IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

R. PATRICK MIRK,

Respondent.
_____/

CASE NO.: SC08-1423

TFB NO.: 2006-10,783(13B)
2006-11,698(13B)

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as “The Florida Bar” or “the Bar.” The Respondent, R. Patrick Mirk, will be referred to as “Respondent.”

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC08-1423 held on March 25, 26, and 27, 2009. “SH” will refer to the transcript of the Sanctions Hearing held on September 18, 2009. "TFB Exh." will refer to exhibits presented by The Florida Bar and "R Exh." will refer to exhibits presented by Respondent at the final hearing before the Referee. The Final Report of Referee dated October 29, 2009, will be referred to as "RR."

“Rule” or “Rules” will refer to the Rules Regulating The Florida Bar. “Standard” or “Standards” will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE

Statement of the Facts

The Referee issued a detailed Report of Referee containing extensive factual findings and citations to the record. The Florida Bar will not repeat all of those facts here. The facts can be summarized as follows:

Count I: Complaint of Lorne V. Lyles

In his Initial Brief, Respondent does not contest any of the Referee's findings or recommendations as to Count I. Although it appears that this Count is uncontested, the Referee's findings are briefly summarized here because the misconduct in Count I reflects the totality of Respondent's misconduct and supports the recommended sanction of disbarment.

On or about February 16, 2005, Lorne Lyles hired Respondent to represent him regarding a dispute with a contractor. Lyles paid Respondent a $750.00 fee, which Lyles understood would be applied to legal services Respondent would perform in the future. RR 2; TR1 48-51; Exh. TFBP LL 2. Lyles did not sign a written fee agreement on February 16, 2005 and Respondent did not inform Lyles that the $750.00 would be treated as a non-refundable retainer. RR 3; TR1 50. Respondent deposited Lyles' $750.00 check into his operating account. Thereafter, Lyles became dissatisfied with Respondent's representation and

requested a refund. RR 4; TR1 58. Respondent issued a refund check in the amount of $750.00 to Lyles drawn on his operating account. RR 4; Exh. TFB LL 4. Respondent failed to timely respond to the Bar concerning Lyles's Inquiry/Complaint.

The Referee found by clear and convincing evidence that Lyles's $750.00 payment was an advance payment of fees and not a non-refundable retainer, and that Respondent had not earned all of the fee prior to issuing the refund check. The Referee found that Respondent violated Rule 5-1.1(a) by failing to hold the advance payment in trust until earned. The Referee also found that Respondent failed to apply trust funds for the intended purpose in violation of Rule 5-1.1(b). The Referee found that Respondent violated Rule 4-8.4(g) by failing to timely respond to The Florida Bar. RR 4-5.

Count II: Conversion of Trust Funds Belonging to Frank Bragano

Respondent represented Frank Bragano and his company, Florida Restoration Services. TR2 195. In 2004, Respondent settled a claim on behalf of Bragano in the Meridian matter and deposited the settlement funds into his trust account. On June 30, 2004, Respondent issued a trust account check to Bragano in the amount of $31,487.50, representing Bragano's share of the Meridian funds. Exhs. TFBP BR 01, 02; T2 198-203. Bragano put the check in his desk drawer,

but did not cash it. T2 203. Bragano testified that he was not concerned about the check because it was in a trust account, which was "just like having it in the bank." TR2 204. Bragano testified that, by leaving the funds in Respondent's trust account, "[t]hat meant that no one could touch it without my permission whatsoever. It was my money." TR2 204. *See* RR 5-6.

In June 2004, Bragano began discussions with Respondent and others concerning a large multi-million dollar "investment platform." TR2 205-206. Respondent was to serve as corporate counsel for the project. During the summer of 2004, the project evolved to include four separate limited liability companies (LLC's), the first of which was Montpelier LLC. Bragano was one of the principals in Montpelier. TR2 205-07. Respondent's duties included drafting the corporate documents, handling negotiations with the joint venture partner, and reviewing and drafting contracts. He was to be counselor and attorney for the project. TR2 207-210. *See* RR 6-7.

Respondent agreed to be paid a portion of future profits of Montpelier LLC and the other LLC's, in the event they were successful. TR207, 210; TR3 319; TR4 454-55. The investors anticipated profits in the tens of millions of dollars and Respondent looked forward to making a large sum of money. TR2 242; TR4 455, 458. *See* RR 7-8.

Respondent drafted the corporate documents for four LLCs, including Montpelier. TR2 207-209. Respondent drafted Articles of Organization for Montpelier and signed the Articles as Registered Agent. Bragano signed as a managing member on June 28, 2004. TR2 208-09; TR5 625; R Exh. 92. Respondent did not prepare a written fee agreement for his services in representing Montpelier. TR2 209; TR5 623. Respondent testified he later prepared certain compensation documentation that was sent to New York but was never signed. TR5 623. Respondent never produced a copy of this documentation. Despite the volume of documents Respondent produced relating to the investment project, he was unable to produce even a draft of a written fee agreement. *See* RR 8.

The Meridian funds remained in Respondent's trust account because Bragano had not cashed the $31,487.50 check. On August 16, 2004, Respondent withdrew $1,000 from Bragano's trust funds. Exh. TFBP BR 22 (MEW 17). Bragano was not aware of the $1,000 disbursement and did not authorize it. TR2 213. Respondent stated he needed the funds to cover the cost of setting up the four LLCs, including Montpelier, and that he planned to replace Bragano's funds when the money came in from the other members who had agreed to advance $200 each to pay for startup expenses. TR5 663-64. Respondent never replaced the funds. *See* RR 9.

In or about October 2004, Bragano discussed with Respondent the possibility of using a portion of the Meridian funds to assist a friend, Craig Green, who was experiencing financial difficulties. Bragano informed Respondent for the first time that he had not cashed the Meridian check. Shortly thereafter, Bragano was able to secure another source of funds to assist Green, and did not have to use the Meridian funds. TR2 216, TR3 268-271, 274; TR3 404-405. *See* RR 9.

