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 REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

Respectfully Submitted by:
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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 Respondent.

As the client admitted that the trust funds were not for a specific purpose, it was permissable 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. Now that the client has repudiated the settlement agreement, litigation has been commenced to collect the balance of the fee.

ARGUMENT

I. THE FEE DISPUTE IS A CIVIL MATTER AND IS STILL PENDING.

In the Bragano matter, the only issue truly in dispute is the fee issue. Everyone agreed that Respondent did the work requested of him and that he was entitled to a fee for his services. Respondent's testimony, and all of the written evidence claims a $40,000.00 flat fee for the Montpelier bond issue. The written evidence includes the original attorney notes, the billing statement, the notes to the bond closing agent, the loan cost spread sheet, all the letters to the client and the post settlement meeting letter from the Respondent to the client and his new attorney, all which claim $40,000.00 is due from the client. There is no written evidence from the client or his attorney ever disputing the amount claimed or that the fee was due when taken. There is no written evidence at all claiming that no fee is due or that the fee is contingent.

The only dispute from the actions of the client and the one letter from his new attorney (Roig) is the argument that the client (Bragano) should not have to pay the fee alone. He argues that either the other members of Montpelier or the company itself should have to pay. This is, of course, a fee dispute.

The problem with the Referee's findings is his clear misunderstanding or lack of knowledge in the field of corporate formation law, which he admitted to at the trial. The Bar argues that the company hired the Respondent and only the company should have to pay. This isn't the case and can't be true by the facts in evidence.

It is undisputed that Bragano came to Respondent, with no prior warning, with a proposal to set up four LLC's and to obtain a large bond offering for each ($100,000,000.00), and that Respondent knew nothing of these projects and had never met any of the other prospective LLC members except Lynch. Thus, it was impossible for Respondent to have been hired by the companies, as they did not exist until Respondent set them up a few days later.

Because it was Bragano, and Bragano alone, who hired Respondent to set up the companies and do all the work requested, Bragano became the promoter of Montpelier and the other three initial LLC's. The other members and the corporations were asked to sign fee agreements, ratifying what Bragano had done, but they never did.

The Bar and the Referee have confused what was anticipated to be done with what was legally required to be done. The undisputed testimony

by Respondent was that he expected to be paid a $40,000.00 flat fee at each of the four closings. He explained that this was customary in these types of large, multi-million dollar closings. Of all the attorneys who attended the trial, it appeared the only one with any such experience was Respondent. The Bar brought no expert to refute this industry custom. The Referee admitted no such knowledge or experience.

In failing to follow Ratner v Central National Bank of Miami, 414 So2d 210 (Fla 3DCA 1982), the Referee assumed that the expectation of payment at the closing was somehow legally controlling upon Respondent's right to payment. Clearly, Ratner holds that the promoter remains responsible for all start-up expenses until either the service provider agrees to look to another for payment or the company actually pays. Respondent gave the other members and the company this option in each letter, but the client could never get the other members to agree to pay a share.

The fabrication referred to by Bar counsel is not Respondent's demand to be paid a flat fee, but rather, the recent fabrication of some sort of vague profit sharing plan for Montpelier. There are two problems with this newly found theory.

First, what is the agreement and where are the documents? The fact that such an arrangement was contemplated months later on different projects with different LLC's and different members does not relate to work done in July and August. Secondly, The Bar's theory that no fee was due because no profits were realized again raises the disputed fee issue. The undisputed fact is that in September or October, Bragano arranged for Montpelier to sell the bond project to another company. This was done without notice to Respondent. The bond escrow funds, from which Respondent was to be paid, were then transferred to one of the new LLC's formed in October.

When one party breaches a contract, making performance (here, payment), impossible, he is still responsible for payment for services, either in contract or in quantum meriut. This is one of the issues that is still pending in the trial court in Tampa.

