IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant

Case No: SC08-1423
Lower Tribunal: 2006-10,783 (13B)
2006-11,698 (13B)

V.

R. PATRICK MIRK

Petitioner/Respondent
_____/

PETITIONER'S INITIAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

Respectfully Submitted by:
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STATEMENT OF THE FACTS AND OF THE CASE

Statement of the Facts

Respondent, R. Patrick Mirk, hereafter referred to as "Mirk", had a long-standing relationship with the complaining party, Frank C. Bragano, hereafter referred to as "Bragano". [T 195]. The representation included personal affairs of Bragano, litigation and transactional work for his corporations and work for his business associates and partners. [T 587-588]. The representation covered at least 16 years [T 195].

Many, but not all of the matters had written fee agreements. [T 589-591]. A number of examples were introduced at the hearing. [R 15, 16, 18, 19, 20, 21 and 22]. Each of the contracts contained retaining lien language.

In early June 2004 Bragano and his partner Andrew Lynch came to Mirk with a number of new matter due to a dispute with another attorney, Curran Porto, who was working on several condo projects in Miami for Bragano, Lynch and others. [T 595]. In a matter of weeks, Mirk resolved the dispute and Porto disbursed funds to Mirk's trust account to settle the dispute [T 599]. In late June 2004 Mirk wrote checks to Bragano, Lynch and a third partner, George Donald, disbursing their shares of the proceeds.

[R 8]. Bragano did not cash his check, which totaled $31,487.50 [R 8].

After the Meridian dispute with Porto was resolved, Bragano approached Mirk with a new project on June 28, 2004 concerning the formation of four limited liability companies and the securing of a series of four $200 million loans for four projects. [T 619 – 623]. Mirk kept written notes of the meeting [R 109]. The original notes were presented at trial [T 617]. These notes were explicit, and the various persons, transactions, corporate names, amounts involved, etc., all are reflected in the numerous corporate documents, transaction documents, and transmittal documents that were introduced into evidence without objection. [R 10, 42, 43, 44, 45, 46, 48, 91, 92, 93, 94, 95 96, 97, 98, 99 and 100].

According to the precise and explicit testimony of Mirk, the fee for the services to be performed was $40,000.00 per bond. This fee is set out in the notes and in numerous invoices and letters issued over the next several years. [R 25, 43, 49, 50, 98, TFB 3, TFB 4]. It never varies. There is no contradiction that the only LLC for which a bond was approved was the first LLC, Montpelier. [R 42, 43, 44, 45, 46, 91, 92, 93, 94, 95, 96, 97, 98 & 99]. The loan was approved [R 93] and the closing set for July 28, 2004. [R 97].

Bragano and the other members elected not to close the loan and the

loan was sold to another company. [T 647 – 648]. Mirk was not informed of the sale and only learned that the closing was cancelled when the bond agent called asking for instructions on the escrow deposit. [T 649].

When the LLC's were discussed in June 2004 Mirk expected his $40,000.00 fee to be paid at the bond closing. [T 623]. Mirk was not the corporate attorney for Montpelier yet on June 28, 2004 [T 793], since the corporation was not formed until July 2, 2004. [T 626]. Montpelier, the first LLC to seek bond approval had a precise and unique set of members. [R 43, 96, 99; T 633, 644 – 646]. The initial members did not include Craig Green, Mirk or several others who formed new LLC's in October and November 2004. [T 645 – 646]. Mirk was not listed as receiving any percentage of ownership or any percentage of profit. There is no documentation of any kind even suggesting that Mirk's compensation for start-up and bond approval was anything other than $40,000.00.

The corporate accountant, Rusty Zuckerman, prepared a spreadsheet showing the five year cost and expense projections for Montpelier. [R 43]. The projection showed accounting fees of $75,000.00 per year for five years and legal fees for $100,000.00 per year for years two through five, but $140,000.00 for year one, the extra $40,000.00 being for start-up and bond

approval. [T 628, 634 – 635]. These figures were not rebutted by Bragano or any other witness. These are exactly the figures referred to by Mirk in every relevant letter and document.

