds was minimal and that they shouldn't pay Gross/Benitez a 40% contingency fee to obtain release of the funds. *See* (Tr. at 6-13 & 19).

However, by the time Respondent was retained by the Ex-homeowner in each case, they had already entered into the underlying deal with Gross or Benitez. By that point, a mutuality of interest clearly existed between all parties thereto. If Respondent succeeded in recovering the surplus funds, each would receive their bargained-for share thereof. Accordingly, their interests were not adverse.

Moreover, even assuming *arguendo* that the Ex-homeowners had indeed cut a bad bargained, this does not in any way establish a conflict. Contrary to the Bar's position asserted below, Respondent was not ethically obligated to inform the Ex-homeowners that they should not proceed with their Agreement. Given the existence, validity and enforceability of the underlying contracts, what the Bar is suggesting is that Respondent should have advised the Ex-Homeowners to breach their awful contractual obligations, which would obviously expose the Ex-homeowners to liability

for breach of contract. Not only would it have been unethical for Respondent to render such advice to the Ex-homeowners under such circumstances, it would have also amounted to tortious interference.

Ultimately, the Bar's entire position hinges on its perception that the Contingency Agreements were unfair to the Ex-homeowners. This entire position ignores the fundamental tenet of contract law that, in the absence of fraud or coercion, parties are free to bargain and contract, even though one side ends up getting what turns out to be a bad or disadvantages bargain.

See, e.g., Green v. Life & health of Amer., 704 So.2d 1386 (Fla. 1998); *Kel Homes. LLC v. Burriss* , 933 So.2d 699 (Fla. 2nd DCA 2006).

(II) The Referee's Findings And Recommendations As To Count II of the Complaint Should Be Approved

(A) With The Exception Of Rule 5-1.2, The Bar Has Waived And Abandoned On Appeal All Other Charges And Contentions Of Wrongdoing Asserted In Count II Of The Complaint

In its Complaint against Respondent, the Bar argued that Respondent's alleged conduct in connection with Count II thereof violated a total of six separate Florida Bar Rules of Professional Conduct, specifically Rule 3.4.3 (Misconduct and Minor Misconduct); Rule 4-4.1 (Truthfulness in Statements to Others); Rule 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another); 4-8.(c) (A lawyer

shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 5-1.1 (Trust Accounts); and Rule 5-1.2 (Trust Accounting Records and Procedures). *See* Complaint at p.23-24, ¶134. With the exception of a single contention raised by the Bar asserting that the Referee erred by ruling in Respondent’s favor as to Rule 5-1.2, the Bar has not raised on appeal any argumentation or contentions regarding the other five Disciplinary Rules originally asserted by the Bar under Count II. *See* Initial Brief at 12-15. Given that the Referee’s Report and the findings therein are imbued with a presumption of correctness and that it was the Bar’s burden on appeal to clearly and affirmatively establish that the Referee erred in connection therewith, all charges and allegations originally raised against Respondent in Count II other than those advanced in the Initial Brief in connection with Rule 5-1.2 have been waived and abandoned by the Bar. *See supra*, Argument I (A) and authorities cited in footnote 3. .

(B) There Is Substantial, Competent Evidence In The Record Which Supports The Referee’s Conclusion That Respondent Did Not Violate Rule 5-1.2

On appeal, the Bar contends that Respondent failed to comply with the Bar’s subpoenas by failing to “produce any client ledger cards, receipt journals reflecting the date and identification of the client or matter which the funds were received, and the surplus client’s files [for several of the

surplus funds cases.” Initial Brief at 13. The Bar labels Respondent’s explanation that he could not produce the files in question because of Respondent’s practice of destroying all closed files after one year as an “excuse”. *Id.* 14-15. It advances one lone legal contention in support of its assertion that the Referee committed reversible as to Count II, arguing that the Referee erred because he “misapprehended that Respondent’s failure to produce records is the result of his very own misconduct in failing to maintain records for a minimum of six years as required by 5-1.2(d).” *Id.* at 15. This Court should reject the Bar’s contention and approve the Referee’s findings and recommendations as to Count II because they are supported by substantial, competent record evidence.

