**IN THE SUPREME COURT OF FLORIDA**

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| **THE FLORIDA BAR,** | **CASE NO. SC08-1423** |
| | **TFB NO. 2006-10,783 (13B)** |
| **Complainant,** | **2006-11,698 (13B)** |

**v.**

**R. PATRICK MIRK,**

**Respondent.**
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**FINAL REPORT OF REFEREE**
**FINDINGS AND RECOMMENDATIONS AS TO GUILT AND SANCTIONS**

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings according to Rule 3-7.6, Rules Regulating The Florida Bar, the following proceedings occurred: the final hearing was held on March 25, 26, and 27, 2009 in Pinellas County, Florida. A sanctions hearing was held on September 18, 2009 in Pinellas County, Florida. The parties presented testimony, evidence, argument and memoranda to the referee. This Report contains the Referee's findings of fact and recommendations as to guilt and sanctions. All of the transcripts, pleadings, responses, and exhibits received in evidence, and this final Report, will constitute the record in this case to be forwarded to the Supreme Court of Florida.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Henry Lee Paul

For The Respondent: Scott K. Tozian

## II. FINDINGS OF FACT

After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find as follows:

As to Count I
TFB No. 2006-10,783(13B)
Complaint of Lorne V. Lyles

1. On or about February 16, 2005, Lorne Lyles hired Respondent to represent him regarding a dispute with a contractor concerning a construction project.

2. Lyles paid Respondent a $750.00 fee. TR1 48, Exh. TFBP LL 2.

3. Respondent told Lyles that his hourly rate was $250.00 per hour. Mr. Lyles understood that the $750.00 payment was to be applied to the legal services Respondent was going to perform in the future. Lyles understood that Respondent would do three hours of work for the $750.00, and then charge Lyles $250.00 per hour for any work after the $750.00 was exhausted. TR1 49-51.

4. Mr. Lyles acknowledged that it would cost "more than $750.00 to

resolve the matter." (T.67).

5. Mr. Lyles did not sign a written fee agreement with Respondent on February 16, 2005. TR1 50.

6. Lyles testified that he spent forty-five minutes to an hour with Mr. Mirk at their initial meeting. During this time they discussed a collection letter Lyles had received from an attorney representing the other party to a construction dispute. The letter requested a response within thirty days. Mr. Mirk also thoroughly explained the construction licensure issues involved.

Mr. Mirk testified he performed three hours of work on the case in the first few days of representing Mr. Lyles. However, the response letter was not sent by Mr. Mirk until April 6, 2005. There was no evidence Mr. Lyles suffered actual prejudice by the delay.

7. Respondent did not inform Mr. Lyles that the $750.00 would be treated as a non-refundable retainer. TR1 50.

8. On February 25, 2005, Respondent and Lyles signed a contract for professional services. TR1 52, Exh. TFBP LL 3.

9. The contract for professional services did not mention the $750.00 payment, and did not specify the manner in which the advance fees were to be handled.

10. Respondent deposited Lyles's $750.00 check into his operating account.

11. Thereafter, Lyles became dissatisfied with Respondent's representation. On or about July 21, 2005, Lyles called Respondent and requested a refund of the $750.00. TR1 58.

12. Lyles then met with Respondent at his office to obtain a refund. In Respondent's letter to the Florida Bar dated March 16, 2006, he stated he had not run his bills for June and was not yet scheduled to run the bills for July and therefore did not know how much of a refund to which Mr. Lyles was entitled. TFB LL09. Nevertheless, he issued a refund check to Lyles dated July 25, 2005, in the amount of $750.00 drawn on his operating account. Exh. TFB LL 4.

13. I find by clear and convincing evidence that Lyles's $750.00 payment was an advance payment for fees and was not a non-refundable retainer.

14. The credible evidence established Respondent earned some, but not all, of the fee advance prior to issuance of the refund check dated July 25, 2005.

15. Absent an agreement that the $750.00 would be treated as a non-refundable retainer, Respondent was obligated by Rule 5-1.1(a) (1) to hold the advance fee payment in trust until earned.

16. By failing to deposit the funds into the trust account, Respondent

failed to apply trust funds for the intended purpose in violation of Rule 5-1.1(b).

17. On or about December 13, 2005, The Florida Bar received an Inquiry/Complaint from Mr. Lyles against Respondent. Exh. TFBP LL 5. The Florida Bar sent a letter to Respondent requesting him to respond in writing to the Bar regarding Lyles's Inquiry/Complaint. When the Bar received no response, the Bar sent a certified letter to Respondent again requesting a written response. Exhs. TFBP LL 6, 7.