The Montpelier loan funding commitment for $200 million was approved on July 8, 2004 after Mirk completed the due diligence request from the lender. [R 93]. The bond closing was set for July 28, 2004. [T 642, R 97]. Mirk sent his request for his $40,000.00 fee to the closing agent. [T 642 – 643, R 98].

Mirk learned some weeks later that the loan and bond program had been sold by the Montpelier members to another company in Texas. The sale had been done without any notice to or consultation with Mirk, who was now the corporate attorney. Mirk received this notice when he was consulted by Sterne Agee, the bond escrow agent, concerning the refund of hundreds of thousands of dollars held in escrow. Mirk, of course, discussed this with the members of Montpelier in September 2004 and they said they would take care of his fee, and that they were looking for a new lender to use with the other LLC's. [T 650]. Mirk advised the Montpelier members that he expected to be paid from the upcoming refund from Sterne Agee.[T 653].

The program finally changed in October 2004. The remaining old

LLC's were modified to change membership. A new member, Craig Green, who had been working as a broker for a commission, was invited in. [T 678 – 682]. Another bond investment company, GEM, was found who could send funding overseas. [T 679]. Several new LLC's were formed to reflect the new members, delete one dropped member, and start a different trading program with the start-up funds until the long term project, a new project, got under way. [T 679 – 682].

A new bridge loan investor was secured who brought in his own attorney. [T 681 – 682]. This new company, Lake Geneva Holding, II, LLC, had different members, a different trading platform and a different long-term project than Montpelier. [T 681-682, TFB 118]. The compensation for the attorneys and the ownership percentages for the members were not agreed upon until November 2004. [TFB 118, 119]. Mirk's compensation for this new project and new corporation was to be a percentage of profit, not a flat fee. All the testimony and documents at the three-day hearing explicitly showed that this was true. The other attorneys were also going to receive a percentage of profit as compensation. [TFB 118-119].

In October 2004 several events occurred which led to the dispute

between Mirk and Bragano, which is still in civil litigation today.

First, Mirk became aware that Montpelier was being abandoned after the $100 million loan was sold. The Montpelier escrow funds were being used to start a new trading platform and Mirk was not paid from this fund as expected. [T 649 – 653]. New members and their attorneys became involved in the new corporations and programs. [T 678 – 681]. Then the Craig Green home foreclosure became an issue. [T 656]. Green had been involved originally and was a member of the new LLC. Bragano wanted to help Green out and instructed Mirk to contact Green's attorney in England and offer a wire transfer of funds from the Meridian refunds, which were still in the trust account because Bragano still had not cashed the June check for $31,487.50. Mirk did as directed. [R 12, 13, 14, T 656-658].

Mirk advised Bragano that a stop payment would have to be done on the Meridian check so that the funds would be available for transfer to Green. [T 659]. Mirk kept his handwritten notes. [T 660 – 662, R 39-41]. Mirk also transferred the funds from the Meridian account to the Montpelier account in his computer. [R 9]. The October Meridian statement was mailed to Bragano at his home address. [R 9].

In the past, Mirk would transfer funds between the various Bragano

accounts as needed and send monthly accountings. [T 670 –671]. This was done in Montpelier. [T 675, R 25]. The Montpelier and all the LLC accounts were addressed to the corporate registered address, which was also Mirk's office address. The Craig Green matter resolved itself in a few days and on October 25, 2004, Mirk began applying the trust funds, now held in the Montpelier account, to the $40,000.00 flat fee charged on October 1, 2004. [R 25]. Funds were withdrawn as needed throughout the rest of 2004. [R 26, 27, 28 – 38]. In all, $31,487.50 was applied, plus other funds actually paid directly to Bragano in 2004, leaving a balance due of $8,261.72 as of December 31, 2005. [R 38].

Mirk continued to work on the new project into mid-December 2004, when Bragano, Green, and several others traveled to England to complete the trading program for Lake Geneva Holding, II, LLC. No further work was done on Montpelier after September 2004. [T 693]. Over a week went by and finally Mirk received some details of the results from the trip. [T 694]. The deal had not closed due to some insurance problem. They were planning to go back in January. Mirk noted to Bragano that the other members had still not signed any of the various compensation documents for any of the various LLC's and that the Montpelier payments were overdue

from the other members. [T 695].

