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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
Complainant,

Sup Ct. Case No. SC11-1780
TFB File#: 2010-70,709(11M)

vs.

JOSE CARLOS MARRERO,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Florida Rules

PRELIMINARY STATEMENT

The Florida Bar petitions for review of the Amended Report Referee which found that Respondent was not liable for violating Rules 4-8.4(c) and 5-1.1(b) of the Rules Regulating the Florida Bar.

The Florida Bar will be referred to as the "Bar".

References to the Formal Hearing Transcript will be referred to as (Tr__).

References to Deposition Testimony be referred to as ("Witness" Depo.-Page).

ISSUES PRESENTED

1. Did the Referee properly find that Respondent did not violate Rule 4-8.4(c) of the Rules Regulating the Florida Bar when there was no clear and convincing evidence that Respondent intended to commit a fraud or engage in any other dishonest behavior?

2. Did the Referee properly find that Respondent did not violate Rule 5-1.1(c) of the Rules Regulating the Florida Bar when there was no clear and convincing evidence that Respondent improperly maintained money or property of another entrusted to him for a specific purpose?

3. Did the Referee properly not discipline Respondent for uncharged violations of the Rules Regulating the Florida Bar when, even though there was sufficient evidence to sustain a violation of the uncharged misconduct; the conduct was not intertwined with the violations alleged in the complaint; the Bar admitted it was not intertwined with the conduct alleged in the complaint; the Bar waived the opportunity to charge Respondent with the uncharged misconduct and where the uncharged misconduct was the basis of Respondent's defense?

4. Should the Court, in the event that it finds Respondent responsible for some misconduct, remand the matter to the Referee for findings of fact concerning appropriate discipline?

Standard of Review

In order to sustain a disciplinary decision against an attorney there must be clear and convincing evidence that the attorney committed a violation of the Rules Regulating the Florida Bar. *The Florida Bar v. McCain*, 361 So.2d 700 (Fla. 1978).

The Referee's findings of fact carry a presumption of correctness that should be upheld unless it is clearly erroneous or without support in the record. *The Florida Bar v. Brown*, 905 So.2d 76, 81(Fla.2005). Absent a showing that the Referee's findings are clearly erroneous or lacking in evidentiary support, this court is precluded from reweighing the evidence and substituting its judgment to that of the Referee. *The Florida Bar v. Wohl*, 842 So.2d 811, 814 (Fla. 2003). The party contending that the Referee's findings of fact are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings. *The Florida Bar v. Carlon*, 820 So.2d 891, 898 (Fla. 2002); *The Florida Bar v. Maurice*, 955 So. 2d 535 (Fla. 2007). The Referee's specific factual finding in this case that Respondent did not commit any intentional acts of impropriety must be upheld if there is competent substantial evidence in the record to support it. *The Florida Bar v. Watson*, 76 So.3d 915 (Fla. 2011).

SUMMARY OF ARGUMENT

The Amended Report of Referee should be sustained because there was no clear and convincing evidence that Respondent violated Rules 4-8.4(c) and 5-1.1(b) of the Rules Regulating the Florida Bar.

There was substantial competent evidence to support the Referee's findings of fact and conclusion of law that Respondent did not violate Rule 4-8.4(c) of the Rules Regulating the Florida Bar. In order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent. In this case Respondent did not intentionally make misrepresentations, act dishonestly or engage in a fraud. Respondent did not do any of the following: (1) negotiate any of the contracts between any of the parties; (2) participate in structuring the transactions; (3) close the loan for either transaction; (4) represent any of the parties as an attorney in the transaction; (5) sign any HUD-1 statements or contracts in which he attests to borrowers having made a deposit; (6) represent that there was a deposit escrowed for the purchase of the property; (7) use his trust account for any part of the loan transactions; and (8) did not personally profit from either loan transaction. Both loan transactions were designed, structured and carried out by an individual other than Respondent.

Although Respondent's signature appeared on documents which failed to disclose certain key information, those documents were not prepared by him. In fact, Respondent did not know how to prepare those documents and had no training on how to perform closings or do title work. There was no evidence presented that Respondent knew that the documents contained false or incomplete information when he signed them and that the documents were inaccurate. At best, there was evidence of Respondent's negligence. However, there was no proof that Respondent intended to perpetrate a fraud or engage in dishonest misconduct.

Moreover, the Bar did not present any evidence, let alone substantial competent evidence, that demonstrated that Respondent had the mal intent necessary in order to discipline him for violating Rule 4-8.4(c) of the Rules Regulating the Florida Bar.

There was no clear and convincing evidence that Respondent violated Rule 5-1.1(b) of the Rules regulating the Florida Bar. In fact, the evidence demonstrated the contrary. Respondent did not misappropriate any client funds; did not convert any client funds and did not improperly disburse client funds. The testimony of the Bar's auditor confirmed that Respondent did not misappropriate any client funds which were deposited in his law firm's trust account or Weston Title's escrow account.

Respondent did exactly what Gonzalez told him to do with the subject funds. Specifically, Gonzalez instructed Respondent to immediately disburse the loan money she deposited into Weston's escrow to the borrowers so that she could start collecting interest. Respondent carried out Gonzalez' instructions exactly as she directed. Accordingly, there was no substantial competent evidence submitted by the Bar that demonstrated that Respondent violated Rule 5-1.1(b) of the Rules regulating the Florida Bar.

The Referee properly did not discipline Respondent for uncharged violations of the Rules Regulating the Florida Bar. The uncharged conduct was not intertwined with the conduct alleged in the complaint. Respondent and the Bar agreed that a violation of Rule 4-5.3 was not within the specific scope of the allegations contained in the complaint. Additionally, the Bar waived its opportunity to discipline Respondent based upon the uncharged conduct. The Bar knew about the alleged uncharged misconduct but it specifically chose not charge him with it. Finally, the uncharged conduct was the basis of Respondent's defense and therefore he could not be disciplined for the same conduct.