Following the Green matter, Bragano believed the Meridian funds remained in Respondent's trust account. Bragano did not have any further discussions with Respondent about the uncashed trust account check until December 2004. RR 9-10; TR2 218. Unbeknownst to Bragano, after learning Bragano had not yet cashed the trust account check, Respondent stopped payment on the Meridian check in October 2004 and began disbursing Bragano's trust funds to himself. Bank records show that the stop payment order was issued on October 25, 2004. Exh. TFBP BR 28. Bragano did not authorize the stop payment and did not know about it. RR 10; TR2 216, 234; TR3 357.

On October 25, 2004, the date the bank records show the stop payment was entered, Respondent wrote a check to himself for $10,000. This was followed by three checks for $2,000 each on November 10, November 12 and November 15, 2004, and a check payable to the U.S. Treasury on November 22, 2004 in the

amount of $7,068.14 to pay taxes personally owed by Respondent. On November 24, 2004, Respondent wrote a check to himself for $1,931.86, and on December 13, 2004 wrote a check to himself for $4,500.00. Respondent disbursed the remainder of Bragano's Meridian funds to himself on April 11, 2005. RR 10-11; Exh. TFBP BR 22 (MEW 034-036). Bragano did not know about the disbursements and did not authorize them. RR 11; TR2 212-215. Respondent did not inform Bragano that he planned to withdraw the trust funds, even though Respondent spoke to Bragano frequently. RR 11; TR2 215, 235.

On December 19, 2004, Bragano called Respondent on the phone to tell him he was planning to cash the trust account check he had been holding. Respondent replied "okay, no problem." TR2 219. Respondent said nothing to Bragano to indicate that he had stopped payment on the check and removed the funds. TR2 221. The next day, December 20, 2004, Bragano received a letter by fax from Respondent stating that Respondent had stopped payment on the check and applied the funds to payment of fees and expenses incurred in relation to other legal matters Respondent was handling. RR 11; Exh. TFBP BR 03. In the letter, Respondent informed Bragano that he claimed he was to receive a fee of $40,000 for setting up each of the four corporations in the investment platform and assisting in the documentation of the bond issues, and a fee of $100,000 per year to act as

corporate counsel. Respondent further stated that he had invoiced Montpelier $40,000 for the services performed. Respondent concluded by stating: "As soon as my compensation is formalized and paid you will be repaid the Meridian funds." Exh. TFBP BR 03. *See* RR 11-12.

After receiving the letter, Bragano had an angry telephone conversation with Respondent. TR2 220. Bragano was upset that the funds were gone and he could not cash the trust account check. RR 12. This was the first time Bragano heard of Respondent's claim for a $40,000 flat fee. No agreement had been made by Bragano or anyone else to pay Respondent $40,000 for setting up Montpelier or the other corporations, or to pay Respondent $100,000 per year. TR2 221-22. Prior to the December 20, 2004 letter, Bragano had never received any correspondence or invoices from Respondent relating to fees or expenses relating to Montpelier. TR2 225; TR6 803. *See* RR 112-13.

On or about December 21, 2004, Bragano went to the bank and attempted to cash the $31,487.50 check he had been holding. Bragano was informed by the bank that a stop payment had been put on the check. RR 13; TR3 265-267.

Bragano received another letter from Respondent dated December 23, 2004, in which Respondent made a number of demands, including the formalization of his compensation arrangement for other pending projects. Respondent stated that

he would return the $31,000 to Bragano if his demands were met. RR 13. Respondent further stated: "Before you take some precipitous action from which you can't withdraw, I ask you to carefully consider what is at stake at this time." Exh. TFBP BR 04. Bragano was very angry with Respondent for having taken his funds, but after discussing the matter with his partners, decided not to take any action at that time. Bragano's partners felt there was too much at stake to risk Respondent taking any action that might undermine the investment platform. Bragano testified that he feared Respondent "would blow up" all the work that had been done on the investment platform. TR2 240, 244-45; TR3 358; TR4 463-64. *See* RR 13.

In June 2005, after the investment platform had come to an unsuccessful end, Bragano authorized attorney Ricardo Roig to write a letter to Respondent demanding the return of his $31,487.50. Exh. TFBP BR 05. In the letter, Roig requested that Respondent provide invoices to support his claim that he was owed $40,000 for work on Montpelier. TR4 510. *See* RR 13-14.

On August 11, 2005, Bragano, Lynch and Roig met with Respondent to discuss the matter. TR2 247; TR3 271. Respondent did not bring any invoices to the August 11, 2005 meeting. TR3 409; TR4 471, 509. No resolution was reached. TR3 277, 294. Bragano insisted that Respondent return his $31,487.50.

Respondent continued to claim that he was owed $40,000 in legal fees for Montpelier. RR 14. At no time during 2004, 2005, or 2006 did Respondent inform Bragano that he was asserting a retaining lien on the Meridian funds. RR 21; TR3 298-99.

Respondent never returned Bragano's funds, and on June 16, 2006, Bragano filed a grievance with The Florida Bar. Bragano alleged that Respondent had converted trust funds belonging to him and refused to return the funds upon demand. RR 14; Exh. TFBP BR 06.

During the disciplinary proceedings, Respondent produced a billing statement on the Meridian account showing he stopped payment on the $31,487.50 check October 21, 2004 and transferred the funds to the Montpelier account the same day. R. Exh. 9. October 21, 2004 was two days after Bragano first informed Respondent that he had not cashed the Meridian check. TR3 274, 360. Bragano testified that he never received the October 31, 2004 billing statement, which was addressed to Bragano and Lynch at Bragano's home address in Tierra Verde. RR 17; TR3 275-76; R Exh. 9. Lynch testified that he never saw any invoices from Respondent in 2004 for services relating to Montpelier and that Respondent did not bring any invoices to the August 2005 meeting. TR4 471.

Respondent also produced an invoice dated October 31, 2004 on the

Montpelier account, showing the $31,487.50 as a transfer from the Meridian account. The statement also listed a $40,000 flat fee and a withdrawal of $10,000 to Respondent for fees. R Exh. 25. This invoice was addressed to Montpelier at Respondent's law office address. RR 17; TR5 675. The invoices dated November 30, 2004 and December 31, 2004 were also addressed to Respondent's law office. R Exhs. 26, 27. Bragano never saw these invoices. RR 18; TR2 225.