Mirk wrote a letter on December 20, 2004 advising Bragano that after the October stop payment, the $31,487.50 had been applied against the work done that year and once again requesting the LLC members to make their capital contributions so that the LLC fees and expenses could be paid. [TFB 3]. The letter once again specified the flat fee of $40,000.00 for each LLC and bond issue and the annual $100,000.00 fee after bond issue. The letter expressly advised Bragano that Montpelier had been invoiced $40,000.00. Bragano never made any written reply to the letter. [T 697]. Mirk wrote a follow-up letter to Bragano on December 23, 2004. [TFB 4]. Bragano never sent a written response but his partner Lynch did, saying a meeting would take place in January. [T 968, TFB 47].

Despite only being partially paid, Mirk continued to work for Bragano and his various companies including the local construction company, Florida Restoration. [T 701]. In June, 2005 yet another attorney, Ricardo Roig, was hired by Bragano to sue Mirk, just as Mirk had been hired the previous June to sue Porto. [T 701]. Roig wrote a demand letter [TFB 5], and Mirk responded. [R 50].

A settlement meeting was held on August 11, 2005 attended by Mirk,

Roig, Bragano, and Lynch. [T 706]. After the meeting, Mirk sent Bragano and Roig a letter on August 23, 2005 entitled “Settlement Follow-Up”. [R 49]. As does each of the previous letters by Mirk, the letter discusses the $40,000.00 payment due for the work for Montpelier. In all the letters, notes, and billing statements concerning Montpelier the fee issue is precise, explicit and lacking in confusion. It is always $40,000.00 and always for Montpelier. Neither Bragano nor Roig ever wrote, faxed, or sent an e-mail taking exception to the amount of the fee or that it was for work done for Montpelier. There never was any suggestion that the fee was to be some sort of percentage. However, there is ample documentation that in two later projects, one in October and one in November, there was a percentage of profit plan as compensation. These are discussed in the letters of December 20, 2004, December 23, 2004, and August 23, 2005 as well, but clearly distinguished from the fee due for Montpelier for the work done from late June through September 2004.

There was disagreement, however, as to who was responsible for the $40,000.00. Mirk’s letters clearly explain the partial fee has been taken from Bragano, but that if the corporation and its members would personally ratify and guarantee the fee, then Bragano would be refunded the $31,000.00

applied against the $40,000.00 fee.

Not only did Bragano and Roig not take issue with the Montpelier fee proposal, they never took issue with any of the other issues in the letter. Roig did take over certain files and Mirk continued to work on other files, just as the letter says. [T 707]. Mirk represented Florida Restoration in the Indy Mac foreclosure of Miller, both before and after the August 11, 2005 meeting. [708 – 709]. Mirk continued to represent Florida Restoration on the Miller lien case and received a settlement of $72,500.00, which was processed through Mirk's trust account in December 2005, four months after the settlement. [T 710- 713, R 106]. Mirk did not seek to obtain the remaining $8,000.00 fee from the proceeds and Bragano did not seek to apply Mirk's $2,500.00 fee to the $32, 000.00 taken from trust the year before.

Mirk continued to represent Florida Restoration and Bragano personally, on the Banning Lumber case, and Bragano continued to pay Mirk for his services throughout 2006. [T 715 – 719, R 102, 103, 104, 105].

From December 2004 through June 2006, there never was a complete breakdown in the attorney-client relationship and Bragano never took any action to collect back the funds taken from trust, except through Roig's

letter, which resulted in the settlement. However, in June 2006, just two weeks before Banning Lumber was scheduled to go to trial, Bragano hired yet another new attorney, Gregory Orcutt, who filed another lawsuit for Bragano, Lynch, and Florida Restoration, against Mirk and ten other defendants over a real estate investment in Miami made in 2003 when Mirk was not handling new cases for Bragano and Curran Porto had been hired by Bragano to do so. [R 86]. Mirk called Lynch on the date the summons was served, and Lynch said he had told Orcutt not to sue Mirk. [T 722].