In the event that the Court finds Respondent liable for any misconduct, it should remand the matter to the Referee for findings of fact concerning Respondent's appropriate discipline. To do otherwise forces Respondent to speculate and almost admit to a rule violation. Respondent is also unable to argue the appropriate standard of discipline until he knows exactly what rule he is deemed to have violated.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Procedural History

The Bar filed a one count complaint alleging that Respondent violated Rules 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and 5-1.1(b) (trust account violations) of the Rules Regulating the Florida Bar. The Honorable Jacqueline Schwartz, County Court Judge for the 11th Judicial Circuit, was appointed Referee. Respondent moved to dismiss the complaint for failure to state a cause of action since it failed to contain proper ultimate facts to support the nature of the violations alleged. The Bar opposed the motion arguing that the Florida Rules of Civil Procedure did not apply and that all the Bar was required to allege was a "bare bones" allegation of the rule violations against Respondent. Referee Schwartz denied the Motion to Dismiss. Referee Schwartz was subsequently disqualified. The Honorable Abby Cynamon, Circuit Court Judge for the 11th Judicial Circuit, was appointed as the successor Referee. Respondent moved for rehearing of his prior Motion to Dismiss. Referee Cynamon denied the motion.

Respondent answered the complaint and participated in discovery. Respondent served interrogatories seeking, *inter alia,* that the Bar identify each act or omission committed by Respondent that supported the alleged Rules violations. The Bar answered these interrogatories by simply referring Respondent to the

allegations in the complaint. Respondent moved to compel better answers but the motion was denied.

Trial in this cause was held on April 19-20, 2012, April 27, 2012 and May 18, 2012. The Bar called complainant, Ileana Gonzalez, and the Bar's auditor, Thomas Duarte, Esq. as its witnesses at trial. Mr. Duarte was qualified as an expert witness over Respondent's objection. Respondent testified in his own defense. The depositions of Ileana Gonzalez, Alexander Borrell, Esq., Thomas Duarte, Esq. and Jose Marrero were also entered into evidence during the trial without objection.

On July 16, 2012, the Referee issued her Report of Referee. On August 28, 2012, the Referee, *sua sponte,* issued her Amended Report of Referee. The Referee stated that the Bar did not prove by clear and convincing evidence that Respondent committed a violation of Rule 8-1.4(c) or 5-1.1(b) of the Rules Regulating the Florida Bar. The Referee, found, however, that Respondent was negligent in his oversight of the employees of his title company and that this was sufficient evidence to constitute a violation of Rule 4-5.3(b) (failure of lawyer to adequately supervise non-lawyer employees). The Referee did not discipline Respondent for this negligence inasmuch as the Bar strenuously argued that since it did not allege a violation of Rule 4-5.3(b) in its complaint, it was outside the scope of the charged violations.

The Bar petitioned for review and filed its Initial Brief. Respondent now files this Answer Brief.

Statement of Facts

Respondent was admitted to the Florida Bar in 2002. In addition to practicing law, Respondent was also the President of Weston Professional Title ("Weston"), a company that wrote title policies and closed real estate transactions. (Bar Complaint, p. 2 & Tr.364). Rick Pedrosa was Respondent's partner in Weston. (Tr.363). Pedrosa was also a professional mortgage broker who owned the Home Mortgage Specialists ("HMS"), a private mortgage business that was separate and apart from Weston. (Tr. 53, 56-59; Gonzalez Depo. pp. 11, 25, 46, 49, 55; Marrero Depo. pp. 30, 45).

Ileana Gonzalez ("Gonzalez") was a "hard equity lender" who was in the business of providing high interest rate loans to borrowers. (Tr. 367). Pedrosa, through HMS, had an ongoing business relationship with Gonzalez wherein he would introduce borrowers to Gonzalez and she would lend them money at very high interest rates ranging between 9 and 14 percent. (Tr. 31-32, 51, 367; Gonzalez Depo. pp. 27, 46, 58). Weston was the closing agent for the loans provided by Gonzalez to Pedrosa's borrowers. (Gonzalez Depo. pp. 49, 55)

Gonzalez wanted to start earning interest on her loans as soon as possible. (Tr. 54; Gonzalez Depo. pp. 44, 55-56). Therefore, it was Gonzalez' business

practice to disburse the loan funds to Pedrosa's borrowers prior to a formal closing, receipt of a mortgage and/or receipt of any other security documents. (Tr. 30-32; Gonzalez Depo. p. 28). Moreover Gonzalez did not check the borrower's credit, did not check the borrower's employment, did not appraise the property she was lending against and she did not even know the names of Pedrosa's customers until after she had funded their loans (Tr. 49; Gonzalez Depo. pp. 25-26). The reality is that Gonzalez, a private hard equity lender, wanted the borrowers to receive the money immediately so that she could start receiving interest payments as soon as possible. (Tr. 54; Gonzalez Depo. p. 44).

The subject transaction was not a conventional loan with a conventional closing. (Marrero Depo. pp. 35-36). Ms. Gonzalez was a private lender. (Gonzalez Depo. p. 53). Given the interest rates Gonzalez was charging, she did not care about the details of the transaction, the closing date, and if, when and how a closing was to occur. (Tr. 30-32; Gonzalez Depo. pp. 26-28). Gonzalez did business this way with Pedrosa solely as result of her trust in him based upon her success in her past loans with his customers. (Tr. 367; Gonzalez Depo. pp. 27, 4).

The first transaction alleged in the complaint is borne out of a loan provided by Gonzalez to Pedrosa's employee, Karla Gutierrez ("Gutierrez").[1] Gutierrez

[1]The borrowers in the subject transaction were Karla Gutierrez and her husband Reynaldo, as well as her father and mother, Cipriano and Gloria Carrero. The

wanted to purchase a home in Weston, Florida. Pedrosa referred Gutierrez to Gonzalez. (Tr. 23-24). Consistent with her prior history of loaning money to Pedrosa's borrowers, Gonzalez agreed to lend Gutierrez $200,000 at 11% interest per year.[2] (Tr. 50, 53). The loan was originally guaranteed by Rick Pedrosa. (Tr. 32; Gonzalez Depo. p. 30; Marrero Depo. pp. 20, 48).