18. Rule 4-8.4(g) requires an attorney to respond in writing to an initial inquiry from the Bar within 15 days and to any follow-up inquiry within 10 days. Respondent failed to respond to the Bar until March 16, 2006.

19. I find by clear and convincing evidence that Respondent failed to timely respond to the Bar's written inquiries concerning Lyles's complaint.

20. Respondent's failure to timely respond to the Bar was a violation of Rule 4-8.4(g).

As to Count II
TFB No. 2006-11,698(13B)
Complaint of Frank Bragano

Conversion of Trust Funds Belonging to Frank Bragano

21. Respondent represented Frank Bragano and his company, Florida Restoration Services. TR2 195. Respondent had a course of dealing with Bragano

in which he represented Bragano as both his corporate attorney and his personal attorney. TR5 587.

22. In 2004, Bragano hired Respondent to resolve a dispute with another attorney, Curran Porto, concerning an investment deal known as the Meridian Project. Porto represented Bragano and was also an investor in the Meridian Project. Respondent negotiated a resolution that resulted in the deposit of $100,462.50 of Meridian funds into his trust account. Exh. TFBP BR 01; TR2 198-200.

23. 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; TR2 202-03. These funds belonged to Bragano personally.

24. Bragano put the $31,487.50 check in his desk drawer, but did not cash it. TR2 203. Bragano testified that he was not concerned about the uncashed 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.

25. In June 2004, Bragano began discussions with Respondent and others

concerning a large multi-million dollar "investment platform." 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 named Montpelier LLC. Bragano was one of the principals in Montpelier. TR2 205-07.

26. Respondent's duties included serving as corporate counsel, drafting the corporate documents, handling negotiations with the joint venture partner, and reviewing and drafting contracts on behalf of the four LLC's. Respondent was to be counselor and attorney for the project. TR2 207-210.

27. Respondent testified that Bragano offered to pay him a flat fee of $40,000.00 for each bond that was approved. (T 622-623, 768, 810; Resp. Ex. 109). Bragano testified that Respondent agreed to only be paid a portion of future profits of the venture, in the event it was successful. (T207, 210, 319, 454-455). The clear and convincing credible evidence established that Respondent entered into a verbal agreement with Bragano on behalf of Montpelier LLC to be paid a portion of future profits of the venture, in the event it was successful, and not a flat fee of $40,000.00. Respondent also made agreements to obtain a percentage of future profits in the event other LLC's were successful. 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.

28. Respondent drafted the corporate documents for four LLCs, including Montpelier. Respondent drafted Articles of Organization for Montpelier and signed the Articles as Registered Agent. Bragano signed as one of the managing members on June 28, 2004. TR2 208-09; TR5 625; R Exh. 92. During the summer of 2004, Respondent participated in continuous meetings and conference calls concerning the project, and flew back and forth to New York numerous times. TR2 205, 207.

29. Respondent had a personal stake in the success of the Montpelier project. This was never documented in a written agreement.

30. Respondent acknowledged he did not prepare a written fee agreement for his services in representing Montpelier at the time of the incorporation. TR5 623. Respondent testified he later prepared certain compensation documentation that was sent to New York but was never signed. TR5 623. Respondent was unable to produce 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.

31. Between Respondent's representations in 2004 to the time of disciplinary investigation, Respondent suffered a series of serious health

conditions, including a stroke, which caused him to close his office in 2006. TR6 737.

32. 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 212-13. Respondent testified he withdrew the funds to cover the cost of setting up the four limited liability corporations, including Montpelier. Respondent stated 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.

33. In or about October 2004, Bragano informed Respondent for the first time that he had not cashed the Meridian check. 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. 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; TR3 404-405.

34. 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. TR2 218.

35. 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. Respondent acknowledged stopping payment on Bragano's trust account check, but claimed that Bragano authorized him to do it so that he could wire a portion of the funds on behalf of Craig Green. TR5 659. Bragano was emphatic in his trial testimony that he never authorized Respondent to stop payment on the Meridian check. TR2 216, 234; TR3 357. I find Bragano's testimony credible that he did not authorize the stop payment and did not know about it.

36. On October 25, 2004, the date the stop payment was entered, Respondent wrote a check to himself for $10,000.00. This was followed by three checks for $2,000.00 each on November 10, November 12 and November 15, 2004, payable to himself. On November 22, 2004, Respondent wrote a check payable to the United States Treasury in the amount of $7,068.14 in payment of 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. Exh. TFBP BR 22 (MEW 034-036).

