IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOSE CARLOS MARRERO,

Respondent.

_____/

Supreme Court Case
No. SC11-1780

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

INITIAL BRIEF OF THE FLORIDA BAR

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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 transcript of the Hearing on Sanctions held on February 27, 2015 will be by the symbol "TR" followed by the corresponding page number(s).

References to the Record of the guilt phase of these proceedings, which was previously reviewed by this Court, are included in this appeal. In such cases, reference to The Florida Bar's exhibits presented at the guilt phase of the Final Hearing will be by "TFB", followed by the exhibit number. References to the Transcript of the guilt phase of the Final Hearing will be by the symbol "TR.I at" followed by the appropriate page number).

STATEMENT OF THE CASE AND OF THE FACTS

The Complainant, The Florida Bar, is seeking review of the Amended Report of Referee, which recommends that Respondent be suspended for a period of 90 days, followed by a three year probationary period with conditions. Specifically, The Bar is seeking review of the Referee's findings regarding aggravating and mitigating factors, as well as her recommendation regarding the appropriate sanction.

For the convenience of the Court, the Bar herein sets forth the facts of the case as found by this Honorable Court in its Opinion dated January 15, 2015:

> The Florida Bar alleged that Respondent violated the Rules Regulating the Florida Bar by his conduct when serving as an escrow agent for a loan provided by Ms. Gonzalez, and when processing a related loan from Countrywide Bank. As the referee found in its report, Respondent and Mr. Pedrosa were officers of Weston Professional Title Group, Inc. Respondent was the President and registered agent of Weston. Pedrosa was a mortgage broker. Occasionally, Pedrosa made business arrangements with Ms. Gonzalez. She would make cash loans, through Pedrosa, to his clients. The evidence demonstrates that on December 13, 2005, Respondent accepted a $200,000 check from Gonzalez that was to be used for a loan. She provided the check through an arrangement she made with Pedrosa.
>
> Although Respondent did not negotiate the agreement with Gonzalez, he knew the funds were for a loan to borrowers Gutierrez and Carrero. Gonzalez testified that Pedrosa informed her the funds were to be used for a second mortgage.
>
> Bank statements show that Respondent deposited the $200,000 cashier's check into his escrow account on December

15, 2005, and he disbursed the entirety of the loan funds by wire transfer to the borrowers the next day, on December 16, 2005. He did not require the borrowers to sign any agreements at the time. The funds were provided to Gutierrez and Carrero before the note and mortgage were prepared or signed. In fact, the mortgage and note were not created until three weeks after the funds were disbursed. Respondent did not draft the "second mortgage" and promissory note until January 10, 2006, which was 25 days after he gave the borrowers the entire $200,000. This conduct did not protect the interests of lender Gonzalez. As Respondent was a fiduciary responsible for the funds and to all involved parties, these deliberate acts are not negligence. He intentionally disbursed the funds the day after receiving them from Gonzalez, without having the borrowers sign any documents at that time. He performed these actions deliberately and knowingly.

Furthermore, in the "second mortgage" Respondent listed the property at issue as collateral for the loan. However, when the mortgage and note were executed on January 11, 2006, and witnessed by Respondent, the borrowers had no ownership interest in the property that was listed as collateral. The borrowers did not purchase the property until six days later on January 17, 2006.

Although Gonzalez received the loan closing documents on January 11, 2006, Respondent did not record the Gonzalez mortgage until six months later. The deed of mortgage, which Respondent prepared, was executed by Gutierrez and Carrero on January 11, 2006, but was not recorded until June 22, 2006. Thus, Gonzalez did not have a recorded interest in the property until six months after Respondent gave the borrowers the $200,000. At no time during these events did Respondent inform Gonzalez that the funds were being used by the borrowers to purchase the house. Gonzalez had been told that the funds were to be used to make repairs on a house that the borrowers already owned; her loan was to serve as a second mortgage.