On December 15, 2005, Gonzalez and her husband went to see Pedrosa and then delivered a certified cashier's check made payable to Weston. (Tr. 21). The check was accepted by Respondent and deposited into the Weston escrow account. (Marrero Depo. pp. 18, 21-22). Respondent was not serving as counsel for Gonzalez in the subject transaction. (Gonzalez Depo. pp. 32, 46). Gonzalez

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borrowers will be referred to jointly herein as "Gutierrez". (Marrero Depo. pp. 45-46).

[2]It is the Bar's position, through their in house auditor/expert witness, Duarte, that Respondent committed a mortgage fraud because all of the parties involved in the subject transaction knew each other. (Tr. 247-248). To conclude that Respondent committed mortgage fraud because he knew the parties involved in the subject loan is the height of speculation and conjecture. Indeed, Gonzalez testified, that she had a previous and an ongoing business relationship with Respondent's partner, Rick Pedrosa. (Tr. 30-32, 49, 53, 58-59; Gonzalez Depo. pp. 22, 25-27, 46-49, 55-56). Specifically Gonzalez testified that she had lent money to Pedrosa's clients in the past in transactions that were structured in a manner that was identical to her transaction in this case. (Tr. 24). Moreover, it was because of her existing relationship with Pedrosa, her trust in him and her financial success in her prior transactions with him, that she agreed to enter into the transaction alleged in the complaint. (Gonzalez Depo. pp. 25-27). It is inconceivable how Duarte could conclude that since the parties to the subject transaction were known to each other, Respondent committed mortgage fraud.

testified that Respondent was working on behalf of Weston and was not representing her as an attorney. (*Id.*). Moreover, Gonzalez testified that Pedrosa's mortgage company had the first part of the transaction (the procuring of the loan) and Weston had the second part of the transaction the closing of the loan and the disbursement of the loan proceeds. (Gonzalez Depo. p. 49).

Pursuant to the Gonzalez' specific instruction, Respondent deposited the certified cashier's check into the Weston escrow account and, upon its clearing the account, immediately disbursed the funds to Gutierrez on December 16, 2005. (Tr. 368; Marrero Depo. pp. 18, 21). Gonzalez specifically instructed Respondent to disburse the funds immediately so that she could commence earning interest on this loan as soon as possible. (Tr. 54, 368; Gonzalez Depo. p. 44). Gutierrez started paying the interest payments immediately. (Tr. 54-55, 369). The Bar's Initial Brief concerning this critical aspect of the transaction in issue is inconsistent. On the one hand, the Bar asserts that Gonzalez expected the money to be held until the closing occurred. (Initial Brief at p. 4). The Bar then argues that Gonzalez expected to earn interest on the loan from the day that she provided the funds to Weston Title. (*Id.*). This would require that the borrowers receive the money almost immediately (which is exactly what occurred in this transaction, as well as Gonzalez' previous transactions with Pedrosa where Gonzalez earned interest between 11 and 14 percent). In fact, the borrowers paid Gonzalez interest

payments on the money she lent them prior to the closing taking place. (Tr. 24, 30-32).

The Gutierrez loan was originally unsecured with Pedrosa having guaranteed same on behalf of his employee. (Tr. 386-389). Gonzalez always knew that she was in second position behind the first lienholder, Countrywide Bank. (Tr. 55). When Pedrosa no longer wished to guarantee the loan, Gonzalez instructed Respondent to prepare a second mortgage in her favor. (Tr. 389). The second mortgage on the property was recorded. (Tr. 380). It would have been recorded sooner but Respondent was neither given instructions nor the money to pay the documentary stamp tax. (Tr. 28; Marrero Depo. p. 24). Once the subject second mortgage was recorded, Gonzalez was in second position behind Countrywide's mortgage just as she had always understood would be the case. (Tr. 55).

For 18 months after Gonzalez made her loan to Gutierrez, Gonzalez received Gutierrez' payments pursuant to the loan agreement. (Tr. 55). At no time during the 18 month period that Gutierrez was making her payments did Gonzalez ever raise a complaint about the mortgage instruments which secured the loan and/or the time of its recording. (Tr. 33, 368). However, Gutierrez, like many other people who owned homes during the bursting of the South Florida real estate market, eventually went into default on the subject loan. (Tr. 33; 381). Gonzalez, who was in second position, was no longer secure due to the loss in equity of

Gutierrez' home as a result of the decline of the housing market. (Tr. 33, 380). Now that her loan was no longer secure due to the loss in the fair market value of her security, Gonzalez wanted to someone to blame and to repay her money. (*Id.*).[3]

On April 15, 2008, Gonzalez filed a verified complaint for damages against Gutierrez and Pedrosa alleging that they fraudulently induced Gonzalez to provide the subject loan. (Gonzalez Depo. Page 48). Respondent was not a party to this civil action. (Duarte Depo. Page 25). The Bar's argument that Respondent was not named in that lawsuit because Gonzalez did know about Respondent's conduct when she filed the lawsuit defies common sense. Gonzalez was represented by counsel who possessed all of the documents when he filed the lawsuit on her behalf. (Tr. 39). If her lawyer believed Respondent perpetrated a fraud he would have alleged it in the complaint, or at the very least, in an amended complaint.