37. The evidence is clear and convincing that Bragano did not know about these disbursements and did not authorize them. TR2 212-215. Respondent did not inform Bragano that he planned to withdraw the trust funds, even though Respondent spoke to Bragano frequently. TR2 215, 235. I find that Respondent intentionally concealed the unauthorized disbursements from Bragano.

38. On December 19, 2004, Bragano called Respondent to inform him that he was planning to cash the trust account check he had been holding. Bragano wanted to loan the money to a friend. TR2 219.

39. The next day, December 20, 2004, Bragano received a letter by fax from Respondent stating that Respondent had stopped payment on the check. In the letter he stated he applied the funds to payment of fees and expenses incurred, as well as fees and expenses he anticipated incurring in the future. Exh. TFBP BR 03. In the letter, Respondent informed Bragano that he claimed he was to receive a fee of $40,000.00 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 $100,000.00 per year to act as corporate counsel. Exh. TFBP BR 03. Respondent further stated that he had invoiced Montpelier $40,000.00 for services performed

on the financing program. Respondent concluded by stating: "As soon as my compensation is formalized and paid you will be repaid the Meridian funds." Exh. TFBP BR 03. One can't help but note an apparent inconsistency in Respondent's letter. One the one hand he is asserting that he provided and invoiced $40,000 worth of legal services to Montpelier and was owed that amount. This of course exceeds the amount held in trust. Yet at the same time in the same letter Respondent states he will also use the trust account funds for fees and expenses he anticipated incurring in the future. If he sought to collect fees owed to him out of the trust account the entire balance would have been depleted. This of course would leave nothing to apply to the future fees and expenses to which he referred in the letter. Lastly, if as Respondent claims, he intended to use at least some of the Bragano trust account money for future unearned fee and expenses, wouldn't those funds be required to be held in trust?

40. After receiving the letter, Bragano had an angry telephone conversation with Respondent. Bragano was upset that his funds were no longer there and that he could not cash the trust account check. TR2 220, TR4 460.

41. Bragano denied that he or anyone else had ever agreed to pay Respondent a flat fee of $40,000 for setting up Montpelier or the other corporations, or to pay Respondent $100,000 per year. TR2 222.

42. Prior to the December 20, 2004 letter, Respondent had not sent any correspondence to Bragano to inform him about the trust fund withdrawals or to request payment of fees allegedly due. TR6 803. Bragano never received any invoices from Respondent for fees or expenses relating to Montpelier. TR2 225.

43. On or about December 21, 2004, Bragano went to the bank and attempted to cash the $31,487.50 trust account check. Bragano was informed by the bank that the check was no good because a stop payment had been placed on the check. TR3 267.

44. 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. Exh. TFBP BR 04.

45. 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. TR2 240, 244-45; TR3 358-59; TR4 464.

46. In June 2005, after the investment platform had come to an

unsuccessful end, Bragano authorized his 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.

47. On August 11, 2005, Bragano, Lynch and Roig met with Respondent to discuss the matter. TR2 247; TR3 271. Respondent did not provide any invoices at 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. TR4 480.

48. 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. Exh. TFBP BR 06.

49. The clear and convincing evidence shows that Respondent did not have an agreement to be paid a $40,000 flat fee for work done in relation to Montpelier. Although it is not necessary to have a written fee agreement in this instance, the clear and convincing evidence is that Respondent did not have a written fee agreement or a verbal fee agreement for a $40,000 flat fee for work

performed on Montpelier.

50. 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. Respondent's evidence consists of his own testimony, handwritten notes he claims to have made contemporaneously, or letters he wrote after the fact.

51. It is undisputed that there was no executed written fee agreement for a $40,000 flat fee in connection with Montpelier. Although Respondent produced a voluminous amount of documents relating to Montpelier and the investment platform, he was unable to produce any documentation of the alleged flat fee agreement, or any draft or proposal of such an agreement. Respondent produced only a four-word note handwritten by himself ("$40K fee – per bond") to support the alleged agreement. R. Exh. 109. Respondent testified that he never obtained a written fee agreement for the claimed $40,000 fee. TR6 766.