Because the allegations involved trust funds, The Florida Bar sent a letter to Respondent on October 13, 2006, requesting him to provide his trust accounting records. RR 23; Exh. TFBP BR 09. By letter dated November 15, 2006, Respondent denied any wrongdoing and refused to provide his trust account records. Exh. TFBP BR 10. In the letter, Respondent stated that the complaints against him had nothing to do with his trust account. Respondent further stated, "when [Bragano] would not pay my agreed upon fee of $40,000 . . . I applied the funds in trust against the fees I had already earned." RR 23; Exh. TFBP BR 10.

On December 7, 2006, the Bar served Respondent with a Subpoena Duces Tecum, directing him to produce his trust account records for the period January 1, 2004 to December 29, 2006. Exh. TFBP BR 11. Respondent made a decision not to comply with the Subpoena. RR 23; TR3 420-21. During the final hearing, Respondent cited health problems as the reason why he did not comply with the

Subpoena. TR6 737-39, 785. In the Report of Referee, the Referee found it "weighty and significant" that Respondent did not mention these health issues in his November 15, 2006 letter to the Bar in which he listed in detail the reasons why he chose not to produce his trust account records. *See* RR, at 23-24.

On February 2, 2007, the Grievance Committee made a Finding of Non-Compliance with Subpoena, finding that Respondent failed to show good cause for failing to comply with the subpoena for his trust account records. Exhs. TFBP BR 12, 13. On February 28, 2007, The Florida Bar filed a Petition for Contempt and Order to Show Cause. Exh. TFBP BR 14. *See* RR, at 24.

By Order dated March 7, 2007, the Florida Supreme Court ordered Respondent to show cause why he should not be held in contempt of Court and suspended until such time as he complied with the Subpoena. Exh. TFBP BR 15. On May 14, 2007, the Court issued an Order holding Respondent in contempt and suspending him from the practice of law until he certified compliance with the Subpoena. Exh. TFBP BR 17. Respondent provided the Bar with some trust accounting documents, but those documents were incomplete. TR3 427. Respondent ultimately provided the subpoenaed documents. TR6 784-85; Exh. TFBP BR 22. He was found in compliance and reinstated to the practice of law by Order of the Court dated September 19, 2007. Exhs. TFBP BR 19, 20, 21, 23, 24,

25, 26. *See* RR, at 24.

The Florida Bar auditor, Clem Johnson, reviewed the trust account records provided by Respondent. The records showed Respondent's disbursements of Bragano's Meridian funds, and identified when the disbursements were made, to whom, and the amount of each check. TR3 415-16. This was information Respondent had previously withheld from The Florida Bar until ordered to provide it by this Court.

Statement of the Case

The Bar filed its Complaint on July 21, 2008. The final hearing was held on March 25, 26, and 27, 2009. Respondent was represented by counsel at the final hearing. The Florida Bar presented the testimony of Lorne Lyles, Frank Bragano, Bar auditor Clem Johnson, Andrew Lynch, and Ricardo Roig. Respondent presented the testimony of Curran Porto and testified on his own behalf. On September 4, 2009, the Referee issued a Preliminary Report of Referee recommending that Respondent be found guilty of violating the Rules Regulating The Florida Bar. As to Count I (Complaint of Lorne Lyles), the Referee recommended that Respondent be found guilty of violating Rules 4-8.4(g) (failure to timely respond in writing to the Bar); 5-1.1(a) (Nature of Money or Property Entrusted to Attorney); and 5-1.1(b) (Application of Trust Funds or Property to

Specific Purpose). As to Count II (Complaint of Frank Bragano), the Referee recommended that Respondent be found guilty of violating Rules 5-1.1(a) (Nature of Money or Property Entrusted to Attorney); 5-1.1(b) (Application of Trust Funds or Property to Specific Purpose); Rule 5-1.1(e) (Notice of Receipt of Trust Funds; Delivery; Accounting); and 5-1.1(g) (Failure to Comply with Subpoena).

A Sanctions Hearing was held on September 18, 2009. On October 29, 2009, the Referee issued a Final Report of Referee, recommending that Respondent be disbarred and ordered to pay restitution to Frank Bragano in the amount of $31,487.50.

In his Initial Brief, Respondent makes critical statements concerning the grievance committee investigating member, Bar counsel, and the Referee. *See* Initial Brief at p. 13-15. Respondent's statements are not only improper, they are unsubstantiated and outside the record and should be disregarded by this Court.

The Referee issued a detailed and thorough Report of Referee with extensive citations to the record. After reviewing the transcript of the final hearing and proposed reports submitted by both parties, the Referee issued a Preliminary Report of Referee containing his findings and recommendations as to guilt. At the sanctions hearing, the Referee expressed appreciation for the proposed reports submitted and stated: "I really did go through both of those. I pretty much went

through the whole transcript. That's why it took me some time. . . ." SH 65-66. The Referee again requested both parties to submit a proposed final report of referee as to sanctions. The Referee stated he would read both of them and use them as references as "I did last time." SH 68. The Referee did not adopt "word for word" the Bar's proposed report of referee as Respondent asserts. The Referee created his own report that included findings contained in neither of the proposed reports.

On or about December 24, 2009, Respondent filed a Petition for Review of the Report of Referee, challenging the Referee's findings of fact, conclusions of guilt and recommended discipline. Pursuant to Rule 3-7.7, the jurisdiction of this Court is invoked.

SUMMARY OF THE ARGUMENT

This case involves Respondent's conversion of trust funds belonging to his client, Frank Bragano. Respondent wrote a check to Bragano in the amount of $31,487.50 for his share of a settlement. Bragano held the check without cashing it for a period of time. During this period of time, Respondent secretly stopped payment on the check, disbursed the funds to himself and concealed his disbursements. Bragano discovered his money was gone when he decided to cash the check. The Referee found that Respondent's unauthorized disbursements totaling $31,487.50 constituted a conversion. Competent and substantial evidence in the record supports the Referee's findings.

Respondent has tried to characterize this case as a "fee dispute." He does not dispute that he took the funds. Rather, Respondent claims he was justified in taking the funds because Bragano owed him a flat fee of $40,000 in an unrelated matter. Long after the disciplinary proceedings began, Respondent claimed he was justified in asserting a retaining lien on his client's trust funds pursuant to *Daniel Mones, P.A. v. Smith*.

