IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner/Appellant,

v.

JOSE CARLOS MARRERO,

Respondent/Appellee.

_____/

Supreme Court Case
No. SC11-1780

The Florida Bar File
No. 2010-70,709 (11D)

THE FLORIDA BAR'S INITIAL BRIEF ON APPEAL

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SYMBOLS AND REFERENCES

For the purpose of this brief, Jose Carlos Marrero may be referred to as "Respondent". The Florida Bar may be referred to as "The Florida Bar" or the "Bar". The referee may be referred to as the "Referee". Additionally, the Rules Regulating the Florida Bar may be referred to as the "Rules" and the Florida Standards for Imposing Lawyer Sanctions may be referred to as the "Standards".

References to the Report of Referee will be by the symbol "ROR" followed by the corresponding page number(s). References to the transcripts of the final hearing held on April 19, 20, and 27, 2012 will be by the symbol "TR" followed by the corresponding page number(s).

References to The Florida Bar's exhibits will be by TFB Ex., followed by the exhibit number. References to Respondent's exhibits will be by R Ex., followed by the exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

On September 13, 2011, the Florida Bar filed a formal Complaint, alleging that Respondent, Mr. Jose Carlos Marrero, violated Rules 4-8.4(c) and 5-1.1(b) of the Rules Regulating the Florida Bar, in connection with his participation in a mortgage fraud. Specifically, the Florida Bar alleged that Respondent disbursed the proceeds for a second mortgage prior to the execution of any documents that would secure the funds, and for a purpose other than that for which they were entrusted. Additionally Respondent drafted a purported second mortgage and promissory note in which he encumbered a property that none of the signatories to the document owned or had the legal authority to encumber. Thereafter, Respondent's title agency facilitated a fraud on what would become the primary lender, Countrywide bank, by not disclosing the purported second mortgage referenced above, or the fact that the purported second mortgage funds were actually used by the borrowers to fund the deposit, down payment and costs to close when the borrowers purchased the property in question. (See the Complaint of the Florida Bar, filed in this Court on September 13, 2011).

This Court referred the matter to the Chief Judge of the Eleventh Judicial Circuit for appointment of a referee. The Honorable Abby Cynamon was appointed Referee and the matter proceeded to Final Hearing, commencing on April 19, 2012.

At the final hearing in this cause, the Florida Bar presented documentary and testimonial evidence to prove the assertions contained in the Complaint. The Bar presented testimonial evidence from Ms. Ileana M. Gonzalez and the Bar's Staff Auditor, Mr. Thomas C. Duarte. The Bar presented twenty-three documentary exhibits, as well as the depositions of the various witnesses. The Bar's evidence revealed the following facts:

In December 2005, Ms. Ileana M. Gonzalez agreed to provide $200,000.00 to fund what she believed to be a "second mortgage." (TR. 22-23, 115, 118). This testimony was undisputed at the Final Hearing. Ms. Gonzalez believed the funds were to be provided to four joint borrowers, Ms. Karla Gutierrez and her husband, and Gutierrez's father, Mr. Cipriano-Carrero, and his wife, for the purpose of making home repairs and improvements to their property. (TR. 23, 56, 115, 118). In direct contrast to his testimony at the Final Hearing in this cause, Respondent corroborated Ms. Gonzalez's testimony in his initial written response to the Florida Bar grievance, wherein he admitted that the monies were provided to fund a second mortgage to Gutierrez and her family members . (TR. 115; TFB Ex. 6).

Mr. Rick Pedrosa was the mortgage broker for the deal, and was the person who instigated the deal. (TR. 22, 24). Mr. Pedrosa is the one that discussed all aspects of the deal with Ms. Gonzalez, and he is the one who made all of the representations upon which Ms. Gonzalez relied. (TR. 48, 58-59). It was their

ordinary practice for Ms. Gonzalez to accept Pedrosa's representations without documentation to support same. (TR. 49-50).

In addition to being a mortgage broker, Mr. Pedrosa was also Respondent's partner and a co-owner of Weston Professional Title Group, Inc. (hereinafter referred to as "Weston Title") (TR. 192, 247, 293, 363). Respondent was the President and managing partner of Weston Title, and was designated as the Agent in Charge with the Florida Department of Financial Services. (TR. 120, 376, 383). Mr. Pedrosa's mortgage brokerage firm was located in the same building as Weston Title. (TR. 385). During the relevant time period, Ms. Karla Gutierrez, the borrower, was an employee of Mr. Rick Pedrosa, and as such was known to Respondent. (TR. 23, 56, 192, 247). The real estate agent handling the transaction was Ms. Karla Gutierrez's mother. (TR. 137). Respondent was the attorney for the transaction. Respondent deposited and disbursed the escrow funds and prepared the mortgage documents. (TR. 118, 122-123). Further, Respondent's title company was the closing agent for this, as well as for Ms. Gutierrez's purported "first mortgage" with Countrywide Bank. (TR. 122-123, 146). Therefore, with the exception of Ms. Gonzalez and Countrywide Bank, who provided the mortgage loan funds, there was never an independent party involved at any stage of these transactions; rather all the parties and participants in the transactions were connected to each other. (TR. 192, 247).

On December 15, 2005, Ms. Gonzalez was present in the office of Mr. Rick Pedrosa. (TR. 24). Ms. Gonzalez gave Pedrosa a cashier's check for $200,000.00 to fund the purported second mortgage. (TR. 21, 22, TFB Ex 1). Respondent came to Pedrosa's office while Ms. Gonzalez was still present, and took possession of the $200,000.00 check for deposit into Weston Title's escrow account. (TR. 24-25). Respondent made a copy of the check for Ms. Gonzalez and wrote "received Marrero" on the copy. (TR. 24-25). Ms. Gonzalez testified that this was the normal way they had done loans in the past, that Respondent knew it was for a loan, and that in accordance with their prior practice she made out the check to Respondent's title company. (TR. 53). Ms. Gonzalez's understanding and expectation was that Respondent would hold the money until the closing on her note, at which time he would provide the funds to Ms. Gutierrez. (TR. 54, 57, 253). This was her understanding and expectation because that is the way that each of her prior loan transactions with Pedrosa and Respondent were handled. (TR. 253, 255, 268). It also was the normal course of business for Ms. Gonzalez to begin earning interest on the loan from the same day she provided the funds. (TR. 54-55).

Respondent deposited the $200,000.00 cashier's check into Weston Title's escrow account on December 15, 2005. (TR. 118, 119; TFB Comp Ex. 8A). Respondent disbursed the entirety of the mortgage funds by wire transfer to the borrowers the next day, on December 16, 2005. (TR. 118-119, TFB Comp. Ex.

8A, 8B). Although the monies to fund the purported second mortgage were disbursed to the borrowers on December 16, 2005, Respondent had not yet prepared the promissory note or the purported "second mortgage" note which would serve as collateral for those funds. (TR. 118; TFB Comp. Ex. 2A, 2B). Neither the purported second mortgage note, nor the promissory note were executed until January 10, 2006. (TR. 122-123; TFB Com. Ex. 2A, 2B). Thus, during that three week period of time between when the funds were disbursed and when the notes were prepared and executed, the borrowers had possession of the funds, but there was no legal document evidencing any obligation to repay. (TR. 123). Respondent not only drafted the purported second mortgage, he also witnessed the execution of same. (TR. 123; TFB Comp. Ex. 2A). The closing took place on January 11, 2006, and Ms. Gonzalez received a copy of the note a few days later. (TR. 28, TFB Comp. Ex 2A). The copy she received was not recorded. (TR. 28).