52. Respondent produced a Cash Flow Analysis prepared by Rusty Zuckerman, the project’s CPA. R Exh. 43. The analysis lists first year costs for “legal acctg ect” of $215,000.00. The costs for subsequent years are listed at

$175,000.00. On direct examination Respondent testified this Analysis was prepared while he was in New York on July 2nd and July 3rd. He said everyone was there except for Mr. Lynch, who participated via conference call. TR5 635. Respondent claimed the first year cost breakdown included his $40,000.00 flat fee for the start up as well as $100,000.00 for other legal services to be performed by him in year one. TR5 636. He testified the subsequent years projected costs were only $175,000.00 because they did not include the $40,000.00 year one start up fee. Moreover, he said everyone there was aware of what his fees were going to be. TR5 635. On cross examination Respondent was questioned about the statements he made during his deposition regarding the Cash Flow Analysis. During his deposition Respondent was asked whether the Analysis showed his fees. His response during his deposition was that it did not because it was prepared before he was even there. TR6 758. He further stated that at the time of his deposition he did not remember the Analysis included his fees, even though the document was shown to him at that time. He claims he has been able to think about it and figure it out since then. TR6 759-760.

53. The uncorroborated testimony by Respondent that he had a verbal $40,000 flat fee agreement and that he provided draft fee agreements to Bragano for a $40,000 flat fee is not credible.

54. Until the December 20, 2004 letter, Respondent never told Bragano he was claiming a $40,000 fee for work done on Montpelier. During the disciplinary proceedings, Respondent produced invoices billing Montpelier for $40,000. Bragano had not previously seen these invoices. TR2 225-26. Bragano's partner, Andrew Lynch, testified that he never saw any invoices from Respondent in 2004 for services relating to Montpelier. TR4 471.

55. During the disciplinary proceedings, Respondent produced a billing statement dated October 31, 2004 on the Meridian account showing he stopped payment on the $31,487.50 trust account 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 he never received the October 31, 2004 billing statement, which was addressed to Bragano and Lynch at Bragano's home address in Tierra Verde. TR3 275-76; R Exh. 9.

56. 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 invoice 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. TR5 675.

57. 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. TR2 225.

58. The Referee finds credible the testimony of Bragano and Lynch that they had never previously seen the invoices produced by Respondent during the final hearing.

59. The clear and convincing evidence shows that Respondent agreed to work for Montpelier in exchange for a percentage of future profits. Bragano's testimony that the agreement was that Respondent would receive a percentage of the profits of Montpelier, but would not be paid a flat fee, is credible. TR2 210-11, 221-22; TR3 399-400.

60. Lynch never saw a fee agreement pertaining to how Respondent would be paid for his work on Montpelier. TR4 454-455. Lynch testified to a conversation he had with Respondent about the profits Respondent expected to make from the investment platforms. Lynch understood that Respondent was to receive a percentage of future profits. TR4 454-55. Lynch testified that Respondent was not owed $40,000.00 for setting up Montpelier. TR4 465.

61. Roig testified that his only recollection of a $40,000.00 fee was from Respondent’s letter saying he was supposed to be paid $40,000.00. TR4 516.

Roig does not recall Bragano ever acknowledging him or others agreed to pay Respondent a $40,000.00 fee or for that matter any other set fee. TR4 517. From the conversations Roig had with Bragano, it was his belief Bragano was willing to try and arrange for some compensation from the investors for Respondent for the work he performed on the investment platforms. This however, was not the result of an agreement by anyone to pay Respondent $40,000.00 or any other set amount. TR4 513-516. Roig does not recall Respondent ever raising the issue of a retaining lien in connection with this dispute. T4 514.

62. Respondent complained that by the end of October, he had worked almost four months on the investment project almost full-time without any payment. This is a risk Respondent took when he agreed to be compensated by a percentage of future profits. As it turned out, neither Montpelier nor any of the other investment platforms was successful, and there were no profits. TR2 240-41; 249. Respondent did not receive any percentage of the profits because there were no profits. The hoped for riches did not materialize.

63. After the disciplinary proceedings were before the Referee, Respondent claimed as a defense that he was entitled to take Bragano's funds because he was asserting a retaining lien for fees owed. In support of his position, Respondent cited *Daniel Mones, P.A. v. Smith*, 486 So.2d 559 (Fla. 1986), in

which the Florida Supreme Court held that an attorney has a right to a retaining lien for fees owed to the attorney on client funds not held in trust for a specific purpose.

64. I find that the *Mones* case, cited by Respondent, is not controlling here. In *Mones*, the Florida Supreme Court held that an attorney could assert a retaining lien because the funds were not held for a specific purpose, distinguishing *Florida Bar v. Bratton*, 413 So.2d 754, 755 (Fla. 1982). *Bratton* holds 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.