The fact is that Gonzalez did not sue Respondent because she knew that Respondent played no role in her decision to provide the loan to Gutierrez. In fact, on several occasions in this case, Gonzalez confirmed that Respondent never represented her in the transaction. (Gonzalez Depo. pp. 32, 46). Gonzalez also confirmed that it was Pedrosa, not Respondent, who made the alleged representations upon which she relied on when she agreed to enter into the transaction. (Tr. 25, 44, 47, 48, 58). Lastly, because the evidence on this issue was

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[3]Gonzalez candidly testified that the problem with the subject transaction arose "*when the lady (Gutierrez) stopped paying me*" (Tr. 33).

so overwhelming, Bar counsel stipulated at the trial of this cause that Respondent never made any representations to Gonzalez: "*In terms of the people who borrowed the money and the people who made the representations to you, which we know Mr. Marrero did not make these representations and I'm not suggesting that he did.*"). (Tr. 44). Gonzalez' lawsuit was ultimately dismissed for lack of prosecution.[4]

The first time Respondent was accused of any wrongdoing in the Gonzalez transaction was on December 1, 2009, when attorney Borell sent a letter to the Florida Bar alleging that Respondent engaged in unethical conduct regarding the Gonzalez loan transaction. The letter contains a page and half of detailed allegations against Pedrosa and then gratuitously includes a sentence that Respondent knew of the fraud. In his letter, attorney Borell enclosed Gonzalez' verified Inquiry/Complaint Form, as well as his October 13, 2009 letter to the Metro Dade Police Department Economic Crimes Division. In her Verified Inquiry/Complaint Form, Gonzalez wrote the following:

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[4] Before the dismissal of her civil action, however, Gonzalez' attorney, Alexander Borell sent his October 13, 2009 letter to the Metro Dade Police Economic Crimes Division. In this letter, Mr. Borell accused Gutierrez and Pedrosa of an alleged fraud and stated, *inter alia*, "*that my client would like to visit with a Detective and see if there are any criminal charges that can be filed against any or all of the above parties.*" There was never any police action taken pursuant to Borell's letter. Mr. Borell never followed up with the Police on this letter. (Borrell Depo. pp. 14-15).

> *Jose C. Marrero transacted a real estate closing that defrauded me $200,000. I have him $200,000.00 that I was told was for a second mortgage for his clients. I later learned that they money was used as his clients down payment to purchase the house I was supposedly giving the second mortgage on.*
>
> *This attorney knew his clients didn't own the property and lied to me for many months for his own personal benefit.*
>
> *The $200,000.00 I gave was made payable to his Trust Account, and something should be done.*

Gonzalez' own testimony at the final hearing of this cause contradicted her allegations in the aforementioned inquiry. Specifically, Gonzalez testified that she had virtually no communications with Respondent and that it was Pedrosa, not Respondent, who knew about the details of the transactions. (Tr. 25, 44, 47, 48, 58).

It is against the foregoing backdrop regarding a loan provided by a hard equity lender who had a history of operating in a non-conventional fashion, that the Bar contended that Respondent committed mortgage fraud in connection with his preparation of the note and mortgage which ultimately served to secure the Gutierrez loan and, therefore, violated Bar Rule 4-8.4(c) and a violation of Rule 5-1.1(b). The Referee properly found that there was insufficient evidence to support that Respondent's conduct violated either of those rules.

ARGUMENT

POINT I

The Referee properly found that Respondent did not violate Rule 4-8.4(c) of the Rules Regulating the Florida Bar when there was no clear and convincing evidence that Respondent intended to commit a fraud or engage in any other dishonest behavior.

In order to find that an attorney acted dishonesty, made misrepresentations, was deceitful, or committed fraud, the Bar must prove the necessary element of intent. *The Florida Bar v. Forrester*, 818 So.2d 477 (Fla. 2002) (quoting *The Florida Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla.1999). The Bar must prove by clear and convincing evidence that Respondent acted intentionally in order to be found guilty of violating Rule 4-8.4(c). *Id. The Florida Bar v. Head*, 84 So.3d 292 (Fla. 2012). The Referee correctly found that the Bar failed to establish that Respondent committed a mortgage fraud.

Under Rule 4-8.4(c), the element of intent may be satisfied by showing that the conduct was deliberate or knowing. *The Florida v. Brown*, 905 So.2d 76, 81(Fla.2005); *The Florida Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla.1999); *See also The Florida Bar v. Smith*, 866 So.2d 41, 46 Fla.2004) (recognizing that the motive behind the attorney's action was not the determinative factor but instead the issue was "whether the attorney deliberately or knowingly engaged in the activity in question."). Therefore, the Bar had the burden to show that Respondent had the intent to commit a mortgage fraud at the

time he prepared the subject note and second mortgage. The Bar didn't meet this burden because there were no facts in the record to support it. Indeed, when all of the circumstances of the transaction are considered in their totality, it is clear that no mortgage fraud was committed by Respondent.

It has always been the Bar's position that since Respondent prepared and signed the subject second mortgage, he committed a mortgage fraud. This is the same position it advances in its Initial Brief. (Initial Brief, p. 24). Respondent respectfully submits that the case law upon which the Bar relies for its position on the issue of intent cannot be read to allow such a conclusion. Otherwise, any mistake made by an attorney would be deemed to be intentional, dishonest and/or deceptive. As the Referee recognized, Respondent's improper oversight of the employees of his title company amounted to negligence. The facts of this case do not allow Respondent's conduct to be viewed in any other fashion, let alone, a fraudulent one.

The Bar makes the same arguments in its Initial Brief which it made to the Referee at the trial of this cause. Indeed, the Bar's Statement of Facts focuses almost entirely on documentation and its staff auditor's opinion that same establishes that a fraud was committed. However, the Referee considered the Bar's arguments that Respondent disbursed the proceeds from a second mortgage prior to the closing on the first mortgage, that the content of the second mortgage

that was signed and witnessed by Respondent and that Respondent issued a title policy that did not include all of the encumbrances on the property. Indeed, the Referee considered everything that the Bar argued, accepted it as being true and, ultimately, found that the Bar did not prove that Respondent committed a mortgage fraud. The Referee also considered and accepted the testimony of Respondent in finding that he did not commit a mortgage fraud.[5]

The burden was upon the Bar to prove by clear and convincing evidence that Respondent had the requisite intent to engage in conduct that violated Rule 4-8.4(c). In this case, the Referee did not believe that the Bar met its burden. The Referee's determination is well-supported by the facts and circumstances in the record regarding the subject transaction.