At the time that Respondent drafted the purported second mortgage note, attaching and encumbering the property in Weston as collateral or security for the loan, the borrowers, Gutierrez and Cipriano, did not possess any ownership interest in the property in question. (TR. 39-40, 56, 124). They did not close on that property until January 17, 2006, one week later. (TR. 124, 126). Respondent failed to inform Ms. Gonzalez that the borrowers did not yet own the property at the time

he drafted and witnessed her mortgage note. (TR. 58). His omission of that pertinent detail contributed to Ms. Gonzalez's belief in the misrepresentations made by Mr. Pedrosa; that the funds were provided for a second mortgage, and for the purpose of making home improvements.

Ms. Gonzalez would not have funded the purported second mortgage if she had known that the borrowers did not yet own the property, and in fact were instead using her second mortgage funds to actually purchase and close on the property. (TR. 41-43, 46, 243-245). Indeed, Ms. Gonzalez's practice was to only loan money when there was already equity in the property, and since the borrowers in this case did not yet own the property, there was no equity. (TR. 43-44, 252). There was no testimony presented to contradict Ms. Gonzalez' statements, and in the report of Referee, the Referee specifically found her testimony to be credible.[1]

Despite his practice of recording mortgage notes in a timely manner, Respondent did not record the purported "Second mortgage" until June 22, 2006, approximately five and one half months later, well after any possible title search could reveal the existence of the Gonzalez loan. (TR. 28, 125). This is in contrast to the purported "First mortgage" note from Countrywide Bank, which was recorded in a timely manner on January 19, 2006, a mere two days after the closing on the Countrywide mortgage. (TR. 128; TFB Ex. 7).

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[1] In her Report of Referee, the Referee stated, "The Referee finds that Gonzalez's recollection comports with the evidence adduced at trial." (ROR. 2).

Ms. Gonzalez had made previous loans of this type with Respondent and Pedrosa. (TR. 30-32). However, in the past, the ordinary practice was for the funds to be provided and the note executed much closer in time, rather than the 25 days it took for this transaction. (TR. 30-32).

Eventually, Ms. Karla Gutierrez, the borrower, stopped making payments on both the first and second mortgages. (TR. 33). When Ms. Gonzalez confronted her about the failure to pay, Ms. Gutierrez was unrepentant, and simply told Ms. Gonzalez to take the property back. (TR. 33). However, that solution was not acceptable to Ms. Gonzalez, because by that time, the property was not worth the amount owed on the purported "first mortgage" to Countrywide Bank. (TR. 33-34). The Homeowner's Association initiated a foreclosure action when Gutierrez failed to make required payments. (TR. 35).

Ms. Gonzalez filed a civil suit against Pedrosa and Gutierrez, however, the suit was ultimately dismissed for lack of prosecution when Gonzalez ran out of funds to continue with the lawsuit. (TR. 34-35). Respondent was not named in that initial suit because the details of Respondent's misconduct were not then known to Ms. Gonzalez at the time she filed the initial lawsuit. (TR. 38-39) It was not until she was provided with the paperwork regarding the foreclosure action that she learned that the borrowers did not yet own the property at the time Respondent drafted and executed her "second mortgage," and that her funds were actually used

to close on the Countrywide loan. (TR. 39, 40). Thereafter, Ms. Gonzalez through successor counsel filed the instant grievance with the Florida Bar. (TR. 41).

Mr. Thomas C. Duarte, the Bar's Staff Auditor in this case, testified regarding the exhibits presented by the Florida Bar, as well as the purported first and second mortgage transactions conducted by Respondent and his title agency on behalf of his partner's employee, Karla Gutierrez. Mr. Duarte was accepted by the Referee as an expert in the area of financial transactions, the review of mortgage documents, and analysis of same. (TR. 79-80, 89).

Staff Auditor Duarte identified several issues with the purported second mortgage at issue in these proceedings. First, Respondent disbursed the mortgage funds prior to drafting and executing either the second mortgage or the promissory note that would secure the funds. (TR. 118-119; TFB Comp. Ex 2A, 2B). Further, at the time that Respondent, himself, prepared, executed, witnessed and presided over the closing of the purported second mortgage held by Gonzalez, the borrowers did not own the property in question, and had no legal authority to encumber same. (TR. 124). Additionally, Respondent did not record the purported second mortgage until approximately five and one half months later, well after any title search by Countrywide, the primary mortgage holder, would reveal the existence of the "second mortgage." (TR. 125, 126-127).

In addition to the problems Duarte discovered with the purported second

mortgage held by Ms. Gonzalez, the Complainant in this matter, he also discovered several issues with the purported "primary mortgage note" held by Countrywide bank, for which Respondent's title agency was the settlement agent. (TR. 130). First, Countrywide's closing file revealed that the purchase contract between the borrowers and sellers of the property in question required an earnest money deposit in the amount of $22,500.00 which was to be provided to Weston Title by December 6, 2005. (TR. 130; TFB Ex. 9). However, despite the fact that the HUD-1, prepared by Respondent's title agency, indicated that Weston Title was previously in possession of that deposit, those funds were not provided to Weston Title until the day of the closing when the borrowers brought a check which included that amount to the closing table. (TR. 130-136; TFB Ex.'s 9, 10, 11, 12). Rather, the deposit, as well as the funds used to close on the Countrywide note, were obtained from Gonzalez's purported second mortgage, which was almost exactly the same amount the borrowers brought to the Countrywide closing. (TR. 130-136). In this manner, the borrowers had none of their own funds tied up in the property.

Additionally, the Auditor discovered that the borrowers completed two Uniform Residential Loan Applications, one on December 2, 2005, prior to the Gonzalez "second mortgage," and one on the date of closing of the Countrywide loan, January 17, 2006. (TR. 140-142; TFB Ex. 13, 14). However, both

applications were exactly the same. (TR. 142). Despite the facts that the Gonzalez funds were disbursed one month prior, and the Gonzalez mortgage note was executed one week prior, the borrowers failed to disclose the existence of the Gonzalez note on the second application they completed at the Countrywide closing. (TR. 142-143; TFB Ex 13, 14). Respondent's agency was the settlement agent which received the second application from the borrowers at closing. (TR. 146).

Further, Countrywide bank provided closing instructions to Respondent, whose title agency was the settlement agent at the closing. (TR. 145-146; TFB Ex 15). Here, Respondent's title agency, as the settlement agent, acted as a fiduciary on behalf of the lender at the closing. (TR. 146). In particular, at page 7, section C, of the closing instructions, the lender cautioned the settlement agent to look for indications of fraud occurring during the transaction, and in the event that circumstances indicated fraud may be occurring, the settlement agent was to stop or post pone the closing until such time as the lender's chief credit officer gave permission to proceed with the transaction. (TR. 146-148; TFB Ex 15).