As to The Florida Bar v Quick, 279 So2d 4 (Fla 1973), The Bar misses the point. A fee dispute is only a proper target for Bar intervention if the client claims a clearly excessive fee. Otherwise, the dispute should be handled by a trial court. There is a fee dispute (how much and who pays?) here. There is no claim that the fee was excessive. For that reason this

matter should be remanded back to await the outcome of the trial court.

II. THE REFEREE'S FINDINGS IGNORED CLEAR AND CONVINCING EVIDENCE THAT THE MONTPELIER FEE WAS NOT A SHARE OF FUTURE PROFITS.

The client, despite numerous letters, advice of counsel, and a live, face-to-face settlement meeting, never wrote a letter refuting the claimed fee of $40,000.00. Never. The client, despite three other lawsuits with Respondent since the dispute arose, never brought a claim or counterclaim to have the money taken returned. Neither the client nor his several attorneys ever wrote stating the fee was a share of profits. There is no fee agreement for a share of profits from Montpelier.

All of this evidence should have been clear and convincing that there was not a profit sharing agreement. The very fact that it only arose for the first time at trial supported this position, which was crowned by the fact that neither Bragano nor Lynch had any idea how much the fee was to be. Respondent's claim was clear, consistent, contemporary and written. [See letters of December 2004]. The client's claim was vague, recently fabricated, and completely unsupported by written evidence.

The Bar says the Referee weighed all the evidence. However, if you

look at the specific findings on specific issues, the Referee states specifically what facts and evidence he was relying on to support each finding. Thus, this Court must conclude that the exclusion of relevant evidence from a particular finding presumes that the Referee did not include it in that finding.

III. THE REFEREE'S FINDINGS IGNORE CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT WAS ENTITLED TO A RETAINING LIEN.

The Referee's finding that Mones v Smith, 486 So2d 559 (Fla 1986) does not apply was incorrect. The client himself admitted that the funds were not held for a specific purpose, after the Craig Greene loan was resolved. The settlement check was written and delivered in June, but the check was never cashed. All of the specific purpose cases cited by The Bar involve funds given to the attorney for some purpose other than to return it to the client. In none of the cases cited by The Bar on the issue of conversion were the funds taken from trust and applied to a fee claimed by the attorney.

In all of the cases cited to the Referee at the sanction hearing, where there was a fee dispute involving trust funds, the maximum sanction was a suspension of between 30 and 90 days. Only in those cases where there was no colorable claim by the attorney was there a disbarment.

IV. THE CONDUCT OF THE PARTIES ESTABLISHED THAT THE FEE AND LIEN DISPUTES HAD BEEN SETTLED BEFORE THE BAR COMPLAINT WAS FILED.

The Bar's entire argument that this dispute was not settled in August 2005 is the bold statement that Respondent's letter of August 23, 2005 was uncorroborated. To start, both Roig and Bragano admit they received the letter. Both admit they never responded to the letter with a letter denying anything in Respondent's letter.

Consider now the conduct of the participants. Roig did not sue Respondent; Roig and Respondent split up the remaining cases; Respondent continued to work for Bragano and received payment for it; Respondent received $70,000.00 for Bragano and Lynch in November 2005, processed it through trust, and neither party claimed any part of it for Montpelier; Bragano did not complain to The Bar until he hired yet another attorney, Orcutt, who advised Bragano to complain to The Bar after Respondent withdrew from the Banning case, weeks before trial, over Bragano's objection after Orcutt had convinced Bragano and Lynch to allow Orcutt to sue Respondent for involvement in a transaction for which he was never hired. Neither The Bar nor the Referee even try to explain why these undisputed facts don't clearly show conduct consistent with settlement.

Additionally, neither The Bar nor the Referee explain why the fact that Bragano never sued Respondent to get his money back, despite several opportunities to do so, doesn't support the existence of a settlement.

There was a settlement and Orcutt advised Bragano to breach it.

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 April 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 Parkway, Suite 2580, Tampa, Florida 33607.

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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.

BY _____

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