The evidence in this case was contradictory and the issues contested. The Referee evaluated the conflicting evidence and believed the Bar's witnesses and disbelieved Respondent. Bragano and his partner testified that Respondent took

the funds without knowledge or authorization. Respondent testified to the contrary. The Referee found the testimony of Respondent and his partner to be credible and the testimony of Respondent not to be credible.

The Referee found by clear and convincing evidence that Respondent did not have a fee agreement to be paid a flat fee of $40,000 for work done in connection with the unrelated matter. The Referee further found that Respondent was not entitled to assert a retaining lien on Bragano's funds because there was never any agreement for payment of a 40,000 flat fee to Respondent, and because the trust funds were entrusted for a specific purpose—to honor a trust account check previously written to Bragano for his share of a settlement. The Referee found *Mones* was inapplicable. Respondent cannot be permitted to justify his theft under the guise of a belated invocation of *Mones*.

The competent and substantial evidence in the record supports the Referee's findings, as shown by the Referee's detailed factual findings and citations to the record. The Respondent is asking this Court to substitute its judgment for that of the Referee and overturn the Referee's findings and recommendations. This Court should approve the Referee's factual findings and recommendations as to guilt. This Court should also approve the Referee's recommendation that Respondent be disbarred and ordered to pay restitution to Bragano in the amount of $31,487.50.

STANDARD OF REVIEW

The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *Fla. Bar v. Nicnick*, 963 So.2d 219, 221 (Fla. 2007). If the referee's findings are supported by competent, substantial evidence, then this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Fla. Bar v. Porter*, 684 So.2d 810, 813 (Fla. 1996). Because the referee is in the best position to judge the credibility of witnesses, this Court defers to the referee's assessments. *Fla. Bar v. Forrester*, 916 So.2d 647, 652 (Fla. 2005).

In reviewing a referee's recommended discipline, this Court 's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to determine the appropriate sanction. *Nicnick*, *supra*, at 224. However, this Court will generally not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. *Id*.

ARGUMENT

I. THIS IS NOT A FEE DISPUTE; THE REFEREE CORRECTLY FOUND THAT RESPONDENT CONVERTED TRUST FUNDS BELONGING TO HIS CLIENT.

Respondent asserts that this matter is a "fee dispute" that should be resolved in a civil court and is not the appropriate subject of a disciplinary proceeding. By making this argument, Respondent is attempting to divert the Court's attention from his misconduct—the theft of his client's funds.

Respondent issued a trust account check to Frank Bragano for Bragano's share of a settlement in the Meridian matter. When Bragano did not cash the check for a period of time, Respondent secretly stopped payment on the check and began disbursing the funds to himself. The Referee found that these unauthorized disbursements constituted a conversion of client funds. RR 22. After disbursing most of the funds, Respondent attempted to justify the disbursements by claiming Bragano owed him a $40,000 flat fee for work related to setting up the Montpelier corporation, an unrelated matter. Respondent states "there is no dispute" that he always requested a $40,000 flat fee for his services in relation to Montpelier. Initial Brief, p. 17. The evidence shows otherwise. Bragano and his partner, Andrew Lynch, testified that there was never an agreement to pay Respondent a $40,000 flat fee. The Referee credited this testimony and found by clear and

convincing evidence that Respondent did not have an agreement to be paid a $40,000 flat fee for work done in relation to Montpelier. RR 14-15. The Referee found by clear and convincing evidence that Respondent agreed to work for Montpelier in exchange for a percentage of profits. RR 18. The evidence supporting the Referee's findings is discussed *infra* in Section II of this brief.

Respondent argues that, because he filed a civil suit against Bragano for the balance due of the alleged fee in Montpelier, this matter should be resolved in civil court and not in a disciplinary proceeding. Respondent's late-filed lawsuit was simply an attempt to bolster his defense to the conversion of Bragano's trust funds. Respondent did not file his civil suit until February 2009, just prior to the final hearing before the Referee, which commenced March 25, 2009. The civil suit was filed three and one-half years after the Montpelier representation ended. Respondent disbursed Bragano's funds to himself between August 2004 and April 2005. Bragano filed a Bar complaint in June 2006, and the grievance committee found probable cause in May 2008.

Respondent did not present any evidence or testimony concerning the civil suit during the final hearing. He is now attempting to use the litigation to collaterally attack the Referee's findings and recommendations as to guilt and sanctions. This Court should disregard Respondent's statements concerning the

civil suit as improper and outside the record.

Respondent cites *Fla. Bar v. Quick*, 279 So.2d 4 (Fla. 1973) to support his argument that this is a fee dispute and not a disciplinary matter. The facts of *Quick* are inapplicable here. In *Quick*, there was no dispute concerning the existence of a fee agreement; the issue was whether the fee charged was clearly excessive. The respondents in *Quick* billed the client for $14,998.99, while the client claimed that the agreement was for a flat $5,000.00 fee. The Court held that the evidence was not clear and convincing that the amount of fee charged was extortionate or fraudulent.

In this case, the issue was whether Respondent converted trust funds belonging to Bragano. The funds remained in Respondent's trust account because Bragano had not yet cashed a trust account check previously issued by Respondent. This case does not involve any issue concerning an excessive fee. Respondent's "fee dispute" argument is a red herring and simply an attempt to divert this Court's attention from the real issue—whether the Referee's finding that Respondent converted client funds is supported by competent and substantial evidence. The record evidence supports the Referee's finding that Respondent made a series of unauthorized disbursements of client funds held in trust.

II. THE REFEREE'S FINDING THAT RESPONDENT DID NOT HAVE AN AGREEMENT TO BE PAID A FLAT FEE OF $40,000 IS SUPPORTED BY THE COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD.

The Referee found by clear and convincing evidence that there was no agreement for payment of a $40,000 flat fee to Respondent for work performed on Montpelier. RR 14-15, 21. The Referee also found by clear and convincing evidence that Respondent agreed to work for Montpelier in exchange for a percentage of future profits and that those profits never materialized. RR 18-19. Respondent asserts that these findings are in error and not supported by the evidence.