Further, Section C-2 requires the settlement agent to notify the bank before the closing if they have knowledge of any material fact that would make an impact on the lender's decision to make the loan. (TR. 151; TFB Ex 15). Such factors would include, but were not limited to, any changes in the value or the title of the

property, any changes to the sales contract, any changes to the financing, any bankruptcy enforcement or any knowledge or indication of suspicious activity. (TR. 151; TFB Ex 15). Similarly, Section C-3, entitled "Fraud, Misrepresentations and Falsehoods," requires the settlement agent to put the lender on notice of any indications of a fraud related to the transaction, or any material misrepresentations made by the parties to the transaction. (TR. 152; TFB Ex 15).

Of particular note, Section C-11 of the closing instructions, entitled, "Silent Second," requires the settlement agent to immediately suspend the closing in the event the settlement agent becomes aware of an undisclosed second mortgage on the property. (TR. 152; TFB Ex 15). The closing may not proceed until the bank provides approval to continue the closing. (TR. 152; TFB Ex 15). Likewise, Section C-12, entitled, "Source of the Borrower's Funds," requires the settlement agent to notify the lender if there is any indication that the borrowers used funds from a source other than what is indicated on the mortgage loan application to make the down payment and pay the closing costs. (TR. 152; TFB Ex 15).

Staff Auditor Duarte also reviewed the title insurance documents for this transaction. (TR. 161). The title insurance commitment, which was signed by Respondent, indicated that there were no issues with title to the property, and that the title agency would issue a title policy in due course. (TR. 164, 166; TFB Ex. 17). However, Duarte's review of the Commitment, which was signed by

Respondent, revealed that it contained no mention or acknowledgement of the pre-existing Gonzalez mortgage on the property. (TR. 164-165; TFB Ex 17).

Similarly, the actual title policy that Weston Title issued to the lender, and which was signed by Respondent, did not include in the list of encumbrances on the property the pre-existing Gonzalez mortgage, which Respondent drafted, executed, and witnessed just one week prior to the Countrywide closing. (TR. 167; TFB Ex 18). Respondent signed the title insurance policy as the attorney-at-law. (TR. 167; TFB Ex. 18). Likewise, the title insurance policy that Weston Title prepared and issued to the buyers/borrowers, and which was signed as attorney-at-law by Respondent, did not include the pre-existing Gonzalez mortgage in the list of encumbrances on the property. (TR. 168-170; TFB Ex 19). By contrast, because this policy was issued after the Countrywide closing, it actually does include the Countrywide loan as an encumbrance against the property. (TR. 169-170; TFB Ex 19).

Staff Auditor Duarte testified that, in his expert opinion, both of the mortgage transactions were riddled with fraud. (TR. 194-196).

Despite his attorney's assertion during opening statements that Respondent would present testimony from his co-conspirators, Mr. Rick Pedrosa and Ms. Karla Gutierrez (TR. 11), Respondent presented only his own testimony in his own defense, and denied the allegations contained in the Complaint. Respondent's

testimony was the only substantive evidence produced to prove his version of the facts. Respondent did introduce one exhibit at trial; however that exhibit was a letter written by the Complainant's attorney to the Miami Dade Police Department regarding the allegations of misconduct, and the Police Department's response indicating that no investigation resulted there from. (R's Ex A). However, this exhibit did not corroborate, and/or advance, Respondent's version of the events. This additional evidence was more in the nature of impeachment evidence, introduced solely to undermine the credibility of the Florida Bar's witness, based on the fact that the police did not do anything to investigate any alleged criminal activity, and that she did not specifically name Respondent in the letter. It did not in any way advance his own theory of the case. Thus, the only substantive evidence introduced by Respondent to establish his version of the events was his own testimony.

Respondent indicated that, during the relevant time period, Weston Title employed between eight and twelve employees. (TR. 364). These were processors for the title work, and closers, who actually performed the closings. (TR. 364). The closers also prepared closing documents such as the HUD-1's. (TR. 364). Although he was the managing partner at the title agency, with supervisory responsibility, and was designated as the Agent in Charge with the Florida Department of Financial Services, Respondent testified that he did not have

anything to do with the closers and processors. (TR. 364-365). He stated that he does not personally prepare the HUD-1's, nor does he do the title searches. (TR. 365). Rather, Weston Title outsourced the title searches to a third party independent contractor. (TR. 365). Indeed, he claimed that the title agency "would run itself." (TR. 376). Initially, Respondent testified that his only involvement with the agency was that he had check signing authority, and he signed policies and commitments, and he assisted the processors with resolving complex title issues. (TR. 376-377). However, on cross examination, he admitted that he had responsibility for the day-to-day operations at Weston Title. (TR. 383).

During this time period, Weston Title performed between one hundred and one hundred twenty closings per month, earning between $1500.00 and $4000.00 per closing, for a total earning of approximately $300,000.00 per month. (TR. 366).

Respondent testified that the Gonzalez's had made previous loans with Pedrosa and himself. (TR. 367). He indicated that the Gonzalez's never asked for documentation, and that they trusted Pedrosa completely. (TR. 367). In reference to the loan at issue in these proceedings, Respondent stated that Gonzalez told him to get the money to Karla Gutierrez as soon as possible so that she could begin to collect interest proceeds immediately. (TR. 368-369). Despite having already disbursed the funds on December 16, 2005, Respondent testified that he received

the terms of the Gonzalez loan from Rick Pedrosa sometime in January. (TR. 369). Respondent testified that he did not make any money from the Gonzalez loan transaction. (TR. 369, 370).

Respondent admitted that he, himself, drafted Gonzalez's purported second mortgage and promissory note. (TR. 370). He did this based on Pedrosa's instructions. (TR. 370). The mortgage was executed. (TR. 370). He did not receive instructions to record the purported second mortgage. (TR. 370). Respondent claimed that it was uncertain at that time whether the note would be recorded, and that it was to be secured by Rick Pedrosa. (TR. 371). He did not record it until approximately six months later when he had instructions to do so, and when he was provided the funds to record the mortgage. (TR. 371).

Respondent claimed to have nothing to do with Karla Gutierrez's purchase of the home in question. (TR. 369). Rather, it was handled by one of Weston's closers. (TR. 376). He testified that he only earned standard title insurance rates for his company's work on the Countrywide closing. (TR. 369). Respondent testified that the reason that the title insurance commitment did not reflect the Gonzalez loan was because the second mortgage documents had not yet been drafted and executed at the time the commitment was issued. (TR. 373-374). Further, the Title Insurance Policies issued to the lender and the borrowers did not include the Gonzalez mortgage because it was unknown at that time whether that

document would be recorded. (TR. 374).

On cross examination, Respondent admitted that he accepted the $200,000.00 from the Gonzalez's to fund the loan, and that he deposited the funds into Weston's escrow account and disbursed the funds. (TR. 384). He admitted that he, himself, drafted the purported second mortgage and promissory note for the Gonzalez loan. (TR. 384-385). He admitted that he, himself, signed the title insurance commitment and title insurance policies issued as a result of the Countrywide closing. (TR. 385). Respondent stated that the loan began as an unsecured loan which had the possibility of turning into a second mortgage. (TR. 386-387). Respondent admitted that, despite the two and one half year investigation of the Florida Bar in this matter, he did not mention the fact that the Gonzalez loan started as an unsecured loan at any time prior to his deposition, which took place on April 2, 2012, just eighteen days before the Final Hearing in this cause. (TR. 388).