This Court must presume that that referee's findings of fact are correct and must be upheld unless they are without support in the record. *The Florida Bar v. Brown*, 905 So.2d 76, 80 (Fla.2005). The Referee found that the misrepresentations made to Gonzalez were made by Pedrosa. The Referee also found that Respondent did not make any misrepresentations directly or indirectly

[5]Respondent notes the Bar's reference to Respondent's decision to not call Rick Pedrosa and Karla Gutierrez as witnesses. Respondent did not believe it was necessary to do so since the Bar did not establish in its case in chief that Respondent committed a mortgage fraud. This was affirmed by the Referee's Amended Findings of Fact and Conclusions of law.

to Gonzalez. In fact, Gonzalez' own undisputed testimony confirms that Respondent had almost no communication with Gonzalez.

The Court should reject the Bar's argument that Respondent concealed or failed to disclose information to Gonzalez because such an argument assumes facts that are unsupported by the record and was not previously raised in the pleadings or through discovery. This argument is an afterthought. Indeed, on several occasions, Respondent requested the Bar to identify all acts or omissions on the part of Respondent that support the rule violation. The Bar never identified such conduct in its discovery responses. Moreover, the record is clear that Respondent did not know about the details of the Gonzalez transaction as evidenced in the record by (1) Gonzalez' 2008 lawsuit against the borrowers and Pedrosa for fraud did not name Respondent in the lawsuit; (2) Gonzalez testified during her deposition that she virtually had no communication with Respondent concerning the transaction (Gonzalez Depo. p. 32); and (3) Gonzalez' testimony that Marrero made no representations to her. (Tr. 25, 44, 47, 48, 58).

The Referee properly found that Gonzalez instructed Respondent to deposit the subject funds into Weston's escrow account and then execute Gonzalez' expressed directions concerning the disbursement of these funds. Respondent followed Gonzalez' instructions. One month later, Gonzalez asked Respondent to

prepare a second mortgage when Pedrosa no longer wanted to guarantee the loan. This testimony is undisputed and was found to be credible by the Referee.

The Bar's argument that Respondent took this position for the first time 2 years into this case is simply untrue and misleads this Court. Had the Bar taken Respondent's deposition sooner, or, more importantly, had it conducted a complete investigation before charging Respondent, it would have learned these critical facts regarding the subject loan. Bar counsel and the auditor never bothered to speak with the investigating member or anyone else. (Tr. 281, 282). This is why they were not aware of Respondent's explanation until his deposition which was taken two years later. This is why their sole reliance upon records in this case was insufficient to prove that Respondent committed a mortgage fraud.

Gonzalez' after-the-fact claim that the documentation for the subject loan was not prepared properly is unfounded. The subject loan was carried out just like every other loan Gonzalez had provided in the past to one of Pedrosa's customers. Again, the Gonzalez loan was not a conventional bank loan. It was a private loan between two individuals and no banking rules, regulations or standard closing procedures were applicable. They can actually make up rules and terms as they go along which is what they had done with all of their previous transactions. In the end, Gonzalez only cared about providing the money to the borrower as fast as possible so that she could immediately start receiving interest. That is exactly what

occurred in this case. It bears repeating that when asked at trial as to when there was a problem with the subject transaction, Gonzalez stated "*... when the lady stopped paying me...*" (Tr. 33).

The Bar's auditor, Tom Duarte, testified at final hearing. He was the Bar's entire case as he was the one who investigated this matter for the Bar. (Tr. 108). This was especially true since the only other witness, Gonzalez, corroborated Respondent's explanation of the events leading up to the Bar's filing of the subject complaint.

Mr. Duarte's testimony was the product of inexperience and a complete lack of willingness to learn what really occurred. He was offered as an expert witness in favor of his employer, The Florida Bar. His testimony laid the predicate for the admission of the documents into evidence that supported that both of the mortgage transactions did not occur in a typical fashion and that on its face appeared to be problematic.[6]

Mr. Duarte and Bar counsel believe that the content of documents tells the entire story. They saw some irregularity and/or something that was different from

[6] Duarte's testimony did not require any special skill or knowledge. An expert is helpful to the Court in that it provides an opinion and excludes all other opinions. That is not what occurred in this case. Duarte only testified about a timeline of events, the contents of documents and announced his conclusion that there was a fraud without ever considering the possibility of any viable explanation.

normal and they jumped to the conclusion that Respondent committed a fraud.[7] This is evidenced by his failure to speak to any individuals involved in this case. Duarte, the Bar's main witness, never bothered to speak or communicated with Gonzalez, Pedrosa, Gutierrez, Countrywide officers, the individual who conducted the closing of the Countrywide loan, the individual who prepared the HUD-1 for the Countrywide loan and most importantly the investigating member of the Grievance Committee. (Tr. 225-226, 281-282). His investigation of this matter is simply non-existent. (Tr. 225, 250, 251; Duarte Depo. pp. 46, 63).

Perhaps most telling of the shortcomings of the Bar's lack of investigation was Duarte's failure to speak with the Grievance Committee's Investigating

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[7] Respondent contends Mr. Duarte's expertise is highly suspect based upon his lack of experience and qualifications conducting fraud investigations and analyzing documents on a forensic level. At Duarte's first deposition, prior to the Bar disclosing him as an expert witness, he testified that he did not know the legal definition of fraud, could not provide a definition for mortgage fraud, and when asked about HUD-1 and real estate transactions in general he knew less than a first year law student. (Duarte Depo. pp. 20, 50). His testimony was that he only knew about such transactions from his personal experience when he purchased his only home. (Tr. 20). Two weeks later, after he was listed as an expert by the Bar, as if he was an overnight sensation, he fashioned himself as an expert in real estate transactions and mortgage fraud without any basis or qualifications for the same. The fact is that Duarte is nothing more than a skilled accountant. He has no experience in real estate transactions, closings, title services, HUD-1 statements, and quality control for mortgage transactions. He is not a real estate lawyer, law enforcement officer or quality control agent in the real estate field. He has never worked as or for a closing agent, title agent, mortgage broker or hold any other position in the field of real estate. As such, his skill and knowledge of the subject is limited at best.

member. (Tr. 281-282). The Grievance Committee's investigating member conducted a lengthy face-to-face interview with Respondent. Duarte never considered speaking with the Investigating member. (Tr. 281-282). One must wonder why he did not speak to the Investigating member. Is it inexperience, or is it that the Investigating Member had information detrimental to the Bar's case? Whatever the answer is, one thing is clear--Duarte simply stopped after he reviewed the documents and reached his conclusion that Respondent must have committed fraud.