The practical effect of Respondent's argument is to urge the re-weighing of the evidence by this Court. Because the record reflects that substantial competent evidence supports the Referee's conclusions, this Court should not second guess the Referee's findings of fact. *Fla. Bar v. Nicnick*, 963 So.2d 219, 224 (Fla. 2007). As this Court has stated:

> This Court has a long-established and clear standard regarding a referee's credibility findings: The Court defers to the referee's assessment and resolution of conflicting testimony because the referee is in the best position to judge the credibility of the witnesses. . . . A respondent cannot prevail on review by contesting factual findings and simply pointing to contradictory evidence, when competent, substantial evidence . . . supports the referee's findings.

Fla. Bar v. Head, ____ So.3d ____, 2010 WL 26532 (Fla. 2010) (citations omitted).

The Referee evaluated all conflicting evidence and believed the complainant and disbelieved Respondent. The Referee listened to the testimony, read the transcripts and reviewed the entire record. This is shown by the lengthy Report of Referee, which contains detailed factual findings and extensive citations to the record. The Referee thoroughly supported his findings with competent, substantial evidence. *See Head*, *supra*, at 6.

Respondent claims that "all the documents and actions of all the parties" corroborate his claimed $40,000 fee. Initial Brief, at 21. An examination of the record, however, shows that there is no evidence to support the alleged fee agreement other than Respondent's own testimony, handwritten notes he claims to have made contemporaneously, or letters he wrote after the fact. The Referee found this evidence unpersuasive and directly contradicted by the record. RR 15.

Respondent also argues that the Referee "ignores the fact that all the written evidence supports a $40,000 fee for Montpelier" and that "there is no written evidence that refutes it." Initial Brief, at 21. Despite the mountain of documents Respondent produced relating to Montpelier, he was unable to produce even a draft of a fee agreement. Respondent produced only a handwritten note with the words "$40K fee—per bond" that he claimed to have made on June 28, 2004, when he

initially met with Bragano to discuss the investment platform. R Exh. 109. Respondent's December 20, 2004 letter to Bragano, claiming he was entitled to a $40,000 fee, was written long after he had stopped payment on Bragano's check and disbursed most of the Meridian funds to himself. TFBP BR 03.

Respondent claims that the Referee ignored certain evidence, which he claims supports a $40,000 flat fee for Montpelier, including the billing records, spread sheet, note for fee to Sterne Agee [R 98], August 2005 settlement meeting and letter, and lack of response to Respondent's letters. Initial Brief, at 21. Contrary to Respondent's assertion, most of these matters were specifically addressed by the Referee, and are summarized as follows:

Billing records: The Referee addressed Respondent's billing records in the Report of Referee at pages 17 to 18. The $40,000 flat fee appeared on an invoice dated October 31, 2004 on the Montpelier account, which Respondent produced during the disciplinary proceedings. R. Exh. 25. This invoice was addressed to Respondent's law office. Respondent also produced a billing statement on the Meridian account dated October 31, 2004, showing he stopped payment on the $31,487.50 trust account check and transferred the funds to the Montpelier account the same day. This invoice was addressed to Bragano and Lynch at Bragano's home address. R Exh. 9. Bragano and Lynch testified they had never previously

seen the invoices produced by Respondent during the final hearing. TR2 225; TR4 471. The Referee found the testimony of Bragano and Lynch to be convincing. RR 18. Respondent also produced invoices dated November 30, and December 31, 2004 on the Montpelier account showing the $40,000 flat fee, also addressed to Respondent's law office address. The Referee specifically found that Bragano never saw these invoices. RR 17-18.

Spread sheet: The Referee addressed the spreadsheet (Cash Flow Analysis) in the Report of Referee at pages 15 to 16. At the final hearing, Respondent argued that this document supported the alleged $40,000 flat fee. TR5 634-36. Respondent testified that the Analysis was prepared by the accountant for the investment project. This document contains a line item entry for "Legal acctg etc" in the amount of $215,000 for the first year, and $175,000 for the next three years. R Exh. 43. At the final hearing, Respondent claimed the difference represented his $40,000 start up fee. On cross examination, Respondent was asked about statements he made during his deposition about the Cash Flow Analysis. TR6 757-58. The Referee found that in his deposition, Respondent stated he did not remember that the Cash Flow Analysis included his fees, but he had been able to "figure it out since then." RR 16, TR6 759-60. It is apparent the Referee did not find Respondent's testimony credible regarding the Cash Flow Analysis.

Note to Stern Agee: This handwritten note, which Respondent produced at trial, was not addressed in the Report of Referee. It is apparent that the Referee did not credit Respondent's unsubstantiated testimony regarding the note. The note appeared on a Flow of Funds Memorandum, which Respondent testified was sent to him from the closing agent at Stern Agee. R Exh. 98. Respondent stated that he wrote "Montpelier counsel fee $40K" on the document and instructed his secretary to add this information to the document and forward it back to Stern Agee. TR5 642-43. Respondent never produced a copy of the Flow of Funds Memorandum showing that it had been revised to include his alleged $40,000 fee.

August 2005 meeting and letter: Respondent claims that the matter of his fee was settled at a meeting on August 11, 2005 with Bragano, Lynch and Roig, and confirmed by a letter he wrote to Bragano dated August 23, 2005. The August 23, 2005 letter is another example of Respondent trying to substantiate the alleged $40,000 flat fee with an after-the-fact, self-serving letter written by himself. The testimony of Bragano, Lynch and Roig contradicts Respondent's testimony and his letter. The Referee found that no resolution was reached at the August 11, 2005 meeting. RR 14. This issue is discussed more fully in Section IV of this Answer Brief.

Lack of response to Respondent's letters: Respondent argues that Bragano's

failure to respond to his letters indicates Bragano's acquiescence to the alleged fee. The Referee found that Bragano was angry at Respondent for having taken his funds, but after talking with his partners, decided not to take any action at that time. The partners felt there was too much at stake to risk Respondent taking any action that might undermine the investment platform. RR 13. Respondent's December 23, 2004 letter stated "Before you take some precipitous action from which you can't withdraw, I ask you to carefully consider what is at stake at this time." TFB Exh 4. Bragano testified that he feared Respondent would "blow up" all the work that had been done on the platform. TR2 240. When asked why he did not take action sooner, Bragano testified that "I pretty much had a muzzle put on me . . . because of the sensitivity of the trading platform." TR3 293; TR2 244.