In direct contrast to his testimony at the Final Hearing, Respondent admitted in his initial written response to the Florida Bar that Ms. Gonzalez provided the monies to fund a second mortgage. (TR. 115-116; TFB Ex 6). He took the position that there was no reason for a Florida Bar investigation because Gonzalez ultimately in fact received a second mortgage. (TR. 115-116; TFB Ex 6). Thus, from his very first response to the Florida Bar regarding this issue, Respondent has

entirely failed to acknowledge or accept responsibility for his misconduct, and has asserted that since a second mortgage was eventually recorded, this was a situation of no harm, no foul. (TR. 116; TFb Ex 6). He maintained this stance at the Final Hearing in this cause, stating that the only reason he was there, and subject to disciplinary action, was because Karla Gutierrez stopped making payments on the Gonzalez loan. (TR. 368). He testified that there was in fact both a recorded first mortgage and a recorded second mortgage on the property. (TR. 380). Indeed, rather than express any remorse for his part in the fraudulent transactions, Respondent instead complained that the Florida Bar "put him through the mud" during its investigation. (TR. 392).

In her Report of Referee, the Referee found Respondent not guilty of any of the charged misconduct. In her findings of fact, the Referee essentially accepted the factual assertions and documentary evidence produced by the Florida Bar. (ROR 1-6). She also found that the documentary evidence and testimony presented by the Bar established beyond dispute that Gutierrez and Cipriano-Carrero did not own the property in question when they borrowed the $200,000.00 from Gonzalez for the alleged "home improvements." (ROR 4).

In her findings of fact, the Referee accepted the following testimony from Respondent:

> . . . he did not prepare any of the documents that were the subject of this case; except that he drafted a promissory note

> and second mortgage for the Gonzalez loan based on Pedrosa's instructions; and that he recorded the second mortgage in June 2006, which was six months after preparing the note and mortgage, because he did not have recording instructions. Perhaps most significant to this Referee is Respondent's testimony that, while he was the president of Weston Title and would sign checks, title policies and title commitments, that he had "no training" on how to perform closings or title work.

(ROR. 6)(internal citations omitted).

Based on her findings, the Referee recommended that Respondent be found not guilty of violating Rule 4-8.4(c), because "it is undisputed that Respondent made no representations at all to Gonzalez, let alone misrepresentations. The Referee finds that the Record does not support that any misrepresentation, deceit, dishonesty, or fraud which was attributable to Respondent." (ROR 8). The Referee further accepted Respondent's defense of no harm, no foul, finding that since Gonzalez believed she was receiving a second mortgage, and since that is what she ultimately received when her loan was recorded after the Countrywide mortgage, there was, therefore, no violation of Rule 4-8.4(c) prohibiting dishonest and fraudulent conduct. (ROR 8). Finally, the Referee found that Respondent did not know of the misrepresentations contained in the closing documents for the Countrywide loans, which were prepared by his employees, and which he did not understand or know how to read, and therefore, Respondent's conduct in relation to the Countrywide loans was not intentional or knowing as is required for a violation of Rule 4-8.4(c). (ROR. 8-9).

Of particular note, the Referee did not make any findings, and indeed appears to completely ignore in her recommendation to find Respondent not guilty, the fact that Respondent himself drafted the purported second mortgage, executed and witnessed same, in which he encumbered a property that no signatory to the agreement had the legal authority to encumber, because they did not yet own that property.

In regard to the charged violation of Rule 5-1.1(b), the Referee recommended a finding of not guilty because Respondent disbursed the mortgage funds to the borrowers and prepared a second mortgage to secure those funds, just as Gonzalez wished for him to do. (ROR 10). Further she found no evidence of a misappropriation from Respondent's trust account, despite the fact that this was never charged in the Complaint of the Florida Bar, nor was any evidence of same presented for her consideration. (ROR 10).

Finally, the Referee indicated that, although she does not recommend a finding of guilt based on the charged rule violations, she believes the evidence supports a finding of guilt for Respondent's failure to supervise his employees in violation of Rule 4-5.3(b) of the Rules Regulating the Florida Bar. However, she acknowledged and accepted both parties agreement that such conduct could not be reached as it was not within the scope of the specific allegations of the Complaint. (ROR 11-15).

The Florida Bar filed its Notice of Intent to Seek Review of Report of Referee on October 30, 2012. The Florida Bar's Initial Brief on Appeal follows.

SUMMARY OF THE ARGUMENT

The Referee's findings of fact and conclusions of law in this matter are not supported by competent and substantial evidence and should not be accepted by this Court. Indeed, the Referee overlooked and/or completely ignored the undisputed record evidence in reaching her conclusions, especially in regard to Respondent's creation and witnessing of the fraudulent second mortgage.

Further, her finding that Respondent did not knowingly participate in the subsequent fraud on Country-Wide bank, was similarly not supported by competent and substantial record evidence. Her conclusion that there was no violation of Rule 5-1.1(b) for the improper disbursal of the purported second mortgage funds, at a time prior to the execution of any mortgage documents, and for a purpose other than that for which the funds were entrusted, is similarly not supported by competent and substantial record evidence.

The Referee's conclusions of law must be rejected in their entirety by this Honorable Court, and this Court should find Respondent guilty of the charged rule violations. The appropriate sanction for Respondent's misconduct is disbarment.

ARGUMENT

I. THE UNDISPUTED EVIDENCE ESTABLISHED THAT RESPONDENT DELIBERATELY DRAFTED, EXECUTED, AND WITNESSED A FRAUDULENT AND DISHONEST MORTGAGE DOCUMENT. THEREFORE, AS A MATTER OF LAW, RESPONDENT IS GUILTY OF VIOLATING RULE 4-8.4(c), AND THE REFEREE'S CLEARLY ERRONEOUS CONCLUSION TO THE CONTRARY SHOULD BE REJECTED BY THIS COURT.

In the instant case, the Referee recommended a finding of not guilty as to Rule 4-8.4(c) which prohibits an attorney from engaging in dishonest, deceitful or fraudulent conduct. Her conclusion and recommendation is based primarily on the fact that there is no evidence that Respondent himself made the misrepresentations on which the lender relied in agreeing to fund the purported second mortgage. In drawing her conclusion, the Referee ignored, or simply overlooked, the undisputed record evidence, which conclusively established that Respondent drafted, executed and witnessed a mortgage document which, in and of itself, was fraudulent and dishonest. Therefore, as a matter of law, Respondent is in violation of Rule 4-8.4(c), and the Referee's clearly erroneous conclusion to the contrary must be rejected. On this particular issue, where there are undisputed facts and the only question is whether those facts constitute a rule violation, this Court will review the question of law *de novo*. *See The Florida Bar v. Brownstein*, 953 So.2d 502, 510 (Fla. 2007).

Ordinarily, in Florida Bar disciplinary proceedings, a referee's findings of

fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla.1986). If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *The Florida Bar v. MacMillan*, 600 So.2d 457, 459 (Fla.1992). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *The Florida Bar v. Miele*, 605 So.2d 866, 868 (Fla.1992).