65. The facts of *Mones* are distinguishable from the facts of this case. 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. This is confirmed by Respondent's statement that funds cannot be disbursed while a check is outstanding. TR6 745, 802-03. 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.

66. At no time during 2004, 2005, or 2006 did Respondent inform Bragano that he was asserting a retaining lien on the Meridian funds. TR3 298-99. Respondent had never previously asserted a retaining lien against a client and concealed his unauthorized disbursements from Bragano. TR6 797.

67. As a threshold matter, Respondent's reliance on *Mones* is rejected because I find by clear and convincing evidence there was never any agreement for payment of a $40,000.00 flat fee to Respondent. It should be noted, however, that even if Respondent's position that he had a verbal agreement with Bragano to be paid $40,000.00 for his work on Montpelier was credible, this would have been a corporate obligation of Montpelier, and would not have authorized the secret disbursement of funds held for Bragano as an individual. Even if Respondent's version of the verbal agreement was accepted, there would be no right to assert a retaining lien under *Mones* because of the separate identities of Bragano, the owner of the funds of trust, and of Montpelier, an LLC. Respondent's defense that Bragano acted as an incorporator and was therefore personally liable for the

alleged $40,000 fee is not supported in law or fact. Therefore, his reliance upon *Ratner v. Central National Bank of Miami*, 414 So. 2d 210 (Fla. 3d DCA 1982) is not supported by the record. Respondent admitted he did not inform Bragano that he would consider him to be personally liable for the alleged fee agreement. TR6 754.

68. Respondent without authorization stopped payment on the trust account check to Bragano and began disbursing to himself the Meridian funds. Bragano's unauthorized disbursements to himself of Bragano's funds constituted a conversion of client funds.

69. I find by clear and convincing evidence that Respondent failed to hold Bragano's funds in trust in violation of Rule 5-1.1(a).

70. I find by clear and convincing evidence that by disbursing trust funds belonging to Bragano to himself as fees, Respondent converted client funds to his own use in violation of Rule 5-1.1(b).

71. I find by clear and convincing evidence that by refusing to disburse the $31,487.50 from his trust account as requested by Bragano, Respondent failed to promptly deliver funds his client was entitled to receive in violation of Rule 5-1.1(e).

Failure to Produce Trust Account Records

72. On October 13, 2006, The Florida Bar sent a letter to Respondent requesting him to provide his trust accounting records. Exh. TFBP BR 09.

73. 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." Exh. TFBP BR 10.

74. 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.

75. Respondent made a decision not to comply with the Subpoena. TR3 420-21. At the final hearing, Respondent indicated he did not comply because of health problems. TR6 737-39, 785. However, respondent did not raise his health issues when he sent a letter to the Florida Bar objecting to the request to produce trust records. TFBP BR10. In this letter he set forth with factual specificity the reasons why he chose not to comply. This included reference to specific events and their dates of occurrence. His only mention in the letter of health issues referred to medical conditions existing three to four years earlier. The absence of

mention in his letter of poor health as a reason for non compliance coupled with his detailed reasons for not complying is weighty and significant.

76. 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.

77. On February 28, 2007, The Florida Bar filed a Petition for Contempt and Order to Show Cause. Exh. TFBP BR 14. 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.

78. 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.

79. I find by clear and convincing evidence that by failing to timely

provide his trust accounting records pursuant to a subpoena issued by the Grievance Committee, Respondent failed to comply with a subpoena in violation of Rule 5-1.2(g).

III. Recommendations as to Whether or Not the Respondent should be Found Guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

As to Count I
TFB No. 2006-10,783(13B)
Complaint of Lorne V. Lyles

I find Respondent guilty of violating Rule 4-8.4(g) (failure to timely respond in writing to the Bar); Rule 5-1.1(a) (Nature of Money or Property Entrusted to Attorney); and Rule 5-1.1(b) (Application of Trust Funds or Property to Specific Purpose).

As to Count II
TFB No. 2006-11,698(13B)
Complaint of Frank Bragano

I find Respondent guilty of violating Rule 5-1.1(a) (Nature of Money or Property Entrusted to Attorney); Rule 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 Rule 5-1.1(g) (Failure to Comply with Subpoena).