The Referee considered all the evidence presented by Respondent and found it unpersuasive. As stated in the Report of Referee: "The evidence cited by Respondent to support the alleged flat fee agreement is not persuasive and is directly contradicted by the record. Respondent's claim of an agreement for a $40,000 flat fee is flatly contradicted by Bragano and further undermined by the testimony of Bragano's partner Lynch, and attorney Ricardo Roig." RR 15.

The Referee's finding that Respondent was to be paid a percentage of the future profits of Montpelier is also supported by the record. The Referee credited

Bragano's testimony that Respondent would receive a percentage of the profits of Montpelier and would not be paid a flat fee. RR 18; TR2 210-11, 221-22; TR3 399-400. Lynch testified that Respondent was not owed $40,000 for setting up Montpelier. TR4 465. Lynch understood that Respondent was to receive a percentage of future profits. TR4 454-55. The Referee found that Respondent took the risk of not being paid when he agreed to be compensated by a percentage of future profits. Respondent did not receive any percentage of profits because there were no profits. RR 19.

Respondent's efforts to establish the existence of a fee agreement were an after-the-fact attempt to justify his conversion of Bragano's trust funds. In October 2004, the Montpelier closing had not occurred and the profits had not materialized. Respondent learned that Bragano had not cashed the $31,487.50 trust account check representing Bragano's share of the Meridian settlement. Respondent stopped payment on the check and began disbursing Bragano's funds to himself. Much later, to justify the disbursements, Respondent claimed the existence of a verbal fee agreement for a $40,000 flat fee for work related to the Montpelier project. Respondent was unable to produce any independent evidence to support the alleged fee agreement. The Referee's findings are well supported by the evidence in the records and should be approved by this Court.

III. THE REFEREE CORRECTLY FOUND THAT RESPONDENT WAS NOT ENTITLED TO ASSERT A RETAINING LIEN ON HIS CLIENT'S FUNDS THAT WERE HELD IN TRUST FOR A SPECIFIC PURPOSE.

Respondent argues that the Referee erred in failing to find that he was entitled to assert a retaining lien on his client's funds pursuant to *Daniel Mones, P.A. v. Smith*, 486 So.2d 559 (Fla. 1986). Respondent also argues that Bragano was personally liable for the alleged $40,000 fee as the promoter of the Montpelier corporation pursuant to *Ratner v. Central National Bank of Miami*, 414 So.2d 210 (Fla. 3d DCA 1982). The Referee rejected both of these arguments and specifically addressed them in the Report of Referee. RR 19-22.

The Referee discussed the *Mones* case in the Report of Referee and found it was not controlling. In *Mones*, this Court held that an attorney could assert a retaining lien on a client's funds held in trust because the funds were not held for a specific purpose, distinguishing *Fla. Bar v. Bratton*, 413 So.2d 754 (Fla. 1982). *Mones*, at 561-62. In *Bratton*, this Court held that an attorney cannot impose a retaining lien on client funds entrusted to the attorney for a specific purpose where the parties have not agreed that attorney's fees should be paid out of the entrusted funds. *Bratton*, at 755. The Referee found in paragraph 67 of the Report of Referee that the facts of Mones are distinguishable from the facts of this case. The Referee stated:

> Here, the funds taken by Respondent were entrusted for the specific purpose of paying the trust account check already issued. The $31,487.50 belonging to Bragano was held in trust for a specific purpose—to honor a trust account check previously written to Bragano for his share of the Meridian settlement. . . . Put another way, Respondent disbursed trust account funds which he had already disbursed to Bragano. The funds remained in Respondent's trust account only because Bragano had not cashed the check. The evidence is clear and convincing Bragano never authorized Respondent to use the funds or to stop payment on the check. Respondent simply began disbursing Bragano's funds to himself without notice or authorization. Bragano believed the funds to be safe and available for his use at any time. RR 20-21.

Respondent's defense of a retaining lien was further undermined by the fact that he had never previously asserted a retaining lien against a client, he concealed his unauthorized disbursements from Bragano, and he failed to inform Bragano that he was asserting a retaining lien on the Meridian funds at any time during 2004, 2005, or 2006. RR 21.

Finally, the Referee rejected Respondent's argument that Bragano was personally liable for the alleged $40,000 fee. The Referee found that there was never any agreement for payment of a $40,000 flat fee to Respondent, but even if there were, this would have been a corporate obligation of Montpelier. Even if Respondent's version of the verbal agreement was accepted, Respondent had no right to assert a retaining lien under *Mones* because of the separate identities of Bragano, the owner of the trust funds, and of Montpelier, a corporation. RR 21.

Respondent also argues Bragano was personally responsible for the alleged fee because he was the promoter of Montpelier. Respondent cites *Ratner v. Central National Bank of Miami*, 414 So.2d 210 (Fla. 3d DCA 1982), for the proposition that the promoter of a corporation remains personally responsible for the corporate debt until the corporation ratifies the debt. Respondent claims Montpelier was not incorporated until July 3, 2004. TR5 626. However, the Articles of Incorporation for Montpelier were drawn up on June 28, 2004 and Bragano signed them as Managing Member on that date. TR2 208; R Exh 92. In June 2004, Respondent met with Bragano and others to discuss the investment project, including the incorporation of Montpelier and the other LLCs. RR 7. Respondent acted as corporate counsel and advised Bragano regarding corporate matters. Bragano relied on Respondent's advice. TR2 205-09. Although Respondent now states that the corporation was not effective until July 3, 2004, he admitted he never advised Bragano that the corporation was not in effect, or that he would seek to hold Bragano personally liable for what Respondent considered Bragano's debt to him. TR6 755-56. Respondent had a stake in Montpelier, but he failed to fully explain his role to his client or document this in writing. RR 8. Although not charged with violating Rule 4-1.8(a), the rule requires that an attorney who enters into a business transaction with a client obtain his client's

consent in writing to the essential terms of the transaction, including the attorney's role in the transaction. *See* Rule 4-1.8(a), Rules Regulating The Florida Bar. Respondent's failure to do so shows a fundamental lack of concern for his client.