The Bar’s argumentation as to Count II is based on a misleading premise. Although Respondent admits that he was unable to produce several of the client files for the surplus funds cases because they had been destroyed after a year (*see* SOF at 21, ¶133), Rule 5-1.2(d) does not require attorneys to retain client files in their entirety for six years. Instead, that provision only requires that an attorney retain certain trust accounting records for six years, such as client ledger cards and receipt journals. *See* Rule 5-1.2(a)-(d). Moreover, there is no explicit Bar rule requiring the

retention of client files for six years or otherwise requiring that closed files be retained for longer than one year. *See* SOF at Exhibit “D.”

Specifically, the Bar publication in question sets forth as follows:

QUESTION: How long must [an attorney] retain closed files?

ANSWER: With the exception of trust accounting records (6 years) and closing statements in contingency cases (6 years), there is no set time period after which closed files may be summarily destroyed.

The Professional Ethics Committee has stated that the appropriate time keep a file depends on such factors as the nature of the case and the type of material found in the file.

A copy of the Bar publication in question is attached to the SOF as Exhibit “D.” It is uncontested that Respondent affirmatively relied on the foregoing Bar publication in disposing of the closed client files in question after one year. *See* (SOF at 21, ¶134; Tr. at 31). Accordingly, the Referee was justified in holding that Respondent did not act unethically by destroying the close files after one year.

Furthermore, despite the erroneous impression to the contrary created by the Bar in its Initial Brief, at no point did Respondent prematurely destroy or depose of any of the ledger cards, receipt journals or other trust accounting information sought by the Bar prior to the six year retention period mandated by Rule 5-1.2(d). Instead, Respondent’s uncontradicted testimony at the final hearing before the Referee establishes that, although

the client files themselves were destroyed after one year, Respondent always kept the underlying trust account records for at requisite six years mandated by the Rule. *See* (Tr. at 31).

While Respondent acknowledged that he did not keep “conventional” client ledger cards and receipt journals, he testified without contravention that he, at all times, had trust account procedures in place which were sufficient to retain all of the underlying trust account information required to be kept pursuant to Rule 5-1.2. *See* (Tr. at 30-31). For example, although Respondent did not maintain a separate “ledger card” for each client, he created “closing statements” for each client which contained all of the same information required to be kept on a client ledger card and he maintained a “deposit book” wherein he recorded all of the information that would otherwise be kept in a receipt journal. *See Id.* Accordingly, the trust records retained by Respondent are the functional equivalent of what is required by the Rules. This Court should approve the Referee’s findings and ruling as to Count II because Respondent’s uncontradicted testimony establishes his substantial compliance with Rule 5-1.2.

Moreover, as reflected in the Bar’s Initial Brief, the very same contention now raised by the Bar regarding Respondent’s alleged non-compliance with the Bar’s subpoena had previously been adjudicated in

Respondent's favor by the Referee in a companion proceeding on an Order to Show Cause. (SC04-1006). The Referee denied the Bar's Motion for Contempt in connection therewith. *See* Referee's Order dated January 19, 2006 (copy attached as part of Respondent's Appendix at App.2-4). In its findings in connection with that Order, the Referee expressly found that the Bar had indeed received all of the underlying trust account information it had requested from Respondent. Specifically, the Referee's Order stated as follows:

The Florida Bar alleged that Respondent did not produce all client ledger cards. Respondent testified that he utilized copies of closing statements as client ledger cards. The Florida Bar acknowledged receipt of the copies and closing statements. The Florida Bar alleged that Respondent did not produce receipt journals reflecting the date and identification of the client or matter for which the funds were received. Respondent testified that he utilized the deposit slips as his journal as he identified the client matter for which the funds were received on the deposit slips contained in the deposit book. The Florida Bar acknowledged receipt of the original deposit books.

The Florida Bar claimed that Respondent did not produce certain surplus funds case files and all client files and records contained prior to 2003. The Court finds Respondent does not have to produce old files as they have been discarded and the Florida Bar could conduct its own investigation with bank statements.

App. at 3.