IV. Recommendation as to Disciplinary Measures to Be Applied: In

determining the appropriate recommendation I have read and considered the following decisional law submitted by the parties:

*Florida Bar v. Lord*, 433 So.2d 983 (Fla. 1983); *Florida Bar v.McShirley*, 573 So.2d 807 (Fla. 1991); *Florida Bar v. Valentine-Miller*, 974 So.2d 333 (Fla. 2008); *Florida Bar v. Brownstein*, 953 So.2d 502 (Fla. 2007); *Florida Bar v. Martinez-Genova*, 959 So.2d 241 (Fla. 2007); *Florida Bar v. Barley*, 831 So.2d 163 (Fla. 2002); *Florida Bar v. Massari*, 832 So.2d 701 (Fla. 2002); *Florida Bar v. Korones*, 752 So.2d 586 (Fla.2002); *Florida Bar v. John Cotter Barrett*, SC06-2162 (including report of referee); *Florida Bar v. McFall*, 863 So.2d 303 (Fla. 2003); *Florida Bar v. Rogers*, 583 So.2d 1379 (Fla. 1991); *Florida Bar v. Barley*, 541 So.2d 606 (Fla. 1989); *Florida Bar v. Sawyer*, 334 So.2d 259 (Fla. 1996); *Florida Bar v. Grosso*, 760 So.2d 940 (2000); *Florida Bar v. MacMillan*, 600 So.2d 457 (Fla. 1992); *Florida Bar v. McNamara*, 634 So.2d 166 (Fla. 1994); *Florida Bar v. Stark*, 616 So.2d 41(Fla. 1993); *Florida Bar v. Tauler*, 775 So.2d 944 9Fla. 2000);

Based upon my findings of fact and applicable law disbarment is presumed to be the appropriate sanction. I find insufficient mitigation to render such a sanction unfair or inappropriate. *Florida Bar v. Brownstein*, 953 So.2d 502 (Fla. 2007). Therefore I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

a) Disbarment

b) Restitution to be paid to the complainant, Frank Bragano, in the amount of amount of $31,487.50. The conversion was completed on April 11, 2005. Interest at the statutory rate should accrue from April 11, 2005. Restitution should be paid no later than thirty days after the Supreme Court approves the Report of Referee or otherwise orders restitution.

c) Payment of The Florida Bar's costs in these proceedings.

V. <u>Personal History, Past Disciplinary Record, and Aggravating and Mitigating Factors</u>: Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

Personal History of Respondent:
Age: 61
Date admitted to the Bar: December 1, 1982.

Florida Standards for Imposing Lawyer Sanctions

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

**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 case 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 following aggravating and mitigating factors are applicable:

**9.2 Aggravation.**

Standard 9.22 lists aggravating factors that may justify an increase in the

degree of discipline to be imposed. The applicable aggravating factors in this case include:

**9.22 (a) prior discipline**. The Florida Bar File No. 2003-10,432(13B): In 2003, Respondent received an admonishment for minor misconduct. Respondent failed to timely communicate with his client regarding a post-judgment collection matter involving funds deposited into his trust account. The matter was eventually resolved and Respondent provided the client with the promised financial document. Health issues contributed to the failure to communicate. Respondent also failed to timely respond to the Bar's inquiries after the client filed a grievance.

**9.22 (b) dishonest or selfish motive**. 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 unrelated 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 Florida Bar v. Valentine-Miller*, 974 So.2d 333, 337 (Fla. 2008).

**9.22 (e) bad faith obstruction of the disciplinary process by intentionally**

**failing to comply with rules or orders of the disciplinary agency**. Respondent failed to timely respond to the Bar in the Lyles matter. In the Bragano matter, Respondent's failure to produce his trust account records added 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 Florida Bar v. Brownstein*, 953 So.2d 502, 510 (Fla. 2007).

**9.22 (i) Substantial experience in the practice of law**. Respondent was admitted to the Florida Bar in December 1982 and has been practicing law for 27 years.

**9.22 (j) Indifference to making restitution**. Respondent repeatedly failed to respond to his client's demands for the return of his trust funds. Respondent has shown complete indifference to returning the funds he took from Bragano.

**9.3 Mitigation.**

Standard 9.32 lists mitigating factors that may justify a reduction in the degree of discipline to be imposed. The following mitigating factor is applicable:

9.32 (g), Character and Reputation. Respondent established his favorable reputation for character and his professional and skillful representation of his clients through three members of the judiciary and two attorneys. The testimony received during the course of both hearings established the respondent possesses

above average legal ability.