Respondent disbursed Bragano's trust funds to himself without Bragano's knowledge or authorization. These funds were entrusted for the specific purpose of satisfying the $31,487.50 check previously issued to Bragano for his share of a settlement. Bragano believed the funds to be safe in Respondent's trust account until he was ready to cash the check. TR3 406-407. Respondent should not be permitted to use *Mones* and *Ratner* to justify his theft of his client's funds.

IV. RESPONDENT DID NOT "SETTLE" WITH HIS CLIENT.

Respondent argues that the Montpelier fee issue was settled with Bragano at the August 2005 meeting with Respondent, Bragano, Lynch and Roig. As evidence of this "settlement" he points to a letter he wrote dated August 23, 2005, addressed to Bragano. R Exh 49. In the letter, Respondent stated: "It is my understanding from our meeting on August 11th that you were going to provide me with either payment or written assurance of payment from each of the seven members of Montpelier totaling 40,000.00." Once again, Respondent relies on a letter written by himself, uncorroborated by independent evidence, to support the claimed $40,000 fee. Bragano, Lynch, and Roig all testified at the final hearing

that there was no agreement for a $40,000 flat fee, and that the matter was not resolved at the August 11, 2005 meeting. TR3 277, 294; TR4 469; TR4 518. Bragano was unwavering in his testimony that Respondent stole his money and he wanted it back. TR2 244, 254; TR3 293. Bragano's complaint to The Florida Bar is further evidence that the matter had not been "settled." The Referee specifically found that no resolution was reached. RR 14, paragraph 47. The Referee's finding is supported by the evidence and should be approved.

V. DISBARMENT IS THE APPROPRIATE SANCTION FOR RESPONDENT'S CONVERSION OF HIS CLIENT'S FUNDS.

Respondent has requested this Court to reject the recommended disciplinary measures of disbarment and restitution. The Referee correctly concluded that disbarment and restitution are the appropriate sanctions for Respondent's misconduct. The Referee found insufficient mitigation to depart from the presumptive sanction of disbarment for conversion of a client's funds. The Referee's recommended sanction has a reasonable basis in the case law and Florida Standards for Imposing Lawyer Sanctions and should be approved.

In recommending disbarment, the Referee relied on the applicable Standards for Imposing Lawyer Sanctions. RR 27. The Referee listed the following Standards in the Report of Referee:

4.1 Failure to Preserve Client's Property.

Standard 4.1 provides that, absent aggravating or mitigating circumstances, and upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

4.6 Lack of Candor

Standard 4.6 provides that, absent aggravating or mitigating circumstances, and upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

4.61 Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client.

The Referee also found six aggravating factors applicable in this case:

9.22 (a) prior discipline. The Referee considered that Respondent received an admonishment for minor misconduct in 2003 for failing to timely communicate with his client regarding a post-judgment collection matter involving funds deposited into his trust account and failing to timely respond to the Bar's inquiries concerning the matter. RR 28.

9.22 (b) dishonest or selfish motive. The Referee found that Respondent's conversion of Bragano's funds was motivated by self-interest. Respondent was unhappy because the deal he made to be compensated by a percentage of the future profits of Montpelier did not pay off. The project was unsuccessful and there were no profits from which he could be paid. Instead he began secretly disbursing Bragano's funds to himself after learning that Bragano had never cashed the trust account check for his share of the Meridian settlement funds. An attorney who intentionally misappropriates client funds has engaged in dishonest conduct. *See Fla. Bar v. Valentine-Miller*, 974 So.2d 333, 337 (Fla. 2008). RR 28.

9.22 (e) bad faith obstruction of the disciplinary process by intentionally failing to comply with rules or orders of the disciplinary agency. The Referee found that Respondent failed to timely respond to the Bar in the Lyles matter. The Referee also found that, in the Bragano matter, Respondent's failure to produce his trust account records added considerable time and expense to the disciplinary process. His failure to comply with the Bar's subpoena caused the Bar to have to file a Petition for Order to Show Cause with the Supreme Court of Florida. *See Fla. Bar v. Brownstein*, 953 So.2d 502, 510 (Fla. 2007). RR 29.

9.22 (i) Substantial experience in the practice of law. The Referee found that Respondent was admitted to the Florida Bar in December 1982 and has been

practicing law for 27 years. RR 29.

9.22 (j) Indifference to making restitution. The Referee found that Respondent repeatedly failed to respond to his client's demands for the return of his trust funds, and that Respondent has shown complete indifference to returning the funds he took from Bragano. RR 29.

The Referee found only one mitigating factor:

9.32(g) Character and reputation. The Referee found that Respondent established a favorable reputation for character and professional and skillful representation of his clients through three members of the judiciary and two attorneys. The Referee also found that the testimony established the Respondent possesses above average legal ability. RR 29-30.

The Referee also considered this Court's decisional law in making his recommendation. RR 26. The case law supports disbarment as the appropriate sanction for Respondent's misconduct. It is well established that the presumptive sanction for the misuse of client funds is disbarment. This Court has stated: "It is well settled that the misuse of client funds held in trust is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment." *Fla. Bar v. Smith*, 866 So. 2d 41, 47 (Fla. 2004). In recent opinions, this Court has repeatedly rejected suspension in favor of

disbarment for the misuse of trust funds.

For example, in *Fla. Bar v. Brownstein*, 953 So.2d 502 (Fla. 2007), an attorney failed to deliver $20,000 owed to a client from a settlement. He issued two checks for $10,000 each that were returned for insufficient funds. The Bar served a subpoena on Brownstein for his trust account records, but Brownstein failed to produce any of the subpoenaed records. Bank records obtained by the Bar showed that Brownstein had deposited the settlement funds into his trust account and written a series of checks to himself, resulting in shortages in the account. He was found guilty of violating many of the same Rules for which Respondent has been found guilty, including Rules 5-1.1(a) (nature of money or property entrusted to attorney); 5-1.1(b) (application of trust funds or property to specific purpose); 5-1.1(e) (notice of receipt of trust funds; delivery; accounting). *Id*. at 509. The referee in *Brownstein* found two aggravating factors and 10 mitigating factors, and recommended a three-year suspension followed by five years of probation. *Id*. at 509-510.