The Referee's prior findings also support the conclusion that Respondent was, at all times, in substantial compliance with Rule 5-1.2's trust account recordkeeping requirements. Accordingly, the Court should approve Referee's findings and recommendations in this matter.

**(III) The Referee's Findings And Recommendations As To Count III
of the Complaint Should Be Approved**

**(A) The Referee's Findings That Respondent Was Not Involved In Any "Skimming" Of Money From His Personal Injury Clients And That The Costs That He Assessed In Those Cases Were Reasonable Are Supported By Substantial, Competent Evidence And Based On Appropriate Credibility Determinations, And Therefore
Cannot Be Viably Attacked On Appeal**

During the hearing held below in this matter, the Bar attempted to convince the Referee that Respondent, who had settled more than 1,600 personal injury cases over a four year period, had engaged in systematic skimming from his clients in those cases by inventing costs not actually incurred in the prosecution thereof and charging the clients for these fictitious costs, which ranged from \$50 to \$200. *See* (Tr. at 31-42). During its presentation, the Bar argued that Respondent's documentation regarding the costs incurred were inadequate, that the costs claimed were inflated and unreasonable, and that there were numerous items of charged costs that the Bar asserted were questionable or not legitimate. *See Id.*

When the Bar concluded its presentation as to Count III, Respondent testified at length regarding the underlying allegations that had been raised against him, detailing and breaking-down the costs charged by him in the underlying cases, and provided an explanation and justification for each area or item of suspicion or concern that had been advanced by the Bar. *See* (TR. at 42-48). During Respondent's presentation, he answered numerous questions from the Referee regarding the matters that had been raised by the Bar. *See Id.*

In his defense, Respondent pointed out that the 19 cases identified by the Bar in the Complaint as examples of his alleged skimming represented "the worst of the worst" in terms of the magnitude of costs incurred in those particular cases, that in 275 of the cases he waived all costs, that in 275 other cases the total costs were less than \$100, and that in 44 of the cases he waived all attorneys' fees. *See Id.* at 42-43. Respondent also testified that in everyone of the underlying cases, his clients signed a retainer agreement and a Statement of Client Rights explaining and authorizing the imposition of costs in the event of a recovery and also furthered testified that, despite the large volume of personal injury cases he has handed, that not a single client has ever filed a Bar complaint against him in any of those matters, whether it be related to costs or for any other reason. *See Id.* at 42-43, 46 & 48.

Finally, Respondent testified that everyone of the personal injury files had a handwritten expense ledger, and also flatly and unequivocally denied the Bar's allegations that he had skimmed money from any of his clients. *Id.* at 46.

In connection with Count, the Referee determined that the Bar had “failed by any standard of proof to support the allegation of skimming of client funds by [Respondent].” (ROR at 7). Moreover, after having the opportunity not only to hear the Respondent's responses and explanations in connection with the skimming charges lodged against him, but also to gauge, evaluate and assess first-hand the forthrightness, demeanor and credibility of the Respondent, the Referee expressly determined that “[a]lthough [Respondent's] record keeping could have been more detailed, the assertions of [Respondent] are credible and the costs [charged by him in the challenged cases] are reasonable.” (ROR at 7).

As previously established herein, a referee's findings of fact are not subject to attack unless they are without support in the evidence and where the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *See* Argument I (A), *supra* and authorities cited therein. In this cases, the Referee's findings as to Count III were

expressly based on Respondent's testimony at hearing, which the Referee found to be credible. *See* (ROR at 5-7). Given that such credibility determinations are inherently within the purview of the trier of fact, the Referee's findings that the costs charged by Respondent were reasonable and that no skimming took place are, under the circumstances, are unassailable on appeal. *See* Argument I (B) (2), *supra* and authorities cited therein.