However, in the instant case, on this particular issue, this Court will review the question of law *de novo*. In *The Florida Bar v. Brownstein*, 953 So. 2d 502, 510 (Fla. 2007), the Court made clear the distinction between the typical, contested matter submitted for review, and issues like the one presented here, where the facts are not in dispute:

> In this case, the factual underpinnings of this claim were uncontested. Accordingly, this Court is faced with only one question: whether the unchallenged facts support the referee's legal conclusion relative to [the issue presented]. While this Court generally defers to a referee's findings of fact, "where there are no genuine issues of material fact and the only disagreement is whether the undisputed facts constitute unethical conduct, the referee's findings present a question of law that the Court reviews *de novo*.

Brownstein, 953 So. 2d at 510. (internal citations omitted).

The facts surrounding this particular issue are not in dispute. Ms. Gonzalez provided $200,000.00 to Respondent to fund a loan to Karla Gutierrez and her family members. Karla Gutierrez was known to Respondent, as she was an employee of his partner, Rick Pedrosa. Despite the fact that he had already disbursed the funds, Respondent drafted a "second mortgage" and promissory note on January 10, 2006, in relation to these funds. In the body of the mortgage, Respondent listed as collateral for the loan a particular property in Weston. The mortgage and note were executed on January 11, 2006. The note was also signed by Respondent as a witness thereto. At the time the mortgage was drafted, executed, and witnessed by Respondent, the borrowers had no ownership interest in the Weston property used as collateral for the mortgage, nor did they have any other legal authority to encumber same. The borrowers did not purchase the property used as collateral until January 17, 2006. Respondent created the mortgage document upon receiving the instruction to do so from Rick Pedrosa.

These undisputed facts conclusively demonstrate that Respondent is guilty of violating Rule 4-8.4(c). By listing the Weston property as the collateral for the mortgage loan, Respondent drafted a document that contained the inherent misrepresentation that the borrowers had the legal authority to encumber same. Because the mortgage contained such a misrepresentation, the document itself was

dishonest, deceitful and fraudulent. As the creator of the document, the dishonesty, deceit, and fraud are directly attributable to Respondent. By presenting the document to the borrowers for execution, and witnessing the execution of the mortgage, on a date when the borrowers did not yet own the property in question, Respondent himself further engaged in dishonest conduct. By its very definition, there cannot be a "second mortgage" before there is a first mortgage.

Furthermore, Respondent's acts in this regard were deliberate, and as such, are sufficient to prove the element of intent necessary to find a violation of Rule 4-8.4(c). It is well established that, in order to show an attorney's intent to act with dishonesty, misrepresentation, deceit or fraud, it must only be shown that the conduct was deliberate or knowing. *The Florida Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla. 1999). *See also The Florida Bar v. Head*, 27 So.3d 1 (Fla. 2010). "[T]he motive behind the attorney's action [is] not the determinative factor but instead the issue [is] 'whether the attorney deliberately or knowingly engaged in the activity in question.'" *The Florida Bar v. Brown*, 905 So.2d 76, 81 (Fla. 2005) *quoting Florida Bar v. Smith*, 866 So.2d 41, 46 (Fla. 2004). Here, the Respondent set out to create a second mortgage in which he encumbered the property in question, and in fact did create such a document. Therefore, his actions were deliberate. He set out to provide the mortgage document to the parties for execution, and in fact did provide same to them. His actions were deliberate. He

set out to sign the document as a witness to the execution of same, and did in fact sign his name as a witness thereto. Therefore his actions were deliberate. This is exactly the type of conduct that is sufficient to establish intent under the Rules and case law governing these proceedings.

Finally, the Referee erred in finding persuasive the Respondent's argument that, despite the fraud and misrepresentations inherent in the mortgage document itself, this was a case of "no harm, no foul," because Ms. Gonzalez believed she was providing funds for a second mortgage, and ultimately that is what she received. The Referee's analysis in this regard is simply wrong. Her analysis ignores or overlooks the fact that an attorney cannot be permitted to create documents which contain fraudulent terms and untrue statements; even if the court were ultimately able to make a finding that no harm resulted from same. While the Bar in no way concedes the issue of harm in this case, whether or not harm results is irrelevant to a determination of whether Respondent's actions were fraudulent, deceitful or dishonest. This Court should find Respondent guilty of the charged rule violation.

This Court, reviewing these facts *de novo*, must reject the Referee's clearly erroneous conclusion that Respondent did not violate Rule 4-8.4(c) in drafting, executing and witnessing the fraudulent second mortgage document which attached as collateral a property in which no signatory to the agreement possessed

an ownership interest.

II. THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL RECORD EVIDENCE, AND THEREFORE SHOULD NOT BE ADOPTED BY THIS COURT.

As to the remaining conclusions of law contained in the Report of Referee, same are not supported by competent and substantial evidence and must be rejected by this Court.

In Florida Bar disciplinary proceedings, a referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla.1986). If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *The Florida Bar v. MacMillan*, 600 So.2d 457, 459 (Fla.1992). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *The Florida Bar v. Miele*, 605 So.2d 866, 868 (Fla.1992).

In the instant case, the Referee recommended that Respondent be found not guilty of violating Rule 4-8.4(c), based primarily on the fact that he did not utter

any of the misrepresentations which induced Ms. Gonzalez to fund the purported second mortgage. However, the record evidence in this matter clearly contradicts this conclusion. As such, this Court should reject the Referee's conclusion and make a finding that Respondent is guilty of Rule 4-8.4(c), based on his omissions of pertinent details which he was under an obligation to report, which omissions were dishonest and misleading.

Here, Respondent accepted the $200,000.00 the Gonzalez's provided to fund the loan, he disbursed the funds, and he drafted the purported second mortgage which acted as security for Ms. Gonzalez's funds. He also executed and witnessed the execution of the purported second mortgage note. Therefore, he was the attorney, closing agent and escrow agent for the Gonzalez loan. As such, Respondent had a fiduciary duty to the lender, Ms Gonzalez, to ensure the transaction occurred properly and to inform the lender of any and all details pertinent to the transaction. *The Florida Bar v. Hines*, 39 So.3d 1196, 1200 (Fla. 2010). This is especially true here, where Ms. Gonzalez was unrepresented, and where the documents Respondent was called on to draft were so one-sided in favor of the borrowers that Respondent had an ethical duty to make sure Ms. Gonzalez understood the possible detrimental effect of the transaction. *The Florida Bar v. Belleville*, 591 So.2d 170, 172 (Fla. 1991).

Respondent did not fulfill his fiduciary duty to Ms. Gonzalez in this regard.

Respondent failed to inform Ms. Gonzalez that the borrowers did not yet own the property which he attached as collateral to her second mortgage. His omission of this pertinent and material fact misled Ms. Gonzalez into believing that the borrowers did in fact own the property in question at the time that she loaned the funds. This omission further reinforced Gonzalez's belief in the misrepresentations which induced her to loan the second mortgage funds, including the fact that the borrowers owned the property, that there was equity in the property, and that the loan was for the purpose of making improvements or repairs on the property.