The Bar's argument that Respondent should have called the above mentioned individuals to testify to prove that he did not commit fraud is entirely without merit. Such an argument improperly attempts to shift the burden of proof from the Bar to Respondent. The Bar has to prove its case, Respondent does not have to disprove the Bar's case.

At his deposition, Duarte was unable to articulate any specific facts to support the existence of mortgage fraud—rather, stated that it was the circumstances as a whole combined with all of the parties knowing each other which supported his conclusion. Duarte testified that the parties knowing each other was suspicious and, therefore, a fraud must have occurred. (Tr. 246). A lawyer should not be disciplined based upon such rank speculation and/or suspicion.

When one considers that Respondent (1) did not negotiate any of the contracts between any of the parties; (2) did not participate in structuring the transactions; (3) was not personally the closing agent for any of the transactions; (4) did not represent any of the parties as an attorney in the transaction; (5) did not communicate with Gonzalez, (6) did not sign the HUD-1; (7) did not represent that there was a deposit escrowed for the purchase of the property; and (8) did not personally profit from either loan transaction and that the only thing that Respondent did concerning the transactions was deposit a $200,000 check in Weston's escrow account and then wire it to the borrowers at the specific instruction of Gonzalez, he cannot be said to have the required intent to engage in fraud or facilitate fraud since he had no knowledge that a fraud was being perpetrated (if even a fraud was perpetrated at all).

Respondent testified at trial that he did not prepare any of the documents that were the subject of the case except for a promissory note and second mortgage. (Tr. 370). He did not record the second mortgage until 6 months later because he did not have recording instructions or the recording fee (which was to be paid by Gutierrez). (Tr. 28; Marrero Depo. p. 24). This is not mortgage fraud.

The Bar may dislike Respondent's testimony but the Referee accepted it and believed it to be credible.[8] A referee's assessment of a witness's credibility is reviewed for abuse of discretion in an attorney disciplinary proceeding. *The Florida Bar v. Tobkin*, 944 So. 2d 219 (Fla. 2006); *The Florida Bar v. Charnock*, 661 So.2d 1207, 1209 (Fla.1995). The referee is in a unique position to assess the credibility of witnesses, and his or her judgment regarding credibility should not be overturned absent clear and convincing evidence that his or her judgment is incorrect. *The Florida Bar v. Maurice*, 955 So. 2d 535 (Fla. 2007). Moreover, in an attorney disciplinary proceeding, the Supreme Court defers to the Referee's assessment and resolution of conflicting evidence, because the Referee is in the best position to judge the credibility of the witnesses. *The Florida Bar v. O'Connor*, 945 So. 2d 1113 (Fla. 2006).

The Referee sat no more than 6 feet from Respondent during his direct testimony and a comprehensive cross-examination. The Referee had the ability to gauge his expressions, his character, his demeanor and the manner in which he answered questions and the way he conducted himself during the entire proceeding.

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[8] If the Bar honestly accepts the Referee's findings of fact and is simply contesting the Referee's conclusion as matter of law, then the findings of fact by the Referee must be accepted including the Referee's acceptance of Respondent's testimony. Since the Bar rejects that Respondent's testimony and instead chooses to cherry pick the findings of fact it wants to accept this case cannot be reviewed solely as a *de novo* review.

Ultimately, the Referee accepted Respondent's testimony as being truthful as evidenced by her reliance upon it in the Amended Report of Referee. Specifically the Referee found that although Respondent was the President of the title company, and ran the day-to-day business operations, he had no training as to how to conduct a closing or perform title work. (Tr. 377; Amended Report of Referee at p. 6). The Referee also found that Respondent left the closing and the title work to other individuals that were employed by Weston who were better trained and had experience in those fields. (Tr.365; Amended Report of Referee at Page 12).

The Referee also accepted the fact that Respondent did not know how to read or prepare HUD-1's, title commitments, title policies, and other documents associated with closing a mortgage transaction when these transactions occurred. (Tr. 365; 377; Amended Report of Referee at p. 6). Instead, Respondent relied upon loan processors and other employees at Weston to prepare those documents, which he would, then sign assuming that they contained accurate information. It is upon these facts that the Referee found Respondent to be negligent.

The Referee did not abuse her discretion in accepting Respondent's testimony as being true. There was no evidence that impeached Respondent or cast sufficient doubt upon his credibility. The Bar's first reason that he prepared

"fraudulent documents" puts the cart before the horse. The fact is that the Referee found that the documents were negligently prepared and not fraudulently prepared.

The Bar's next argument that Respondent misled Gonzalez by silence assumes facts that were never proven at trial. The Bar presumes that Respondent knew the details of the transactions alleged in the complaint and that he knew that Pedrosa made misrepresentations to Gonzalez. In fact, there is no reason to presume that Respondent knew the details of the transactions especially since (1) he testified that he did not know the details (Tr. 380-381) and Gonzalez ended up in the second lien position—the position she knew she would be in at the time she made the subject loan and the position that she ultimately ended up in. (Tr. 55).

The Bar's third basis for discrediting Respondent is also without merit. Respondent has said from the beginning of this case that he filed a second mortgage 6 months after the closing because the loan was supposed to be unsecured. The Bar just did not want to listen to him and did not want to accept the totality of the circumstances of the subject transaction (not just the documents which were the focus of Duarte) which clearly show that Respondent did not intend to commit mortgage fraud.