(B) The Bar Failed To Meet Its Burden Of Proof Below In Connection With Its Skimming Allegations

In its Initial Brief, the Bar admits that it was “unable to conclusively prove [its skimming allegations against the Respondent]”, although it attempts to blame its failure to do so on the Respondent's alleged failure to produce the required records. Initial Brief at 17. Given the elevated standard of proof applicable to Bar disciplinary proceedings as opposed to ordinary civil proceedings before a trial court, the Bar's admission unwittingly establish its failure to meet its burden of proof in connection with the skimming allegations. *See The Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994) (In a disciplinary proceeding initiated by Bar against an attorney accusing him of professional misconduct, “the Bar has the burden of proving its accusations by clear and convincing evidence.”); *The Florida Bar v. Pellegrini*, 714 So.2d 448, 451 (Fla. 1998) (same); *The Florida Bar v.*

Marble, 645 So.2d 438, 442 (Fla. 1994) (“In Bar discipline proceedings, evidence of misconduct must be clear and convincing for a finding of guilt.”); *The Florida Bar v. Schultz*, 712 So.2d 386, 387-88 (Fla. 1998) (“[W]e agree with the referee’s conclusion that the charge of deliberate fabrication is not support by clear and convincing evidence.”).

(C). The Bar’s Contention On Appeal That Respondent Violated Rule 5-1(2) By Failing To Adequately Document Client Costs Is Meritless

Aside from its contention of skimming, the Bar also argues in support of Count III that Respondent violated Rule 5.1.2(d) by failing “to maintain documentary support for all disbursements and transfers for a minimum of six years.” Initial Brief at 17. Specifically, the Bar contends that Respondent failed to maintain for the requisite 6 year period the documentation required by Florida Bar Rules 5-1.2(b)(4) and 5-1.2(b)(6). However, based on the undisputed facts of this case, it is clear that none of those provisions were ever violated. Bar Rules 5-1.2(b)(4) requires that an attorney maintain “[o]ther documentary support [than that expressly required elsewhere in Rule 5-1.2] for *all disbursements and transfers from the trust account*. (emphasis provided). This provision is clearly inapplicable because, as acknowledged in the Bar’s Initial Brief and stipulated to by the Parties, costs were not paid from Respondent’s trust account or from monies

transferred therefrom, but were instead paid from Respondent's operating account. *See* Initial Brief at 16; SOF at 22, ¶142. As is typically done in contingency cases, the costs incurred would only be assessed to a client at conclusion of a case if there was a successful recovery. Accordingly, Rule 5.1.2(b)(4) is inapplicable on its face because the challenged costs did not constitute "disbursements and transfers from the charge account."

As for Rule 5-1.2(b)(6), this is the very same ledger card requirement that underpinned Count II of the Complaint. As previously established, Respondent was at all times in substantial compliance with this provision, retained all of the information required to be kept thereunder, and provided the Bar with all of the information in question. *See* Argument II (B), *supra*. Accordingly, this Court should approve the Referee's findings and recommendations as to Count III of the Complaint.

(IV) Respondent Confesses Error As To Count IV

(A) The Referee Erred By Finding That Respondent Commingled Funds But Then Refusing To Impose Any Discipline Whatsoever

As to Count IV, the Referee found that, as a courtesy to his clients, Respondent, who had a very high volume personal injury practice, did not make his clients wait until endorsed settlement drafts cleared before issuing them checks for their net settlement proceeds. (ROR at 7). Instead,

Respondent would wait lengthy periods of time before withdrawing his attorneys' fees. *Id.* The Referee found that, "for the most part, although technically improper, the system worked." *Id.* The Referee also found that because "[n]o clients lost money, no client filed Bar Complaints and the practice has long ago been abandoned by [Respondent,] [a] finding of wrongdoing is unwarranted at this time and would serve no good purpose." *Id.*

On appeal, the Bar argues that, notwithstanding the seemingly benign nature of Respondent's actions, the Referee nevertheless committed error because "discounting Respondent's laudable purpose, the fact remains that commingling of funds and over-drawing one's trust account must be strictly avoided under all circumstances." Initial Brief at 21. Respondent has been unable to locate any precedent from this Court to support the proposition that a referee, after having found that a technical trust account violation was indeed committed, may nevertheless excuse it entirely on the basis that no good purpose would be served by disciplining the attorney under the circumstances. Accordingly, Respondent's confesses error as to Count IV, specifically admitting that Respondent violated Rule 5.1.1(a)(1)'s prohibition against commingling of funds.