Standing silent, under circumstances such as this, where silence is misleading, constitutes dishonest or deceitful conduct. The Florida Supreme Court has long held lawyers accountable for dishonesty and/or deceit in failing to disclose necessary information. *See i.e. The Florida Bar v. Herman,* 8 So.3d 1100 (Fla. 2009)(Attorney's failure to inform his client of his business activities that were in direct competition with client's activities was dishonest and deceitful, resulting in violation of Rule 4-8.4(c) which prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.); *The Florida Bar v. Adorno,* 60 So.3d 1016 (Fla. 2011)(Citing to *Herman, supra*, Court found respondent guilty of Rule 4-8.4(c) prohibiting dishonest or deceitful conduct for his failure to inform thousands of members of putative class that he had negotiated

a $7 million settlement on behalf of seven named plaintiffs only, and asking those plaintiff's to sign a nondisclosure agreement). *See also* Commentary to Rule 4-3.3 (Candor Toward the Tribunal)(there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.) Respondent's failure to disclose the fact that the borrowers did not yet possess an ownership interest in the property used as collateral to secure the loan was dishonest and misleading, and therefore constitutes a violation of Rule 4-8.4(c) of the Rules Regulating the Florida Bar (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

In the same manner, Respondent deliberately omitted the Gonzalez mortgage from inclusion on the list of encumbrances on the property in the title insurance policies that he issued to both the lender, Country-Wide bank, and to the borrowers, Gutierrez and Cipriano. His omission misled the bank and, indeed any person with a reason to search the public records, into believing that there was no other mortgage or encumbrance on the property besides the Country-Wide loan. Respondent's silence in this regard is particularly troubling considering that he was the only participant with knowledge of the pre-existing mortgage. He knew that he had not recorded the Gonzalez mortgage, and that, therefore, the bank would not be able to discover the existence of the Gonzalez mortgage, even with the exercise of due diligence. Respondent's omission of the mortgage from the list of

encumbrances in the title insurance policies he issued following the Country-Wide closing was dishonest and misleading, and therefore constitutes a violation of Rule 4-8.4(c) of the Rules Regulating the Florida Bar (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

The Referee's conclusion that Respondent was not guilty of violating Rule 4-8.4(c) was clearly erroneous, as it is not supported by competent and substantial evidence. The record evidence clearly contradicts the conclusions reached by the Referee, and instead supports a finding of guilt for Respondent's deliberate omission of pertinent facts in those circumstances where his silence was misleading.

There was no evidence presented during the final hearing to explain or excuse Respondent's failure to inform Ms. Gonzalez of the pertinent fact that the borrowers did not yet own the property when he drafted and executed the purported second mortgage. In the absence of any such testimony, there is no evidence to support the Referee's recommendation of not guilty where the Florida Bar's evidence overwhelmingly supports a finding of guilt.

In the same manner, the only evidence presented at the final hearing to explain Respondent's deliberate omission of the Gonzalez mortgage from the list of encumbrances in the title insurance policies was Respondent's own testimony. He testified that he did not include the Gonzalez mortgage in the title insurance

policy because it was undecided at that time whether the Gonzalez mortgage would be recorded. Far from supporting the Referee's conclusion that Respondent is not guilty, this explanation is, in and of itself, further evidence of Respondent's intent to mislead or deceive. The Gonzalez mortgage, whether recorded or not, constitutes an encumbrance against the property. Respondent does not shed his lawyer hat, and his obligation to follow the Rules Regulating the Florida Bar, including his obligation to be truthful and forthright in his representations, simply because he is issuing a title insurance policy. Here, Respondent is the only participant who is aware of the encumbrance, and because it is not recorded, it could not be discovered by any other interested party, even after an exercise of due diligence. Because Respondent had knowledge of the existence of the encumbrance, he had an ethical obligation to include that mortgage on the list of encumbrances existing against the property.

Because the record evidence establishes conclusively that Respondent is guilty of violating Rule 4-8.4(c) for his omission of pertinent facts where his silence was misleading, and because there is no competent and substantial record evidence to support a conclusion to the contrary, the conclusions of the Referee in this regard must be rejected by this Court. The Florida Bar respectfully requests this Court to make a finding of guilt for Respondent's violation of rule 4-8.4(c).

The Referee further found that Respondent did not participate in the fraud

perpetrated against Country-Wide bank, and that he was unaware of the misrepresentations and omissions contained in those closing documents because he had no training in how to conduct a closing, did not know how to prepare the closing documents, and did not understand or know how to read those documents. As a result, she recommended a finding that Respondent be found not guilty of a violation of Rule 4-8.4(c). The Referee's findings and conclusion in this regard are not supported by competent and substantial record evidence. Rather, the overwhelming weight of the evidence demonstrates conclusively that Respondent was a knowing and active participant in the fraud committed against Country-wide bank, and as such, this Court should reject the recommendations of the Referee and find Respondent guilty.

The totality of the circumstances involved in the two mortgage transactions related to Karla Gutierrez's purchase of the Weston property provides conclusive proof of Respondent's involvement in the fraud perpetrated against Country-Wide. Respondent drafted, executed and witnessed the purported second mortgage on the property prior to the borrower's possession of any ownership interest in same. There is no legitimate or legal reason for this action, and indeed, Respondent does not even make an attempt to come up with a reasonable excuse or justification for his action.

Respondent, who was intimately familiar with the parties involved, and

whose company was the settlement agent for the Country-Wide closing, and who, himself, issued the title insurance commitment for the Country-Wide loan prior to receiving the Gonzalez funds, was certainly aware of the fact that Karla did not yet own the property that he attached as collateral for the Gonzalez loan. Any attempt to assert otherwise defies credibility. Given this knowledge, it is, therefore, an inescapable conclusion that Respondent prepared the documents and disbursed the funds for the Gonzalez loan in order to facilitate the borrowers' fraud against Country-wide bank.

The Gonzalez loan was used by Karla and her family members to actually purchase the property in question. This information was not disclosed to Country-Wide and the failure to disclose same constitutes a fraud against Country-Wide. It is clear that Country-Wide would have considered this information important and relevant in its determination of whether to proceed with the closing and fund the loan, based on the closing instructions issued to Respondent's agency, as settlement agent for the closing. At the first indication of such a "silent second," or of misrepresentations made regarding the source of the funds used to close on the property, the settlement agent was required to stop the transaction and not proceed further until he received permission from the chief lending officer of the bank. That did not happen here. Instead, Respondent's disbursement of the Gonzalez funds to the borrowers and preparation of the fraudulent Gonzalez "second"

mortgage was an instrumental part of the fraud against Country-Wide. But for Respondent's actions, the borrowers would not have been able to come to the closing table with none of their own funds at stake. Indeed, the very reason that banks reject loans under circumstances such as these was the eventual result of this transaction. Gutierrez stopped making payments and was willing to walk away from the property when foreclosure proceedings were initiated, because she had nothing at stake, as none of her own funds were tied up in the property.

It is an inescapable reality that Respondent's agency was the closing agent for the Country-Wide loan, and that the agency prepared the closing documents which contained numerous misrepresentations and which deliberately omitted the existence of the Gonzalez loan, as well as the fact that the Gonzalez loan was the source of the funds used to close and purchase the property. Further, shortly thereafter, Respondent himself issued the title policies which also omitted the Gonzalez loan from the list of encumbrances against the property. Finally, despite his practice to timely record mortgage notes, Respondent did not record the Gonzalez note until June, 2006, well after any possible title search could discover the existence of the loan and interfere with the Country-Wide closing. Thus, Respondent is intimately connected to every facet of the fraud perpetrated against Country-Wide. The Bar presented overwhelming evidence of Respondent's guilt in this regard.