VI. Statement of Costs and Manner in Which Costs Should Be Taxed: I find the following costs were reasonably incurred by The Florida Bar:

| | | |
|---|---|---|
| **1.** | **Administrative Costs** | |
| | Pursuant to Rule 3-7.6(q)(1)(l) | $ 1,250.00 |
| **2.** | **The Florida Bar Investigator Time** | |
| | Jeffrey C. Satchwell (10.10 hours.) | $ 272.70 |
| | Richard Giannotti | $ 9.36 |
| | Larry R. Sprinkle (1.6 hours) | $ 36.80 |
| **3.** | **The Florida Bar Investigator Expenses (Mileage, tolls, copying)** | |
| | Jeffrey C. Satchwell (10/23/08) | |
| | Subpoena service – Gregory Orcutt | |
| | Mileage: 42.0 miles @ $0.585 per mile | $ 24.57 |
| | Tolls | $ 1.00 |
| | **SUBTOTAL** | $ 25.57 |
| | Richard Giannotti (10/24/08) | |
| | Subpoena service | |
| | Mileage: 16.0 miles @ $0.585 per mile | $ 9.36 |
| | Jeffrey C. Satchwell (11/03/08) | |
| | Subpoena Service | |
| | Mileage: 44.0 miles @ $0.585 per mile | $ 25.74 |
| | Larry R. Sprinkle (11/10/08) | |
| | Subpoena service in Gibsonton | |
| | Mileage: 74.0 miles @ $0.585 per mile | $ 43.29 |
| | Michael B. Lunsford (11/12/08) | |

| | | |
|---|---|---|
| Delivered records to Scott Tozian | | |
| Mileage: 28.0 miles @ $0.585 per mile | $ | 16.38 |
| Tolls | $ | 1.00 |
| **SUBTOTAL** | $ | 17.38 |
| | | |
| Michael B. Lunsford (12/09/08) | | |
| Subpoena service - Nardelli | | |
| Mileage: 24.0 miles @ $0.585 per mile | $ | 14.04 |
| | | |
| Jeffrey C. Satchwell (1/07/09) | | |
| Investigation | | |
| Mileage: 38.0 miles @ $0.505 per mile | $ | 19.19 |
| Tolls | $ | 3.00 |
| **SUBTOTAL** | $ | 22.19 |
| | | |
| Jeffrey C. Satchwell (1/27/09) | | |
| Deliver documents to Tozian's office and Judge Carballo | | |
| Mileage: 56.0 miles @ $0.550 per mile | $ | 30.80 |
| Tolls | $ | 1.00 |
| **SUBTOTAL** | $ | 31.80 |
| | | |
| Larry R. Sprinkle (3/17/09) | | |
| Travel to Gibsonton to interview witness – Lorne Lyles | | |
| Mileage: 25.0 miles @ $0.550 per mile | $ | 13.75 |
| | | |
| Michael B. Lunsford (5/22/09) | | |
| Delivered documents to Judge Carballo | | |
| Mileage: 36.0 miles @ $0.550 per mile | $ | 19.80 |

**4. Court Reporter Expenses**

| | | |
|---|---|---|
| Clark Reporting Service | | |
| Appearance at Case Management Conference | $ | 75.00 |
| | | |
| Clark Reporting Service | | |
| Transcript of Deposition of Frank Bragano, Witness | $ | 250.00 |
| Copy of Exhibits | $ | 11.20 |

| | |
|---|---|
| Delivery | $ 7.50 |
| **SUBTOTAL** | $ 268.70 |

Clark Reporting Service

| | |
|---|---|
| Transcript of Deposition of Andrew Lynch, Witness | $ 162.50 |
| Delivery | $ 7.50 |
| **SUBTOTAL** | $ 170.00 |

Clark Reporting Service

| | |
|---|---|
| Appearance Fee of Deposition of R. Patrick Mirk, Respondent | $ 250.00 |
| Transcript of Deposition (original and copy) | $ 733.50 |
| Copy of Exhibits | $ 62.40 |
| Delivery | $ 7.50 |
| **SUBTOTAL** | $ 1,053.40 |

Clark Reporting Service

| | |
|---|---|
| Transcript of Deposition of Ricardo Roig, Witness | $ 269.10 |
| Copy of Exhibits | $ 22.40 |
| Delivery | $ 14.00 |
| **SUBTOTAL** | $ 305.50 |

Clark Reporting Service

| | |
|---|---|
| Transcript of Deposition of Curran K. Porto, Witness | $ 168.00 |
| Delivery | $ 25.00 |
| **SUBTOTAL** | $ 193.00 |

Clark Reporting Service

| | |
|---|---|
| Transcript of Deposition of Lorne Lyles, Witness | $ 131.25 |
| Copy of Exhibits | $ 1.60 |
| Delivery | $ 25.00 |
| **SUBTOTAL** | $ 157.85 |