**(B) The Maximum Appropriate Punishment Under The
Circumstances Is A Public Reprimand Without Any
Period Of Probation**

It is axiomatic that not all Bar transgressions stand on equal footing and that certain Bar violations are considered more egregious than others and therefore worthy of harsher punishment. In fact, the Florida Standards for Imposing Lawyer Sanctions enumerates four general disciplinary sanctions to be imposed upon an attorney who violates the Rules of Professional Conduct: Disbarment, suspension, public reprimand, admonishment and probation. *See* Florida Standards for Imposing Lawyer Sanctions 2.1, 2.2, 2.3, 2.5, 2.6 & 2.7. Although every case is obviously different and should be decided based on its particular facts, this Court follows certain general rules to aide in determining which particular penalty is appropriate for certain types of violations.

For instance, “[t]his Court has held that public reprimand is appropriate for isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent.” *The Florida Bar v. Wasserman*, 654 So.2d 905, 907 (Fla. 1995) (quoting *The Florida Bar v. Rogers*, 583 So.2d 1379, 1382 (Fla. 1991); *see also The Florida Bar v. Forrester*, 818 So.2d 477, 484 (Fla. 2002) (same); *The Florida Bar v. Schultz*, 712 So.2d 386, 388 (Fla. 1998) (same). The Court has also stated

that “[a] public reprimand is appropriate when ‘a lawyer *negligently* engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public or the legal system.’” *The Florida Bar v. Wasserman*, 654 So.2d 905 (Fla. 1995) (quoting Florida Standards Imposing Lawyer Sanctions §7.3) (emphasis in original).

Conversely, “[t]his Court has held numerous times that engaging in conduct involving dishonesty, misrepresentation, fraud, or deceit warrants suspension.” *The Florida Bar v. Schultz*, 712 So.2d 386, 388 (Fla. 1998). Moreover, “[t]his Court has repeatedly stated that disbarment is an extreme form of discipline and should be reserved for the most egregious misconduct.” *The Florida Bar v. Summers*, 728 So.2d 739, 742 (Fla. 1999). Indeed, the Court has noted that “[d]isbarment is the extreme and ultimate penalty in disciplinary proceedings[,] [occupying] the same rung of the ladder in these proceedings as the death penalty in criminal proceedings.” *The Florida Bar v. Hirsch*, 342 So.2d 970, 971 (Fla. 1977). “The extreme sanction of disbarment should be imposed only in those rare cases where rehabilitation is highly improbable.” *The Florida Bar v. Kassier*, 711 So.2d 515, 517 (Fla. 1988).

In arguing for an appropriate punishment in this case, the Bar cites to a total of eleven cases, eight of which imposed the ultimate penalty of

disbarment, two of which imposed a lengthy suspension of either one or two years, and one case where the a 91 day suspension was imposed. In so doing, Bar Counsel comes perilously close to overstepping the fine line between zealous representation and overzealous abuse-of-process. As the Bar is forced to admit in its Initial Brief, “[all of] the forgoing cases are distinguishable on both their facts and the severity of the conduct involved....” Initial Brief at 23.

According to the Bar, these cases were cited because “the common thread running through all of them is that commingling of funds is strictly prohibited regardless of the purpose” and to establish that the Referee therefore “erred by ignoring this ample line of precedent by finding that Respondent’s actions in the case at bar did not amount to wrongdoing and imposing discipline would serve no good purpose.” *Id.* However, given that every single one of the cases cited by the Bar involve additional severe deliberate misconduct such as intentional misappropriation of client funds, dishonesty, fraud, misrepresentation or other similarly egregious misconduct, the cited authority is uniformly useless in guiding the Court in reaching a determination as to an appropriate penalty for Respondent’s relatively minor commingling under the circumstances of this case. Given that in the Bar’s Conclusion the penalty it seeks against Respondent is

disbarment, it appears that has disingenuously cited to these egregious and clearly non-analogous cases in order to create the false impression that disbarment would be an appropriate punishment in this case as well.