The only evidence presented in the record to contradict the Bar's evidence of guilt, and to support the Referee's recommendation that Respondent be found not guilty was Respondent's own testimony. Respondent testified that he was unaware of the misrepresentations and omissions contained in the closing documents, and that he had nothing to do with the Country-Wide closing. He claimed that he did not record the Gonzalez mortgage because he had no instructions to do so, and that he did not include the loan in the list of encumbrances against the property in the title insurance policy because it was undecided at that time whether the mortgage would be recorded.

Under the circumstances of this case, the Referee erred in relying upon Respondent's testimony, as same cannot be considered competent and substantial evidence. Respondent's testimony was inherently unreliable. Indeed, Respondent drafted a fraudulent document during the events giving rise to these very proceedings. He misled Gonzalez and the bank through his failure to provide pertinent details where his silence was misleading. Moreover, he made affirmative misrepresentations during the Final Hearing in this cause. At trial, Respondent testified that when he received the Gonzalez funds, he was told it was to be an unsecured loan with the possibility of becoming a second mortgage. However, he never mentioned this fact at any time during the two and a half year investigation of the Florida Bar. The first time he mentioned this fact was during his deposition,

which took place a mere two weeks prior to the commencement of trial. Further, his initial response to the Florida Bar directly contradicts this assertion. In his initial response, Respondent admitted that the Gonzalez monies were provided to fund a second mortgage.

In addition to Respondent being an unreliable witness based on the evidence of his misrepresentations and omissions, his testimony in this cause is incredulous. Respondent would have this Court believe that despite the fact that he was the President and Managing Partner of a Title Agency, and the fact that his primary area of practice at his law firm was real estate transactions, he had no idea how to read and understand a HUD-1.

Furthermore, his explanation regarding the purpose for which the Gonzalez funds were provided is contradictory and nonsensical. Clearly, Respondent claimed that the loan was initially provided as an unsecured loan to explain his disbursement of the funds prior to the execution of any documents evidencing a legal obligation to repay same. However, his claim that it was later decided to make the loan a second mortgage because Rick Pedrosa no longer wished to secure the note, but that at the same time it was undecided whether the note should be recorded makes no sense and is inherently unreliable. There is no explanation for why the lender would not wish to secure her mortgage by recording same in the public records. Each of Gonzalez's prior loans with Respondent and Pedrosa were

recorded, and she clearly expected that same would occur in this case. Respondent's testimony lacks credulity.

Therefore, based on the overwhelming evidence of Respondent's participation in the fraud perpetrated on Country-Wide bank, and based on the absence of any competent and substantial record evidence to support the Referee's recommendation that Respondent be found not guilty of same, this Court should reject the Referee's recommendation and find Respondent guilty of a violation of Rule 4-8.4(c).

Finally, the Referee recommended that Respondent be found not guilty of violating Rule 5-1.1(b) of the Rules Regulating Trust Accounts. Her recommendation was based on the fact that Gonzalez gave the monies to fund a loan to Gutierrez and her family members and that Respondent disbursed the funds in accord with her wishes and with her permission.

However, the record evidence clearly contradicts the Referee's conclusion and there is no competent and substantial evidence in the record to support her conclusion. The record evidence demonstrates that the monies were provided to fund a second mortgage, to persons who already owned the property in question, for the purposes of making improvements and repairs on the property. Ms. Gonzalez had the clear understanding and expectation that Respondent would hold the funds until a closing on that mortgage occurred, in accord with their prior

course of conduct.

However, Respondent did not hold the funds as was required pursuant to his fiduciary duty as escrow agent. Rather, he disbursed same to the borrowers by wire transfer the very next day, without drafting and executing a document which would legally obligate the borrowers to repay the loan. Further, the funds were not used as a second mortgage to make improvements and repairs on the property. Instead, the funds were used by the borrowers to fund the closing and purchase of the home in question. It is axiomatic that there can be no second mortgage when there has not been a first mortgage. The funds were not disbursed for the purpose for which they were entrusted. The Florida Bar presented competent and substantial evidence to support a recommendation of guilt as to this Rule violation.

There is no competent and substantial record evidence to support the Referee's recommendation of not guilty in this regard. The only evidence presented that could support her findings and conclusions was Respondent's own testimony. As was established above, his uncorroborated testimony is inherently unreliable and cannot constitute competent evidence to sustain the Referee's conclusions in these proceedings.

Moreover, even if the Referee could rely upon Respondent's testimony as competent evidence, his assertion that Rick Pedrosa told him that the loan was an unsecured loan does not establish an excuse or justification for the improper

disbursal of the Gonzalez funds within a day of receipt, without first conducting a closing on her mortgage. As escrow agent in this transaction, Respondent had an affirmative duty to know the details of the parties' agreement, and to ensure he disbursed the funds in strict conformity therewith. In *The Florida Bar v. Joy*, 679 So.2d 1165 (Fla. 1996), this Court made clear that an escrow agent has an absolute duty to know the provisions and conditions of the principal agreement concerning the escrowed property, and to exercise reasonable skill and ordinary diligence in holding and delivering possession of the escrowed property in strict accordance with the principal's agreement. Thus, it is axiomatic that a lawyer receiving funds from a third party, and depositing same into his escrow account, has an absolute duty and obligation to exercise reasonable diligence to determine for what purpose that third party had provided the funds. According to his own testimony, Respondent exercised no diligence in this regard, but rather simply took the word of Pedrosa as to the purpose of the funds.

Further, the Referee's analysis that there is no rule violation because Ms. Gonzalez gave the funds for a second mortgage, and that she in fact received a second mortgage six months later, is simply wrong and shows a fundamental lack of understanding that the ends do not justify the means. If at the time that Respondent disbursed the funds it was not in compliance with the lender's wishes and was not for the purpose for which the funds were entrusted, then he has

violated Rule 5-1.1(b), irrespective of whether he was later able to present the lender with a second mortgage.

The overwhelming weight of the evidence supports a recommendation of guilt, and there is no competent and substantial evidence to support the Referee's recommendation that Respondent be found not guilty. Accordingly, this Court should reject the recommendation of the Referee and find Respondent guilty.

III. THE PROPER SANCTION FOR RESPONDENT'S MISCONDUCT IN THIS MATTER IS DISBARMENT.

The Referee in this matter recommended a finding of not guilty and therefore she did not make a recommendation as to the appropriate sanction for Respondent. However, "[t]he Supreme Court shall have exclusive jurisdiction to regulate...the discipline of persons admitted [to the practice of law]." Art. V, §15, Fla. Const. Therefore, " . . . the determination of the appropriate discipline is peculiarly in the province of this Court's authority." *The Florida Bar v. O'Connor*, 945 So.2d 1113, 1120 (Fla. 2006). Therefore, the Court will determine the appropriate discipline in this matter *de novo*. In light of the overwhelming evidence of guilt, and the Respondent's failure to express remorse or take responsibility for same, the appropriate sanction in this matter is disbarment.

In the instant case, the Respondent engaged in a pattern of dishonest conduct, improperly disbursed escrow funds, created a fraudulent mortgage, which itself was used to perpetuate a fraud on Country-Wide bank, and took evasive

actions to cover up this misconduct so that the existence of the Gonzalez mortgage would not be discovered. Further, Respondent made misrepresentations in his testimony before the Referee in the instant disciplinary proceedings. Indeed, it is apparent that truth for Respondent is whatever is expedient at the moment. As such, Respondent has engaged in serious misconduct deserving of the most severe of penalties.