> Borrowers Gutierrez and Carrero did not own the property until January 17, 2006, which is the date a loan was settled between lender Countrywide Bank and the borrowers. It is significant that the mortgage loan application executed by Carrero to obtain the Countrywide Bank loan failed to disclose the $200,000 loan from Gonzalez as a liability. In addition, because Respondent delayed for many months before recording the $200,000 Gonzalez loan, his actions prevented the loan from being found by any title search performed for the Countrywide Bank closing on January 17, 2006. Further, the compliance form failed to disclose the $200,000 loan from Gonzalez. The title insurance loan policy, which Respondent signed, also failed to list the Gonzalez loan. Similarly, the Owner's Policy of Title Insurance did not reflect the $200,000 loan. Respondent's title company closed the loan and Respondent signed the policy.
>
> Eventually, after purchasing the property, the borrowers stopped making payments on the Gonzalez loan. Gonzalez's efforts to recover her funds were unsuccessful.

The Florida Bar v. Marrero, 157 So.3d 1020, 1022-23 (Fla. 2015).

After the guilt phase trial was held in this case, the Referee issued a report finding that Respondent did not commit violations of Rules 4-8.4(c) and 5-1.1(b) of the Rules Regulating the Florida Bar. The Bar appealed. In its Opinion dated January 15, 2015, this Honorable Court disapproved the Referee's findings and entered findings of guilt of three violations of Rule 4-8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation) and one violation of Rule 5-1.1(b) (money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied for that purpose.). The Court referred the case back to the

Referee, and directed her to submit an Amended Report of Referee to the Court recommending a disciplinary sanction.

The Hearing on Sanctions in this cause occurred on February 27, 2015. During that hearing, the Referee heard testimony from Respondent in his own behalf and from eight character witnesses. These witnesses included four attorneys, Mr. Rick Pedrosa, the chief operating officer of a real estate company, the pastor and the secretary/pastor assistant of Saint Jude Melkite Catholic Church. The attorneys, Mr. Pedrosa, and the CO testified as to Respondent's reputation for honesty and integrity in the community; all six of these witnesses described Respondent as an "upstanding individual," "honest, "hard-working," "trustworthy" and having a "high reputation." (TR 11-15, 24, 30, 36, 39). Respondent's witnesses from the church testified as to Respondent's community service with the church's outreach programs and had described the Respondent as a "generous" and an "outstanding man." (TR 42-43, 46). Respondent himself testified that he fully cooperated with the Bar in this proceeding when "every document requested . . . was provided in a timely manner." (TR 51). Respondent further testified that he received only $300.00 as his share in the transaction which was the subject of this proceeding. (TR 56). Respondent stated that he did not have a malicious motive in handling the transaction in this cause, that Gonzalez was "a source of business," and

that he was "sorry for what happened." (TR 58-59). Respondent also posed a question as to why he would risk his Bar card over $300. (TR 60). Respondent indicated that he took real estate courses as interim rehabilitation, and that he engaged in community service work for First Baptist Church of Hialeah and Chapman Partnership for the Homeless. (TR 59-60)

In its closing argument during the sanctions hearing, The Florida Bar urged the Referee to recommend to this Court that Respondent be disbarred for his deliberate and intentional misconduct, which was fraudulent and a breach of his professional and fiduciary duties. (TR 64). The Bar argued that several aggravating factors were applicable to Respondent. In particular, the Bar stressed the existence of Respondent's dishonest or selfish motive; the vulnerability of the victim; that there were multiple offenses, as well as a pattern of misconduct; that Respondent was indifferent to making restitution; and that Respondent refused to acknowledge the wrongful nature of his conduct. (TR 67-69). The Bar conceded the fact that Respondent did not have substantial experience in the practice of law at the time of the offenses and that he did not have a prior disciplinary record. The Bar took no position on Respondent's argument as to his interim rehabilitation. (TR 71-72).

In mitigation, Respondent argued that there was an absence of dishonest or selfish motive based on the fact that he only made $300 from the deal with

Gonzalez. (TR 75). Respondent also argued that there was only one transaction in this case which would not support a finding of multiple offenses, or a pattern of misconduct. (TR 76). With respect to refusal to acknowledge the wrongful nature of misconduct, Respondent argued that he, in fact, did so during his testimony at the sanctions hearing. (TR 78). Finally, Respondent addressed the "impressive" testimony from his character witnesses, interim rehabilitation, and full and free disclosure to the Bar as other mitigating factors. (TR 79-80). Respondent urged the Referee to impose a public reprimand or a ninety-day suspension as the appropriate sanction in this matter. (TR 82).