The Referee properly concluded based upon the record that while the documents contained inaccuracies, Respondent did not know that they were

inaccurate. Therefore, Respondent could not have committed an intentional, deliberate or knowing act, which is required for a violation of Rule 4-8.1(c).[9]

Negligence is not fraud. Every time a lawyer makes a mistake does not mean that the lawyer committed fraud. For that matter, every time a lawyer makes a mistake does not mean that the lawyer has violated the Rules Regulating the Florida Bar. There is no ethical canon or Rule Regulating the Florida Bar or any other law that permits Respondent to be held personally accountable for a fraud (if one even existed) that he did not know about and that was being perpetrated by his partner in a business that existed outside of his law practice.

The Referee found that Respondent did not knowingly and willingly decide to partake in a fraud and purposefully engage in dishonest acts with intent to be dishonest. More particularly, the Referee found that Respondent did not commit

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[9]The Bar speculates that Countrywide would not have agreed to loan borrowers the money had it known of the second mortgage. There is no evidence to support this conclusion. This is especially the case since this loan was given during a time period when Banks could not give away money fast enough, and without verified income and employment and without documentation to support the loan. For all we know, that information may have even been provided to the lender at closing. In fact, one might even assume that the lender did know based upon the fact that a $650,000 loan went into default and neither Countrywide nor its successors in interest ever filed a lawsuit or sought reimbursement form Respondent or Weston Title for fraud or negligence. In the end, since neither the Bar nor Duarte ever bothered to speak to the closing agent that was present at the closing, we will never know. Instead, the Bar, who bears the burden of proof, and consistent with its conduct throughout this case, would rather have this Court make inference based upon speculation rather than any evidence that was presented to the Referee.

mortgage fraud. There was competent and substantial evidence to support this finding. Therefore, the Amended Report of Referee should be accepted by this Honorable Court.

POINT II

The Referee properly found that Respondent did not violate Rule 5-1.1(c) of the Rules Regulating the Florida Bar when there was no clear and convincing evidence that Respondent improperly maintained money or property of another entrusted to him for a specific purpose.

The Bar's complaint alleges that Respondent violated the Rules Regulating the Florida Bar relating to trust accounts. The complaint does not contain any facts to support such a violation. The Bar does not accuse Respondent of pilfering client funds, misappropriating funds for himself or using the funds for his own use. In fact, it was never clear to Respondent why this violation was charged. At several stages of this proceeding, Respondent requested the Bar to provide the specific factual basis for its claims against him. In lieu of a response, the Bar referred Respondent to the allegations of the complaint. It is now evident why the Bar did so, because there were no facts to support a violation of Rule 5-1.1(c).

The Bar's auditor did not and could not articulate any facts to support the Bar's contention that Respondent violated Rule 5-1.1(c). (Tr. 223). The Amended Report of Referee specifically notes that the Bar's auditor did not testify to any facts that gave rise to a violation of Rule 5-1.1(c). (Amended Report of Referee at pp. 10-11). In fact during cross-examination, the Bar's auditor testified that he could not find that Respondent misappropriated any monies either from his trust account or Weston's escrow account. (Tr. 223).

This is not a case where money was disbursed without the client's permission and knowledge. The Bar presented no evidence to suggest that the money was disbursed without Gonzalez's authorization. The only record evidence before the Referee was that Respondent disbursed the funds from the Weston escrow account to Gutierrez ***pursuant to the express instructions provided to him by Gonzalez***.

The Bar submitted *The Florida Bar v. Joy*, 679 So.2d 1169 (Fla. 1996) in support of its position and alleges that it is the controlling case. In that case, the Court held that **absent an expressed agreement**, the law implies that the attorney will know the conditions of the principals' agreement and will exercise reasonable skill and ordinary diligence in holding and delivering the escrowed funds according to the agreement. In this case, there were no written instructions. The instructions were verbally provided by Gonzalez. Her instructions were simple--she requested Respondent deposit the funds into Weston's escrow account and then immediately give them to the borrower so she could start collecting interest as soon as possible. Respondent followed Gonzalez' instructions. He promptly deposited the funds into his escrow account and then promptly disbursed them to Gutierrez. Gonzalez testified that Gutierrez immediately started making interest payments after receipt of the subject loan. That is the way Gonzalez did business in the past and that is the way it was done in the transaction that is the subject of the Bar's

action against Respondent. Had Respondent not disbursed the funds immediately to borrower as he was instructed, Gonzalez could have filed a complaint alleging that Respondent failed to follow her instructions concerning her escrow funds and that his failure to do so cost her money.

At best, the Bar proved that there were no written instructions. They did not prove that he acted improperly with the handling of any trust account funds.

Respondent agrees this is not typical transaction. Since Gonzalez was a private lender, and not a conventional lender, it was not a typical transaction with a typical closing with written instructions. The standard operating procedures of a financial institution are not applicable and do not exist in this transaction. In fact, they never did in any of the Gonzalez loans to Pedrosa's borrowers. The evidence adduced at trial demonstrated that Respondent did exactly what Gonzalez told him to do with the money. What else was he supposed to do?[10]

Accordingly, the Amended Report of Referee should be approved.

[10] In fact had he done anything other than what Gonzalez instructed him to do, then he would have violated the rule.

POINT III

The Referee properly did not discipline Respondent for uncharged violations of the Rules Regulating the Florida Bar when, even though, there was sufficient evidence to sustain a violation of the uncharged misconduct, the conduct was not intertwined with the violations alleged in the complaint, the Bar admitted it was not intertwined with the conduct alleged in the complaint, the Bar waived the opportunity to charge Respondent with the uncharged misconduct and where the uncharged misconduct was the basis of Respondent's defense.

Both Respondent and the Bar agreed that a violation of Rule 4-5.3 is not within the specific scope of the allegations contained in the complaint. The complaint is devoid of any allegations that would lead one to believe that Respondent was possibly facing a charge for failure to supervise non-lawyer employees. As the Bar correctly stated during the proceedings below no such allegations exist within the four corners of the complaint, such an allegation was not intertwined with the other allegations in the complaint and that it has never been the Bar's theory of guilt.