However, nothing could be further from the truth. Instead, there exists a legion of on-point caselaw handed down by this Court that establishes that a public reprimand, without the imposition of a period of probation, is the appropriate punishment for a first time offender who has been found guilty of commingling of funds or improper trust account record keeping, even when coupled with additional relatively minor violations of the Florida Bar Rules. *See, e.g., The Florida Bar v. Lumley*, 517 So.2d 13 (Fla. 1987) (determining that, where there was no intent to deprive clients of their money, public reprimand rather than private reprimand was appropriate punishment for commingling personal funds with trust funds and knowingly using entrusted funds for purposes other than designated by clients, and declining to follow referee's recommendation of probation where record did not show that any purpose would be served by imposing probation); *The Florida Bar v. Surprina*, 468 So.2d 988 (Fla. 1985) (commingling of personal funds with trust funds, improper trust account record keeping, mishandling of trust funds, conduct adversely reflecting on fitness to practice law, improper advance of loans to clients, and improper contact of

opposing party represented by counsel warrants public reprimand); *The Florida Bar*, 433 So.2d 1209 (Fla. 1983) (commingling of funds, failure to follow proper trust account procedures and refusal to turn over funds to client for several months warrants public reprimand); *The Florida Bar v. Penn*, 351 So.2d 979 (Fla. 1977) (failure to maintain a trust account and placing trust funds into a joint tenancy account which would be payable to attorney's wife warrants public reprimand and order requiring attorney to maintain trust account in future); *The Florida Bar v. Horner*, 356 So.2d 292, 293 (Fla. 1978) (commingling and use of client's funds, with knowledge and consent of client and without any willful intent to defraud, although only "technical violation[s] of the Rule[s]", warrant public reprimand); *The Florida Bar v. Boyce*, 313 So.2d 708 (Fla. 1975) (public reprimand is warranted for commingling of personal funds and client trust funds, failure to keep accurate trust account records and issuance of trust check twice returned due to insufficient funds); *The Florida Bar v. Weaver*, 279 So.2d 298 (Fla. 1973) (public reprimand warranted for commingling client's funds with attorney's funds and converting them to attorney's own use, where not done with intent to deprive client of funds but rather through inadequate accounting procedures); *The Florida Bar v. Holmes*, 353 So.2d 85 (Fla. 1977) (mishandling trust account and trust monies of clients warrants public

reprimand); *The Florida Bar v. Perez*, 608 So.2d 777 (Fla. 1992) (approving referee’s recommendation of public reprimand as sanction for improperly handling trust accounts and relying on persons unrelated to the law firm in handling checks payable to clients); *The Florida Bar v. Miehle*, 605 So.2d 866 (Fla. 1992) (failure to maintain proper trust account record, failure to account to clients for time billed and to provide information about fee award and failure to properly communicate with clients warranted public reprimand); *The Florida Bar v. Pino*, 526 So.2d 67 (Fla. 1988) (where record does not establish criminal or willful misconduct by lawyer, public reprimand warranted for failure to maintain adequate records of client funds, misuse of client funds, failure to promptly deliver funds to client, conduct adversely reflecting on fitness to practice law and entering business transaction with client where interests differ); *The Florida Bar v. Borns*, 428 So.2d 648, 649 (Fla. 1983) (holding “that a public reprimand is the appropriate discipline” for mishandling of trust funds, failure to promptly return trust funds when requested, use of trust account as depository for payroll tax money and failure to make quarterly trust account reconciliations); *The Florida Bar v. Tobin*, 377 So.2d 690 (Fla. 1979) (violation of disciplinary rules requiring that a lawyer maintain complete records of all funds and other property received from client, that a lawyer

promptly pay or deliver to the client funds in the lawyer's possession that client is entitled to receive, and prohibiting a lawyer from neglecting a legal matter entrusted to him warrants discipline by public reprimand to be published in the Southern Reporter); *The Florida Bar v. Holmes*, 356 So.2d 796 (Fla. 1978) ("technical, but not willful, violation" of Bar rules stemming from attorney's mishandling of client retainer fee warrants public reprimand).