On April 15, 2015, following the presentation of Respondent's testimony and argument of counsel at the sanctions hearing, the Referee entered The Amended Report of Referee containing her findings and recommendations. (ROR). In support of these findings and recommendations, the Referee relied upon the Opinion of the Florida Supreme Court and noted that the Supreme Court "expressly found Respondent's conduct to be intentional." (ROR 5). The Referee also concluded that Respondent's lack of competence was "knowing," and therefore warranted a suspension as a sanction under the Standards. (ROR 5). Additionally, the Referee noted the Supreme Court's finding that Respondent "violated his duty to client Gonzalez to inform her 'that the funds she provided were not being used in

accord with her agreement in providing the loan,' and that Respondent's violations were "knowing." (ROR 6).

In determining the appropriate sanction, the Referee considered mitigating and aggravating factors. (ROR 6). The Referee only found two factors in aggravation: that Respondent had a dishonest or selfish motive, and that he was indifferent to making restitution. (ROR 6-7). The Referee specifically declined to find applicable the following aggravating factors: 1) vulnerability of the victim, 2) multiple offenses, and 3) a pattern of misconduct. (ROR 6-7). With respect to refusal to acknowledge wrongful nature of his conduct, the Referee concluded that this was not an aggravating factor because "although Respondent did not take responsibility for his conduct during trial, he expressed contrition and remorse at the sanctions hearing." (ROR 7). The Referee declined to find multiple offenses and a pattern of misconduct as aggravating factors, agreeing instead with Respondent's contention that the disciplinary action arose out of one transaction, and not multiple acts. (ROR 6).

In mitigation, the Referee found that there was an absence of a prior disciplinary record, although she acknowledged three prior complaints lodged against Respondent with no imposition of discipline. (ROR 7-8). The Referee also found that Respondent exhibited interim rehabilitation, possessed a good character

or reputation, made full and free disclosure to the Bar, and possessed inexperience in the practice of law. (ROR 8).

In her Report, the Referee expressly acknowledged that the precedent most closely on point was *The Florida Bar v. Watson*, 76 So.3d 915 (Fla. 2011), in which this Court imposed a three year suspension on an attorney for mishandling escrow funds, and for his participation in and facilitation of his client's fraud. In that case, Watson was found guilty of the same rule violations as are at issue in the present case. Notwithstanding same, the Referee recommended a ninety day non-rehabilitative suspension, followed by a three-year probationary period. (ROR 12).

At its meeting that ended on May 22, 2015, the Board of Governors of The Florida Bar considered this case, and voted to file a Notice of Intent to Seek Review of the Amended Report of Referee and seek review as to the aggravating and mitigating factors found by the referee, as well as to the recommended discipline. The Florida Bar filed its Petition for Review on June 15, 2015.

The Bar appeals the Amended Report of Referee as to the recommended sanction and the findings concerning the aggravating and mitigating factors. The Florida Bar's Initial Brief on Appeal follows.

SUMMARY OF THE ARGUMENT

The Referee's recommendation of a ninety day non-rehabilitative suspension in this matter is contrary to existing case law and the Standards for Imposing Lawyer Sanctions. Relevant case law establishes that disbarment is the appropriate discipline for Respondent where he intentionally and knowingly: engaged in a pattern of dishonest conduct; improperly disbursed escrow funds; created a fraudulent mortgage, which itself was used to perpetrate a fraud on Country Wide Bank; and took evasive actions to cover up this misconduct so that the existence of the Gonzalez loan could not be discovered, even through an exercise of due diligence on the part of Country Wide Bank.

Further, the Referee did not properly weigh the mitigating factors offered by Respondent, and failed to make appropriate findings regarding aggravating factors that were clearly present in the instant case. Upon a proper weighing of the aggravating and mitigating factors, it is apparent that disbarment is the appropriate sanction in the instant case.