Based on the totality of the circumstances and the overwhelming evidence presented by the Bar in this case, the appropriate sanction is disbarment. "This Court has clearly stated that 'basic, fundamental dishonesty . . . is a serious flaw, which cannot be tolerated' because dishonesty and a lack of candor 'cannot be tolerated by a profession that relies on the truthfulness of its members.'" *The Florida Bar v. Head*, 27 So.3d 1 (Fla. 2010) (citing *The Florida Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002)). Dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole. *Id.* The profession of the practice of law requires lawyers to be honest, competent and diligent in their dealings with clients, other lawyers, and courts. *The Florida Bar v. Varner*, 992 So.2d 224, 231 (Fla. 2008) (holding that a one year suspension was the appropriate sanction for an attorney who lied to opposing counsel, the court and his own client). Indeed, in *The Florida Bar v. Senton*, 882 So.2d 997 (Fla. 2004), this Court held that lying in the disciplinary proceeding alone is worth

disbarment. In the instant matter, Respondent knowingly made false statements in testimony before the Referee. In court, Respondent asserted that the Gonzalez loan began as an unsecured loan. Respondent directly contradicted this testimony in his initial response to the Florida Bar wherein he admitted that the monies were given for the purpose of funding a second mortgage. The appropriate sanction is disbarment.

Further, in an analogous case, this Court entered an Order of Disbarment for an attorney's fabrication of documents in order to cover up her neglect of a client matter. *The Florida Bar v. Mazza-Martinez*, 939 So.2d 95 (Table), (Fla. 2006).

Moreover, in *The Florida Bar v. Watson,* 88 So.3d 151 (Table)(Fla 2012), this Court entered an order permanently disbarring an attorney for violations of Rule 4-8.4(c) and 5-1.1(b) in connection with the respondent's facilitation and participation in his client's fraud. In that case, the Referee found that the respondent made misrepresentations in furtherance of the fraud. Here, Respondent misled the lenders by his omission of pertinent details where his silence was misleading. Respondent also created a document containing inherent misrepresentations when he prepared the Gonzalez mortgage attaching a property that the borrowers did not yet own. In *Watson*, the respondent also disbursed escrowed funds to his client immediately upon receipt, and without waiting for the condition precedent that was to occur before the release of the funds. Similarly, in

the case at Bar, Respondent released the Gonzalez funds to the borrowers immediately and without waiting for the closing of the Gonzalez mortgage. Finally, the funds in *Watson* were released for a purpose other than that for which they were entrusted. In the instant case, the Respondent likewise released the funds for purposes other than that for which they were entrusted. In accordance with this Court's prior precedent, the appropriate sanction for Respondent is disbarment.

Additionally, in accord with Standards for Imposing Lawyer Discipline, disbarment is the appropriate sanction in this case. Standard 5.11(f) indicates that disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. In the instant case, Respondent was dishonest and misled the lenders through his omission of material facts where silence was misleading, and created a fraudulent mortgage document that encumbered property which the borrowers did not own. Further, he lied about the purpose and nature of the loan in his testimony before the Referee in this instant disciplinary proceeding. Such inherent dishonesty simply cannot be tolerated in a community that relies on the truthfulness of its members.

Similarly, Standard 6.11 indicates that disbarment is appropriate when a lawyer, with intent to deceive the court, knowingly makes a false statement or

submits a false document. In the instant case, the Respondent testified that the Gonzalez loan began as an unsecured loan, in order to explain his disbursement of the loan funds prior to the execution of the mortgage. Respondent had not mentioned this fact at any time during the Bar's two and a half year investigation prior to his deposition just weeks prior to the final hearing. Additionally, his initial written response to the Bar Grievance directly contradicted this testimony. As such, disbarment is the appropriate sanction in this case.

Finally, there are numerous aggravating factors present in this case. Respondent clearly had a dishonest or selfish motive. Respondent engaged in a pattern of misconduct and multiple offenses, and this Court treats individual misrepresentations and omissions as separate offenses. Respondent has not acknowledged the wrongful nature of his conduct, and indeed has not taken responsibility for same. Rather, the Respondent has expressed outrage that the Florida Bar has dragged him through the mud during the course of its investigation, and has stated that he would not be under investigation but for Karla's failure to continue to make the mortgage payments. The victim in this case was a vulnerable lay person, an unsophisticated lender who trusted Respondent and his partner in these transactions.

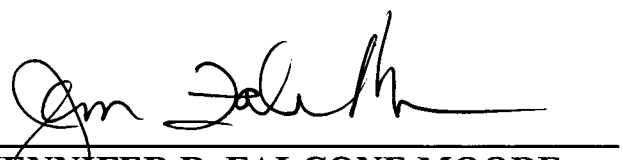
By contrast, the only mitigating factors present in the Record before this Court are Respondent's relative inexperience in the practice of law, and his lack of

prior disciplinary sanctions.

Therefore, based on the totality of the circumstances in this case, and the overwhelming weight of the evidence, the appropriate sanction for Respondent is disbarment. Additionally, the aggravating factors far outweigh any possible mitigation in this case.

CONCLUSION

In consideration of this Court's broad discretion as to discipline and based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court reject the Referee's recommendation that Respondent be found not guilty of the charged rule violations, and make a finding of guilt as to Rules 4-8.4(c) and 5-1.1(b). Further the Florida Bar respectfully requests that this Court impose the sanction of disbarment. Additionally, in accordance with Rule 3-7.6(q)(3) of the Rules Regulating The Florida Bar, upon a finding of guilt in this matter, The Florida Bar respectfully requests this Court to assess the Bar's costs against the Respondent.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief were sent via U.S. Mail (and a true and correct copy was sent via electronic mail at e-file@flcourts.org) to the Honorable Thomas D. Hall, Clerk, Supreme Court Building, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and a true and correct copy was emailed at crimlawmarx@aol.com and mailed to Richard Benjamin Marx, Attorney for Respondent, 66 West Flagler Street, 2nd Floor, Miami, Florida 33130; and emailed at kmarvin@flabar.org to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399; on this 12th day of February, 2013.

JENNIFER R. FALCONE MOORE
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Initial Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

JENNIFER R. FALCONE MOORE
Bar Counsel

THE FLORIDA BAR

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February 12, 2013

Honorable Thomas D. Hall, Clerk
Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399

RE: The Florida Bar v. Jose Carlos Marrero
Supreme Court Case No. SC11-1780
The Florida Bar File No. 2010-70,709(11D)

Dear Mr. Hall:

Enclosed please find an original and seven copies of The Florida Bar's Initial Brief on Appeal regarding the above-referenced matter. In addition, an electronic copy of The Florida Bar's Initial Brief on Appeal has been emailed on this date to this Honorable Court, as well as Respondent's counsel.

Also enclosed please find the original Notice of Filing Transcript in this cause.

Thank you.

Sincerely,

JENNIFER R. FALCONE MOORE
Bar Counsel

JRFM\nf
Enclosures

cc: Richard B. Marx, Attorney for Respondent (w/ enclosures) – via email and U.S. mail
Kenneth L. Marvin, Staff Counsel (w/ enclosure)