Similarly, a slew of other cases hold that a public reprimand coupled with some form of probation is the appropriate penalty in cases of commingling and/or trust account reporting violations where an attorney has been previously disciplined for similar violations or where the attorney being disciplined is also found guilty of other violations of comparable severity. *See, e.g., Florida Bar v. Aaron*, 529 So.2d 685 (Fla. 1988) (commingling funds, failing to keep separate trust ledgers, and failing to distinguish between trust and nontrust funds in accounting mandates public reprimand and, where misconduct is repeated, probation for two years subject to quarterly inspection of trust account records by the Bar); *The Florida Bar v. Mitchell*, 493 So.2d 1018, 1019 (Fla. 1986) (lengthy and continuous failure to comply with trust account record-keeping requirements despite previous reprimand, coupled with intermingling of personal and trust

account funds, warrants public reprimand, 2-year probation and mandatory submission of quarterly reports during the probationary period prepared by a certified public accountant indicating that the trust records are in compliance with the rules); *The Florida Supreme Court v. Borja*, 554 So.2d 514, 515 (Fla. 1990) (imposing a public reprimand and probation rather than suspension for violation of trust account procedures including commingling of funds where a follow-up audit revealed that attorney continued to not be in substantial compliance with the trust rules in that there were no monthly comparisons, there continued to be negative balances in the trust account and the attorney continued to commingle funds); *The Florida Bar v. Finta*, 427 So.2d 721 (Fla. 1983) (violations of Integration Rule regarding breaches of discipline with respect to trust funds and fees and violation of Disciplinary Rule governing preservation of identity of funds and property warrants public reprimand and one year probation); *The Florida Bar v. Hosner*, 513 So.2d 1057 (finding that failure to follow trust accounting rules and intermingling personal funds with those in trust warrants a public reprimand and accepting referee's recommendation of three years probation under the circumstances); *The Florida Bar*, 429 So.2d 3 (Fla. 1983) (rejecting referee's recommendation of four month suspension and finding that public reprimand and one year probation was proper punishment for

failure to maintain complete records and failure to promptly deliver funds to client); *The Florida Bar v. Warren*, 526 So.2d 53 (Fla. 1988) (trust accounting violations, failure to account adequately regarding client funds, and the collection of an excessive fee warrant public reprimand, four year's probation with requirement of submitting quarterly reports from certified public accountant and disgorgement of excess fee collected from client); *The Florida Bar v. Heston*, 501 So.2d 597 (Fla. 1987) (approving referee's recommendation of public reprimand and two year probation during which a CPA is to submit quarterly affidavit attesting to attorney's compliance with trust requirements); *The Florida Bar v. Padrino*, 500 So.2d 525 (Fla. 1987) (failure to keep trust account records and follow trust account procedures in accordance with the prescribed minimum requirements warrants public reprimands by publication and two year probation with reporting condition).

However, after an exhaustive search, Respondent could not find even a single precedent from this Court which supports the proposition that disbarment or even suspension is warranted where the underlying transgression is a mere technical commingling violation unaccompanied by a much more serious violation such as misappropriation of client funds, fraud, misrepresentation and the like. Certainly, the Bar has failed to advance any such authority. Given the sheer volume of caselaw supporting Respondent's

position and the absolute dearth of on-point authority supporting the Bar's draconian stance in favor of disbarment, the appropriate penalty that should be imposed on Respondent for commingling funds under the circumstances is a public reprimand, especially in light of his previously pristine disciplinary record with the Bar.

Moreover, although some of the cases which support the imposition of a public reprimand as the appropriate sanction for a commingling or trust account record-keeping violation also impose a period of probation, probation is unwarranted in this case. This Court has previously held that, in a simple commingling case, the imposition of probation in addition to a public reprimand is unwarranted where the record did not show that any purpose would be served by imposing probation. *See The Florida Bar v. Lumley*, 517 So.2d 13 (Fla. 1987).