Respondent concedes that the Bar may have been able to charge him with other rule violations contained in the Rules Regulating the Florida Bar. The Bar had several opportunities to allege such violations but did not do so. It could have made the allegations in response to the motion to dismiss, in response to the discovery propounded to them or in an amended complaint after taking

Respondent's deposition. Even after the Referee advised the Bar that she could find that Respondent violated Rule 4-5.3, the Bar took the position that Respondent could not be disciplined for such misconduct.

The Bar waived any argument to discipline Respondent based upon uncharged conduct. Respondent moved to dismiss the complaint upon the basis that the complaint failed to advise him of the specific misconduct he is alleged to have committed. The Bar's response was that the complaint specifically stated the exact allegations of misconduct. The motion was denied. Respondent raised the same issues and argument in his discovery requests. Again, he was denied additional information and was simply referred to the allegations in the complaint. Any misconduct based upon improper supervision was never alleged, mentioned, discussed, inferred or even suggested by the allegations contained in the pleadings, discovery, correspondence or the Bar.

The Bar intentionally chose not to charge Respondent with a violation of Rule 4-5.3. Indeed, the Bar was very emphatic about this case being entirely about the conduct alleged in the complaint, specifically that Respondent was dishonest, deceitful and that he had committed fraud. Therefore, Respondent's right to due process would be violated if he were held accountable for uncharged misconduct in which he had no opportunity to be heard and after he attempted to learn the

possible charges against him and where he had no opportunity to defend against them.

Lastly, and, perhaps, most importantly, the uncharged conduct that was found to exist by the Referee was also the basis of Respondent's defense. In *Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) the final order disbarring the attorney relied in part upon misconduct that was never alleged in the complaint. The United States Supreme Court reversed the finding of misconduct because the lawyer was not charged with the misconduct. The Court stated that "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.* at 552, 88 S.Ct. 1222. The Court further held that the conduct in *Ruffalo* upon which the attorney's disbarment was based was unrelated to the original charge and was the basis of his defense to the original charge. Thus, the attorney was completely unaware that the uncharged conduct was to be used against him and that he had been trapped by his defense to the original charge.

The same scenario presented in *Ruffalo* exists in this case. Respondent was charged with engaging in mortgage fraud and his defense was that he was not the individual who made misrepresentation or prepared the paperwork. Respondent argued that other employees in his title company were responsible for the errors that are alleged in the complaint. These errors constituted the basis for the

Referee's finding that Respondent may have been negligent. The same facts that Respondent relied upon for his defense were used against him to form the basis for the uncharged conduct. This is the exact same trap the lawyer faced in *Ruffalo* and which the United States Supreme held was impermissible. As such, Respondent should not be disciplined for any uncharged misconduct.

Respondent recognizes and had become very aware that the transactions alleged in the complaint could have been and should have been handled in a more prudent and competent manner. Respondent has taken these proceedings very seriously and has a much better understanding as to what is required of him as an attorney and his obligations under the Rules Regulating the Florida Bar as well the Florida Administrative Code concerning the ownership and oversight of a title company. In that regard, Respondent has significantly changed his business practices and his has changed the manner in which he conducts himself.

At the time of the alleged misconduct, Respondent was inexperienced in the practice of law and, more importantly, in running a title company. Respondent had only been a part owner of Weston Title for 3 years at the time the events alleged in the complaint occurred. As the Amended Report of Referee correctly suggests, Respondent did not know much about the preparation of documents necessary to close real estate transactions.

Respondent has since taken remedial measures to insure that such conduct does not occur again. Respondent now exercises greater supervision over all of those who work on title-related tasks. Respondent has also enrolled in CLE classes and workshops sponsored by the Bar and other proprietors in order to gain a better understanding of the closing process and to implement proper procedures to insure against mistakes, fraud and encumbering other pitfalls in real estate transactions.[11]

[11] Respondent has also incurred great financial hardships as a result of this action. It has cost him thousands of dollars to defend himself against the Bar's allegations. Aside from the financial pains, Respondent has also suffered mentally, emotionally and physically from this proceeding (in which he was found not guilty of the charged conduct). Respondent, therefore, submits that he has already been sanctioned to some extent.

POINT IV

If this Honorable Court Finds Respondent Guilty of Any Rule, Violations the Matter Should Be Remanded To the Referee to Determine the Appropriate Sanction.

If this Court finds Respondent guilty of violating any of the Rules Regulating the Florida Bar, the case should be remanded to the Referee to determine appropriate discipline. It would be unfair to have Respondent guess what rule violations he should answer to for the purposes of discipline. To do otherwise almost forces Respondent to admit to a rule violation. Moreover, Respondent cannot argue the appropriate standard of discipline until he knows exactly what rule he has violated. Therefore, in the event this Court finds that Respondent violated a Rule Regulating the Florida Bar and is subject to discipline, then Respondent should be afforded the right to argue the appropriate discipline to be applied and present evidence in mitigation before the Referee.

CONCLUSION

The Amended Report of Referee should be accepted and adopted by this Honorable Court and a final judgment should be entered in favor of Respondent.

Respectfully submitted,

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Richard B, Marx, Esq.
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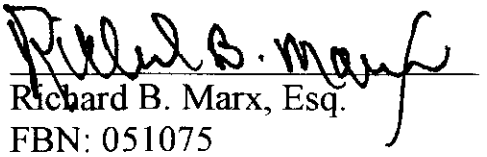
REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure Respondent requests oral argument before the Court and submits that the Court's decision making process will be enhanced by hearing oral argument.

COMPLIANCE WITH RULE 9.210(a) (2)

The undersigned hereby certifies that the foregoing Initial Brief complies with Fla.R.App.P. 9.210 (a) (2) as it was prepared using 14 point proportionately spaced Times New Roman font.



Richard B. Marx, Esq.
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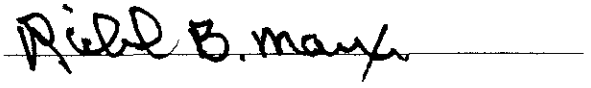
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original has been sent by e-file to the Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was emailed at jmoore@flabar.org to Jennifer R. Falcone Moore, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 on May 6, 2013.



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