Mirk then called Orcutt, who said that both Lynch and Bragano told Orcutt not to sue Mirk, but Orcutt said to Mirk that he told Bragano and Lynch that he would not take the case if he could not sue Mirk. [T 723]. A review of the defendants in the case made it clear why Mirk was added: Mirk was the only defendant who provided venue in Hillsborough County. All the other defendants resided out-of-state or in south Florida. [T 723]. A review of the Complaint reveals that Mirk had no involvement at all in the underlying transaction, but was sent two documents for signatures after Porto stopped representing Bragano in late 2004. [T 723]. In the over 10,000 pages of litigation papers and documents in the case, only two faxes from others were addressed to Mirk. [T 723 – 724]. Orcutt needed venue

in Hillsborough County, but the statute of limitations had expired against Porto. In fact, when Orcutt redrafted his Complaint, he accidentally left Porto in one of the paragraphs. [T 724, R 86]. When questioned at the final hearing on this Bar matter, Bragano testified that he did not know Mirk committed malpractice in the Villa Luisa (Miami condo) case. [T 397]. Mirk filed an Emergency Motion to Withdraw from the Banning Lumber case. [R 90]. Orcutt appeared at the hearing and opposed Mirk's withdrawal from the case, as trial was so close. [T 726 – 727]. The Trial Court permitted withdrawal. Orcutt advised Bragano to file the Bar grievance a week later, [TFB 6] using the exact format as Roig's letter of June 23, 2005. Orcutt joined in a few days later [T 728].

In January 2007 Mirk filed a County Court action for his fee in Banning. [T 729, R 87]. Orcutt appeared and filed a Counterclaim. [T 730]. The Counterclaim did not seek recovery of the $31,000.00 taken from trust.

The Villa Luisa Complaint was also amended after the Bar grievance, and no claim was made for the $31,000.00.

In December 2006, the Bar sent a Subpoena to Mirk seeking all his trust records for all his clients for several years back. Mirk filed a written objection to the subpoena. [T 740]. The Bar never replied to the objection

and no hearing was ever held. Because Mirk was closing his office at that time and as many records were in storage, it took some time to find all of the records, records of cases completely unrelated to the Bar grievance. Mirk was suspended 98 days as a result of the Subpoena dispute. [T 741]. None of the records revealed anything not set out in Mirk's letters to the Bar.

However, the Bar's auditor, Clem Johnson, did find something he found odd in his review of Mirk's trust records. He discovered the George Miller settlement transaction in December 2005, where $72,500.00 was processed by Mirk, $70,000.00 going to Lynch and Bragano and $2,500.00 going to Mirk. [T 433 – 434]. He thought this was odd if the client was not satisfied with Mirk's performance back in October 2004.

Also odd was Roig's testimony that Bragano never disputed the magnitude and quality of work done by Mirk on Montpelier and expressly stated that Mirk was entitled to compensation. [T 524].

Statement of the Case

This matter commenced on June 16, 2006 when Bragano filed a complaint with the Florida Bar. The complaint was assigned to a local grievance committee which committee designated its lay member to be the investigating member. Mirk explained his position in the letters to the Bar,

and repeatedly asked to meet with the committee. The committee did not ever meet with Mirk.

The lay member did speak with Mirk, and Mirk explained the fee issue and the retaining lien law. The lay member stated that the fee dispute did not matter, as Mirk did not have written permission to take the funds from trust. He was, of course, incorrect.

Mirk repeatedly asked to meet with Bar counsel to discuss the matter, but the Bar counsel not only didn't meet with Mirk, he didn't reply to the telephone calls or letters.

Finally, after some secret meetings, the committee found probable cause and Bar counsel filed a complaint with the Supreme Court. Bar counsel later admitted that he had never actually spoken to any of the witnesses himself before filing the complaint.

The local chief judge assigned a new, inexperienced county court criminal judge as referee. The background of the referee was almost exclusively criminal law. In fact, at the conclusion of the final three-day hearing the referee made the following admission: "I don't have the business background that you gentlemen have, so a little education for me." He went on to ask for the retaining lien language in the written contracts to

be explained to him. [T 822].

When discussion came up of the Mones case, the referee stated: “I guess my confusion, and it’s probably me.” [T824]. Throughout the hearing the referee was often confused about which of the six LLC’s was being discussed, and which corporate documents related to which corporation.