This Court rejected the referee's recommendation and disbarred Brownstein. This Court also disapproved several of the mitigating factors and found three additional aggravating factors, including a dishonest or selfish motive, obstruction of the disciplinary proceedings by Brownstein's complete failure to produce any

records in response to the Bar's subpoena, and substantial experience in the practice of law. In holding that disbarment was the appropriate sanction, this Court stated: "We have repeatedly recognized not only the seriousness of the offense in respect to the individual client but also the extreme detriment to the public's confidence in the members of the Bar when a lawyer intentionally takes funds held in trust for the lawyer's own use. Such misconduct must result in the severest of sanctions." 953 So.2d at 511. Like Brownstein, the Respondent in this case made unauthorized withdrawals of client funds, refused to deliver the funds upon demand, and failed to comply with the Bar's subpoena for his trust account records. The Referee here found six aggravating factors and only one mitigating factor. Therefore, the presumption of disbarment applies.

Similarly, in *Fla. Bar v. Martinez-Genova*, 959 So.2d 241 (Fla. 2007), an attorney was disbarred for making a series of unauthorized disbursements of trust funds. Martinez-Genova represented a client in a multi-million dollar loan transaction and was to hold $60,000 in trust as a loan commitment fee. A Bar audit revealed the unauthorized withdrawals which resulted in shortages in Martinez-Genova's trust account. She was found guilty of violating Rules 5-1.1(a), 5-1.1(b), 5-1.1(e), and 5-1.1(f), as well as Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The referee recommended a three-

year suspension, citing numerous mitigating factors, including personal and emotional problems, inexperience in the practice of law, cooperation, remorse, and a mental disability (cocaine addiction and clinical depression). This Court held that the referee's recommendation was not in accord with existing case law, stating that the "presumption of disbarment is 'exceptionally weighty when the attorney's misuse is intentional rather than a result of neglect or inadvertence.'" 959 So.2d at 246, quoting *Fla. Bar v. Barley*, 831 So.2d 163, 171 (Fla. 2002). This Court found that Martinez-Genova's misuse of trust funds was intentional and that she made a series of unauthorized withdrawals of the funds. This Court held that the mitigating factors were not enough to overcome the presumption of disbarment. In this case, Respondent's disbursement of Bragano's funds to himself was deliberate and intentional. Like Martinez-Genova, Respondent's intentional misappropriation of client funds warrants disbarment.

Fla. Bar v. Spear, 887 So. 2d 1242 (Fla. 2004), is another case in which an attorney was disbarred for misappropriating client funds. Spear represented a client in the attempted purchase of a day care center. The deal was not consummated and the client's $85,000 deposit was returned to Spears. The funds were placed into Spear's operating account and he transferred $75,000 from the account. The Florida Bar requested Spear to provide his trust account records, but

he failed to provide records clearly identifying the funds. Spear later borrowed funds from another client to replace the missing funds and repay the client. Spear was found guilty of violating Rules 5-1.1(a), (b), and (e), the same Rules that Respondent has been found to have violated in this case. Spear was also found guilty of record-keeping violations and failure to respond to the Bar. The Florida Supreme Court disapproved the referee's recommended discipline of a three-year suspension and instead disbarred Spear. The Court held that, given the referee's findings and recommendations as to guilt, the recommended sanction of suspension was not authorized under the Standards and did not have a reasonable basis in existing case law. The referee found Spear guilty of converting client funds for unauthorized use in violation of rule 5-1.1(b). The Court emphasized that where conversion of client funds is concerned, the standards are clear, citing Standard 4.11 which provides that disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury. 887 So.2d at 1246-47. The Court recognized that the "overwhelming majority of cases involving the misuse of client funds have resulted in disbarment." *Id*., *quoting Fla. Bar v. Massari*, 832 So.2d 701, 706 (Fla. 2002).

This Court has emphasized the importance of the public trust in an attorney to handle money entrusted to the lawyer's care. In disbarring an attorney who

misappropriated client funds, the Court stated:

> "The single most important concern of this Court in defining and regulating the practice of law is the protection of the public from incompetent, unethical, and irresponsible representation. The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence. The direct violation of this trust by stealing a client's money, compounded by lying about it, mandates a punishment commensurate with such abuse."

Fla. Bar v. Korones, 752 So.2d 586, 589 (Fla. 2000).

Frank Bragano trusted Respondent to hold his settlement funds in trust until he was ready to use them. Bragano considered the money safe "just like having it in the bank." TR2 204. Respondent betrayed this trust when he secretly began disbursing the funds to himself without telling Bragano and without authorization. Respondent's intentional misappropriation of trust funds warrants disbarment.

The Referee also recommended that Respondent be ordered to pay restitution to Bragano in the amount of $31,487.50. Restitution is an appropriate disciplinary measure and is specifically authorized by the Rules Regulating The Florida Bar. Rule 3-5.1(i) provides that "the respondent may be ordered or agree to pay restitution to a complainant or other person if the disciplinary order finds

that the respondent has . . . converted trust funds or property." The Referee found that Respondent's unauthorized disbursements to himself of Bragano's funds constituted a conversion of client funds. RR 22. The Referee found that Respondent made unauthorized disbursements of the entire amount of the Meridian funds that remained in the trust account because Bragano had not cashed the $31,487.50 Meridian check. RR 9-11. This Court should approve the Referee's recommendation that Respondent pay restitution in the amount of $31,487.50 to the complainant, Frank Bragano.

CONCLUSION

The Referee's findings of fact and conclusions of guilt are supported by competent and substantial evidence and should be approved. The Referee's recommendation of disbarment and payment of restitution is supported by the facts, the Standards for Imposing Lawyer Sanctions and the case law. The Bar requests that this Court disbar Respondent and order that Respondent pay restitution to Frank Bragano in the amount of $31,487.50 plus interest, and pay the Bar's costs in these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by UPS Delivery, Tracking Number 1Z E32 77W 25 9710 4089, to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1900; a true and correct copy by regular U.S. Mail to **R. Patrick Mirk**, Respondent, at Post Office Box 18201, Tampa, Florida 33679-8201; by regular U.S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of March, 2010.

_____

Cynthia Lois Miller
Assistant Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

_____

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