ARGUMENT

I. THE REFEREE'S RECOMMENDED SANCTION OF A NINETY DAY SUSPENSION HAS NO REASONABLE BASIS IN EXISTING CASE LAW, NOR THE FLORIDA STANDARDS FOR IMPOSING LAWYER DISCIPLINE, AND THEREFORE SHOULD NOT BE ACCEPTED BY THIS COURT. THE APPROPRIATE SANCTION IN THIS MATTER IS DISBARMENT.

The Referee in this matter recommended a sanction of a ninety day non-rehabilitative suspension from the practice of law, followed by a three-year period of probation. The Referee's recommendation has no reasonable basis in existing case law, and is not supported by the Florida Standards for Imposing Lawyer Discipline, and as such should be rejected by this Court. Rather, disbarment is the appropriate sanction for Respondent where he intentionally and knowingly: engaged in a pattern of dishonest conduct; failed to disclose important facts to the lenders of each loan where he had a duty to disclose, and where his silence was misleading; improperly disbursed escrow funds; created a fraudulent mortgage, which itself was used to perpetrate a fraud on Country Wide Bank; and took evasive actions to cover up this misconduct so that the existence of the Gonzalez loan could not be discovered, even through an exercise of due diligence on the part of Country Wide Bank. Such serious and egregious misconduct is deserving of the most severe of sanctions.

"The Supreme Court shall have exclusive jurisdiction to regulate…the discipline of persons admitted [to the practice of law]." Art. V, §15, Fla. Const. Therefore, "unlike the referee's findings of fact and conclusions as to guilt, 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).

As ultimately it is this Court's responsibility to order the appropriate punishment, this Court enjoys broad latitude in reviewing a referee's recommendation. *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989). The Court usually will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Temmer*, 753 So.2d 555 (Fla. 1999). Here, the recommended discipline has no reasonable basis in existing case law, nor the Florida Standards for Imposing Lawyer Discipline, and does not accurately reflect the severity of the misconduct at issue. Accordingly, the Referee's recommendation should be rejected.

Based on the totality of the circumstances, and this Court's specific findings that Respondent's pattern of dishonest conduct was knowing and intentional, the appropriate sanction in this case 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).

Here, in its prior Opinion, this Honorable Court found that Respondent engaged in a knowing and intentional pattern of dishonest conduct: first, through his drafting, executing, and witnessing a mortgage loan document containing the misrepresentation that the borrowers had the legal authority to encumber the property; second, through his deliberate omissions and knowing failures to report to lender Gonzalez important facts regarding the transaction, including but not limited to, the facts that her funds were not being used for the purpose for which she tendered them, and instead were being used by the borrowers to purchase the property in question; and third, through his deliberate omissions and knowing failures to report the existence of the Gonzalez loan, which he himself had drafted

just one week earlier, to Country Wide Bank as a prior encumbrance on the property, and as the source of the funds used to close on the Country Wide loan. He deliberately failed to record the Gonzalez loan until well past the date of the closing of the Country Wide loan, and omitted any mention of same on any of the title insurance documents prepared for the transaction, thereby preventing Country Wide from discovering its existence prior to the closing. *The Florida Bar v. Marrero*, 157 So.3d 1020, 1023-25 (Fla. 2015). The appropriate sanction in this case, where the Court found "a pattern of knowing decisions and deliberate acts," of dishonesty, is disbarment. *Id*. at 1025.

The precedent which is most on point to the case *sub judice*, in terms of both the severity of the misconduct and the rule violations at issue, is *The Florida Bar v. Watson*, 76 So.3d 915 (Fla. 2011), hereinafter referred to as *Watson I* and *The Florida Bar v. Watson*, 88 So.3d 151 (Fla 2012), hereinafter referred to as *Watson II*. Indeed, even the Referee explicitly acknowledged same in her Report of Referee, stating that *Watson* is "the most relevant and instructive case with regard to the recommendation and imposition of discipline for multiple violations of the same rule." (ROR 11). Both *Watson* cases imposed far harsher sanctions than the one recommended by the Referee in the instant case. In *Watson I*, an attorney was suspended for three years after being found guilty of three violations of Rule 4-

8.4(c) and four violations of Rule 5-1.1(b). In *Watson II*, the same attorney was permanently disbarred for yet another violation of Rule 4-8.4(c) and Rule 5-1.1(b). Although the Referee found the *Watson* cases to be the most relevant and instructive precedent, she inexplicably and erroneously recommended a far less severe non-rehabilitative suspension as the appropriate sanction for Respondent.