The final report is almost entirely word for word what was recommended by Bar counsel.

Upon this background the referee recommended disbarment despite the fact that there is still litigation pending in Circuit Court over how much fee Bragano still owes Mirk.

Respondent.

SUMMARY OF ARGUMENT

In Count II, all the evidence and testimony points to a fee dispute between an attorney and his client. As there is currently civil litigation pending on this dispute, it is more properly a matter subject to a civil action than a disciplinary action.

The clear and convincing evidence does not support any compensation for the Montpelier transaction other than the flat fee sought by

As the trust funds were not for a specific purpose, it was appropriate to apply a retaining lien for unpaid fees.

Both the fee dispute and the lien dispute were settled in August 2005, and the settlement terms were documented in a letter which was never refuted.

ARGUMENT

I. THE FEE DISPUTE IS A CIVIL MATTER AND SHOULD NOT BE THE SUBJECT OF A DISCIPLINARY PROCEEDING.

There is no question that the subject of the complaint filed by Bragano against Mirk stems from a fee dispute between the attorney (Mirk) and the client (Bragano) over the $40,000.00 flat fee charged by Mirk for work on the Montpelier bond issue and charged in part against funds held in trust for Bragano, who was the original promoter of Montpelier before its formation.

There is no dispute that Mirk always requested a $40,000.00 flat fee for his services in forming the corporation and securing the $200 million loan guarantee. The meeting notes show it, the invoices show it, and the letters all show it.

There is no dispute that Mirk applied the $31,487.50 in trust against the $40,000.00 and requested payment of the balance.

There is no dispute that neither Bragano, Montpelier nor its members ever voluntarily paid any of the $40,000.00. Even Bragano's attorney, Roig, admitted that Mirk had done the work requested and was entitled to compensation. [T 524].

The testimony and documents concerning each of the facts above were distinctly remembered, precise and explicit.

The dispute on the fee issue before the Bar complaint was filed was whether or not Bragano's partners or Montpelier itself was liable for the $40,000.00, as opposed to Bragano alone as the promoter.

After the lawsuit was filed by the Bar, for the first time, a new issue arose, claiming that Mirk was to receive some future profit as his compensation for Montpelier. There are no documents at all to suggest this, and there has never been any written response to any of the letters from Mirk disputing that the fee was $40,000.00 for Montpelier.

Furthermore, although Mirk and Bragano have been and remain in litigation since 2006 in three different lawsuits, Bragano has never filed a counterclaim seeking a refund of the $31,487.50. On the other hand, Mirk has sued Bragano for the balance due on Montpelier.

Thus, the Bar's claim that Mirk's application of the trust funds to the Montpelier fee constitutes conversion first requires that the fee dispute itself be resolved. And the proper forum for this adjudication is a civil court not a bar grievance proceeding. The Florida Bar v. Quick, 729 So2d 4 (Fla 1973).

II. THE BAR DID NOT ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE MONTPELIER FEE WAS A SHARE OF FUTURE PROFITS.

In a hearing before a referee, The Bar has the burden of proving its accusations by clear and convincing argument. The Florida Bar v Hooper, 509 So2d 289 (Fla 1987). Clear and convincing evidence must be precise, explicit, lacking in confusion and of such weight, that it produces a firm belief or conviction without hesitation about the matter in issue. In re Davey, 645 So2d 398 (Fla 1994).

As shown above, and in the statement of the facts, Mirk's testimony at the hearing in 2009 is precisely the same as set out in his documents and correspondence and notes from 2004 and 2005. Bragano, on the other hand had no documents at all related to Montpelier and his testimony in 2009 does not match his actions in 2004 and 2005. For instance, when asked in cross about Mirk getting a percentage of the company, he used the phrase "so to speak". [T 207]. He also mentions another attorney. There was no second attorney until a new company was formed in October 2004, over three months later, and long after the Montpelier $200 million loan was approved

in July 2004. Again Bragano talks about a piece of the action [T 319] and his partner Lynch talks about "profit standpoint" [T 454]. None of this after the fact testimony is precise or explicit, as it is required to be.

On the other hand, the record has numerous documents reflecting some profit by Mirk and another attorney in October and November 2004 in another project for an entirely different corporation (Lake Geneva Holding, II, LLC) that was not even formed until October or November 2004.