No such rationale is reflected here. To the contrary, the record in this case reflects not only that Respondent has long ago discontinued the practice resulting in commingling, but he has also discontinued the trust account record keeping practices challenged by the Bar in this matter and all involvement in any surplus funds cases. *See* (ROR at 3-4 & 7); (Tr. at 13-14 & 30-31). In fact, during the hearing in this case, the Bar commended Respondent for promptly modifying his practices once the matters were

brought to his attention. *See* (Tr. at 28). Given Respondent's prompt remedial measures, the imposition of probation is unwarranted.

Moreover, "[w]hen imposing a sanction, it is also appropriate for [the Court] to consider an attorney's disciplinary history." *The Florida Bar v. Wasserman*, 654 So.2d 905 (Fla. 1995). It is undisputed that, prior to this case, Respondent's exemplary record with the Bar was spotless. Despite handling such a high volume of personal injury cases (over 1,600 personal injury cases during the relevant four-year time span), not a single Bar Complaint has ever been filed against Respondent in any of those cases. In fact, the only Bar complaint filed by a client against Respondent was filed in the Marie Hilton surplus funds case, not by Mrs. Hilton herself, but rather by her legal guardian on her behalf and was resolved in Respondent's favor by the Bar's Staff Counsel, who found that there was no wrongdoing committed by Respondent. *See* (App. at 1). Under such circumstances, there is simply no compelling reason to impose probation or any further Bar supervision on Respondent, who has been dealing with protracted Bar scrutiny and prosecution since the Hilton complaint was filed in the year 2000. After what is now going on seven years, fairness dictates that after receiving his public reprimand in this cause, Respondent should be permitted to resume his normal day-to-day practice of law free of continued Bar scrutiny.

(V) An Award Of Costs To The Bar Is Unwarranted

By rule, the Referee has “discretion to award costs, and absent an abuse of discretion, the referee’s award shall not be reversed.” Rule 3-6.6(q) of the Florida Rules Regulating the Bar. In this case, the Referee exercised his discretion in determining that costs should not be awarded to either party under the circumstances.

The Referee’s ruling regarding costs should remain undisturbed because the Bar has utterly failed to establish that the Referee abused his discretion under the circumstances. In its Initial Brief, the Bar requests in its Conclusion that Respondent should be ordered to pay the Bar’s costs. However, no argumentation has been advanced by the Bar in support thereof. Accordingly, the Bar has failed to meet its burden of establishing an abuse of discretion and has otherwise waived and abandoned this issue.

Aside from the Bar’s waiver, an award of costs is unwarranted in this case because the Bar has failed to prevail on the overwhelming majority of the significant issues in the case. Moreover, costs should be denied because, to this day, the Bar has acted inequitably by unjustly seeking the ultimate sanction of disbarment where it is clearly unwarranted, by advancing distorted argumentation and clearly inapplicable caselaw in pursuit of that goal, and by failing to disclose pertinent and on-point authority which stands

for the proposition that a public reprimand is the appropriate punishment under the facts of this case.

Alternatively, assuming *arguendo* that the Court were nevertheless inclined to award costs to the Bar in this case, the amount awarded should exclude the \$14,823.00 sought by the Bar for the Bar's "Staff Auditor." No tenable argument can be advanced to justify an award of "costs" to what is presumably a salaried Bar employee.

CONCLUSION

Based upon the foregoing reasons and legal authority, Respondent Alfonso Salcines, Esq. respectfully requests that this Honorable Court enter an Order (1) approving the Referee's findings and recommendations as to Counts I-III of the Complaint in their entirety; (2) rejecting the Referee's not guilty finding as to Count IV solely with respect to the commingling charge (Rule 5.1.1(a)(1)); (3) imposing a public reprimand through publication in the Southern Reporter as the sole punishment as the appropriate sanction for Respondent's violation of Rule 5.1.1(a)(1), without the additional imposition of probation or any other additional sanction; and (4) declining to assess the payment of costs against either Party.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true a correct copy was served on Carlos Leon
Kenneth Marvin and John Harkness via mail to 651 E. Jefferson Street,
Tallahassee, Florida 32399-2300 on this 8 day of January, 2007.

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I hereby certify that this brief is typed in Times New Roman, 14 point.

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