Clark Reporting Service

| | |
|---|---|
| Appearance at Final Hearing 3/25/09 | $ 475.00 |
| Transcript of Final Hearing (original and copy) | $ 1,161.00 |
| Postage/delivery | $ 7.50 |
| **SUBTOTAL** | $ 1,643.50 |

Clark Reporting Service

| | |
|---|---|
| Appearance at Final Hearing 3/26/09 – 3/27/09 | $ 900.00 |
| Transcript of Final Hearing (original and copy) | $ 2,713.50 |
| Delivery of Transcript | $ 15.00 |
| **SUBTOTAL** | $ 3,603.50 |

**5. Henry Lee Paul, Bar Counsel, Expenses**

Attendance at Final Hearing on 3/25-27/09

| | |
|---|---|
| Mileage: 132.0 miles@ $0.550 per mile | $ 72.60 |
| Copies at Kinko's | $ 9.50 |
| **SUBTOTAL** | $ 82.10 |

**6. Chardean M. Hill, Bar Counsel, Expenses**

Attendance at Final Hearing on 3/20/09

| | |
|---|---|
| Mileage: 31.0 miles@ $0.550 per mile | $ 17.05 |

**7. Cynthia L. Miller, Bar Counsel, Expenses**

Attendance at Final Hearing on 3/25-27/09

| | |
|---|---|
| Mileage: 92.4 miles @$0.550 per mile | $ 50.82 |
| Meals: Lunch (1) | $ 7.25 |
| **SUBTOTAL** | $ 58.07 |

**8. Clem Johnson, Auditor, Expenses**

Testify at final hearing in Clearwater on 3/25-26/09

| | |
|---|---|
| Mileage: 72 miles @ $0.550 per mile | $ 39.60 |
| Meals: Lunch (1) | $ 6.75 |
| **SUBTOTAL** | $ 46.35 |

**9. The Florida Bar Copying Costs**

| | |
|---|---|
| 11/04/08 – 204 pages @ $0.15 per page | $ 30.60 |
| 11/06/08 – 2,111 pages @ $0.15 per page | $ 316.65 |
| 11/25/08 – 88 pages @ $0.15 per page | $ 13.20 |

| | | |
|---|---|---|
| 01/05/09 – 530 pages @ $0.15 per page | $ | 79.50 |
| 02/11/09 – 97 pages @ $0.15 per page | $ | 14.55 |
| 03/23/09 – 459 pages @ $0.15 per page | $ | 68.85 |
| 03/24/09 – 565 pages @ $0.15 per page | $ | 84.75 |
| 05/20/09 – 1068 pages @ $0.15 per page | $ | 160.20 |
| **SUBTOTAL** | $ | 768.30 |

**10. Witness Fees and Expenses**

| | | |
|---|---|---|
| Bank of America (Witness Expense on 12/2408) | | |
| Copies of Documents – Qty. 3 | $ | 0.75 |
| Generalist Time – 1 hour | $ | 8.50 |
| Postage | $ | 3.21 |
| **SUBTOTAL** | $ | 12.46 |
| Wachovia Bank, N.A. (Witness Expense on 1/08/09) | | |
| Research Time – 14 hours @ $10.00 per hour | $ | 140.00 |
| Number of Items: 6 @ $0.15 per item | $ | 0.90 |
| **SUBTOTAL** | $ | 140.90 |
| Wachovia Bank, N.A. (Witness Expense on 1/23/09) | | |
| Research Time – 14 hours @ $10.00 per hour | $ | 140.00 |
| Number of Items: 22 @ $0.15 per item | $ | 3.30 |
| **SUBTOTAL** | $ | 143.30 |
| Wachovia Bank, N.A. (Witness Expense 2/03/09) | | |
| Research Time – 8 hours @ $10.00 per hour | $ | 80.00 |
| Number of Items: 2 @ $0.15 per item | $ | 0.30 |
| **SUBTOTAL** | $ | 80.30 |
| Wachovia Bank, N.A. (Witness Expense 3/23/09) | | |
| Research Time – 3 hours @ $10.00 per hour | $ | 30.00 |
| Number of Items: 1 @ $0.15 per item | $ | 0.15 |
| **SUBTOTAL** | **$** | **30.15** |

**GRAND TOTAL** **$9,499.85**

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 29th day of October, 2009.

_____

The Honorable John D. Carballo
Referee

Original to:

The Honorable John D. Carballo, Referee, Pinellas County Criminal Justice Center, 14250 49th Street North, Clearwater, Florida 33762

Copies to:

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