A review of the membership lists of the operating agreements quickly reveals how different the make-up of the new company was from Montpelier, LLC, which was formed in early July, 2004.

When pressed on cross, Bragano says he would never have offered Mirk a $40,000.00 flat fee, and if requested, he would instead have used Yanchek as his attorney. [T 243]. Unfortunately, Yanchek and his client Husani did not enter the picture until GEM came on board in October 2004. Neither Yanchek no Husani are anywhere in the June and July 2004 Montpelier documents, and they are everywhere in the October and November 2004 Lake Geneva Holding, II, LLC documents.

The referee found that there was clear and convincing evidence of no verbal agreement for the $40,000.00 fee. [Paragraph 49]. This finding,

however, ignores the fact that all the written evidence supports a $40,000.00 fee for Montpelier, that there is no written evidence that refutes it, and that Bragano never wrote a letter refuting it in response to the letters of December 20, 2004, December 23, 2004 and August 23, 2005, even though his attorney Roig was aware of all the letters.

In paragraph 50, the referee states what evidence he felt was not persuasive, ignoring the billing records, spread sheet for $40,000.00, note for fee to Sterne Agee [R 98], August 2005 settlement meeting and letter, lack of response to the three letters, pending lawsuit by Mirk against Bragano for balance, absence of counterclaim by Bragano for $31,000.00 and the absolute lack of a percentage agreement for Montpelier in June when there was one for Lake Geneva Holding, II, LLC in November. Clearly the referee did not base his decision on all of the facts.

The referee then goes on to say in paragraph 53 that Mirk's verbal claim for $40,000,00 is not credible because it is not corroborated. All the documents and actions of all the parties corroborate the fee.

The Bar seems to place a great deal of emphasis on whether or not Bragano actually received the invoices for Montpelier. This is clearly a red herring. Whether or not Bragano received the invoices, the letter of

December 20, 2004 advised him that Mirk had billed him $40,000.00 for Montpelier and applied $31,000.00 in trust against. No one ever suggests he didn't get the letter. Yet even after hiring a new lawyer, he did not challenge the fee – only that he alone had to pay it.

At paragraph 59 the referee finds by clear and convincing evidence that the Montpelier fee was a percent of future profits. Yet no one in the entire three days could say how much, when paid, etc., and there were no such documents. The testimony was inconclusive by Lynch and Bragano, and is insufficient to justify disbarment. State v Junkin, 89 So2d 481 (Fla 1956).

Throughout the hearing the referee expressed confusion about the six different corporations. [T 822 – 824].

III. THE BAR DID NOT ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT WAS NOT ENTITLED TO A RETAINING LIEN.

According to Ratner v Central National Bank of Miami, 414 So2d 210 (Fla 3DCA 1982) the promoter of a corporation is liable for his contracts, even if the contracts are made on behalf of the corporation. That is what happened here. Mirk first learned about Bragano's interest in setting up Montpelier and seeking approval of its $200 million dollar loan at a meeting

on June 28, 2004. [R 109]. Mirk kept notes of the meeting. [R 109]. Mirk did not know and had not met the three New York partners, Motley, Zuckerman and Sirowitz.

Montpelier was incorporated and the funding commitment for $200 million dollars was received. [R 93]. The closing was set for July 28, 2004. [R 97]. As was customary, Mirk forwarded his payment request to the closing agent. [R 98] [T 642 – 643]. Mirk expected to be paid at closing.

The closing never occurred. The members of Montpelier sold the loan to another company. [T 648 – 649]. When Mirk asked about his fee, he was told in September 2004 that the Montpelier member would take care of it. [T 650]. Mirk advised the Montpelier members and Bragano that he expected to be paid his $40,000.00 fee from the refund of escrow funds from the broker, Sterne Agee. [T 653].

It was only in late October 2004 that Mirk elected to enforce his retaining lien rights against Bragano, the promoter of Montpelier, and only after the escrow funds had been placed into a new company and a new bond program without payment to Mirk of his $40,000.00 fee. [T 670 –671]. At this point, the other members had refused to personally guarantee the payment and the corporation had not ratified the promoters contract for the

start-up fee. The company's only asset, the $200 million dollar loan had been sold off. The only available source of recovery was the funds of Bragano held in Mirk's trust account.

It was clear that the funds were not held for any specific purpose. They were no funds placed in trust by Bragano. They were the proceeds of a settlement from another case settled in June 2004, which had a check outstanding which was never cashed. Bragano admitted there was no specific purpose for the funds [T 360 – 361].

For a short period of time in October 2004 $7,500.00 of the $31, 000.00 had a specific purpose as Bragano offered to have the funds wired to England to help Craig Green, one of his partners. [T 656 – 662, R 39, 40, 41].

Mirk had to stop payment on the check to clear the funds for transfer. [T 659]. Once the Green matter cleared up, the funds were free from any specific purpose and Mirk began to apply them against the Montpelier fee. The above steps were explained in the letter December 20, 2004. [TFB 2].

Mones v Smith, 486 So2d 559 (Fla 1986) expressly holds that at retaining lien can be set off against funds held in trust from unrelated cases.

Bragano has known of the lien claim since at least December 20, 2004. Since that time he has been represented by attorney Roig from a least December 2004 through August 2005 or later and attorney Orcutt from at least June 2006 to the present. Although Roig threatened in June 2005 to sue to get the $31,000.00 back, after the settlement meeting in August 2005, he never did so. Roig was aware of three letters and an e-mail from December 2004 through August 2005, all referring to the $40,000.00 fee and trust account set-off. Never once did he send any letter, fax, or e-mail refuting the claim that the fee was $40,000.00 or the lien was properly applied.

Attorney Orcutt, who represents Bragano in three pending lawsuits with Mirk, has never filed a counterclaim to recover the $31,000.00, even in the lawsuit where Mirk is seeking to recover the remaining balance of the $40,000.00.

Bragano admitted there was no specific purpose for the funds [T 360 – 361]. Nowhere does the referee's report explain why none of these undisputed facts have no bearing on the fee and lien issues.

IV. THE FEE AND LIEN DISPUTES HAD BEEN SETTLED BEFORE THE BAR COMPLAINT WAS FILED.

Mirk's settlement follow-up letter of August 23, 2005 [R 49] clearly explains what was settled. Roig and Bragano got the letter. Roig dropped from view, Mirk continued to represent Bragano and Florida Restoration and no one sued anyone.

Then, a year later, after Orcutt advised Bragano to sue Mirk over a project Mirk had not been involved in, Orcutt then advised Bragano to file a Bar grievance against Mirk a week after Mirk withdrew from the Banning case which was about to go to trial. [T 298]. They even attempted to keep Mirk in the Banning case. [T 726 – 727]. This certainly appears to be a reprisal by Orcutt and Bragano who apparently believed Mirk would not withdraw from the Banning Lumber case despite just being sued for malpractice.

All of the actions by Roig, Lynch, Bragano, and Mirk from August 23, 2005 until June 5, 2006 were consistent with the Montpelier fee and lien issues being settled at the meeting in August 2005. The fact that Bragano has never sued to recover the $31,000.00 is also consistent with settlement.

But for the intervention of Orcutt, Mirk would have finished the

Banning case, for which he was being paid, and would have eventually been paid the balance of his original fee, now that the trading program had been successful. [T 375].

CONCLUSION

The Respondent requests the Court to reject the findings of guilt as to Count II, Rules 5-1.1(a); 5-1.1(b); 5-1.1(e); and 5-1.1(g).

Further, Respondent requests the Court to reject the recommended disciplinary measures, including disbarment and restitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this certificate has been Served by U.S. Mail this ____ day of February 2010 to **THOMAS D. HALL**, Clerk, Supreme Court, at 500 Duval Street, Tallahassee, Florida 32399-1926 and **KENNETH LAWRENCE MARVIN**, Staff Counsel**,** The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and **HENRY LEE PAUL,** Bar Counsel, 4200 George J. Bean Pkwy., Suite 2580, Tampa, Florida 33607.

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Florida Bar No. 356621

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in accordance with Fla. R. App. P. 210 (a), (2) that the foregoing brief of Appellee has been prepared in Times New Roman 14 point font.

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