In *Watson I*, 76 So.3d 915, this Court held that a three year suspension from the practice of law was the appropriate sanction for an attorney's facilitation of his client's fraudulent transactions, and his mishandling of the funds of the investors who had invested money in his client's development project. Those investors had entrusted various sums of money to be held in the attorney's trust account for the purpose of serving as collateral for a standby letter of credit. Although the attorney represented to the investors that their monies would remain in his trust account, he immediately and improperly disbursed same upon the receipt of said monies, for a purpose other than that for which they had been entrusted, as no standby letter of credit had been issued. Watson also drafted letters to the investors, explaining that there was a "delay" in the transaction, but which specifically omitted the fact that their funds had been disbursed out of the trust account. Respondent wrote another letter to a different investor asserting that the funds would be held in his trust account, which was a misrepresentation upon which the investor relied. All of the

investors made efforts to recover their funds, but were not able to recover anything. The Court found that the attorney owed a fiduciary duty to the investors and that he acted deliberately and knowingly with regard to the improper disbursement of the investors' funds. Because Watson's acts were intentional and dishonest, the Court also found that the egregious nature of the attorney's misconduct clearly outweighed the mitigation presented. Accordingly, this Court rejected the ninety-day suspension recommended by the Referee in *Watson I*, and instead imposed a three-year suspension.

The facts and circumstances of *Watson II* essentially mirror those described above. In *Watson II*, the same attorney was disbarred after he once again failed to hold funds in his trust account until the condition precedent was met, namely until the bank issued a standby letter of credit. Rather, Watson disbursed the funds immediately upon receipt, contending that the funds properly belonged to his client. The Court approved the Report of the Referee, and permanently disbarred Watson.

Similar to the facts of both *Watson* cases, as this Court noted in its prior Opinion in the instant case, Respondent Marrero also created documents containing misrepresentations and deceptive omissions, upon which he knew others would rely. He disbursed escrow funds immediately upon receipt, and without first drafting and executing the loan documents which would secure the funds. He

further disbursed the funds for a purpose other than that for which they had been provided. His actions were similar in nature and magnitude, to those committed by Watson; therefore, based on this Court's direct precedent, Respondent Marrero should be given, at a minimum, a three year suspension. However, in the instant case, Marrero's misconduct actually exceeded that which was committed by Watson in *Watson I*, and therefore, is deserving of a more severe sanction. Watson, for all intents and purposes, merely assisted and facilitated his client's fraud. By contrast, in the case *sub judice*, Respondent actually engaged in the fraudulent transaction himself, when he drafted, executed and witnessed a mortgage document that contained the misrepresentation that the buyers had the legal authority to encumber the property serving as collateral for the loan. Accordingly, the appropriate sanction in the instant case should be more severe than that imposed in *Watson I*, and Respondent should be disbarred.

Based on all of the above cited authorities and precedent, and the egregious nature of the misconduct at issue, the Referee's recommendation of a ninety-day suspension has no reasonable basis in existing case law and should be rejected by this Court. The appropriate sanction is disbarment.

Similarly, the Referee's recommended sanction, of a ninety day non-rehabilitative suspension, is not supported by the Florida Standards for Imposing

Lawyer Sanctions (hereinafter referred to as the Standards). The Referee considered Standards 4.12 (Violations of Duties Owed to Clients) and 4.52 (Lack of Competence) prior to recommending discipline. (ROR 5). However, these Standards are inapplicable to the instant case. In particular, Standard 4.52 cannot be applied in this case. Here, Respondent's primary defense at the Final Hearing was his lack of competence; a defense which this Court soundly rejected in its prior Opinion. However, even if Respondent's self proclaimed lack of competency was a valid consideration for purposes of determining the appropriate sanction, then Standard 4.52 still would not be the correct Standard to apply. Rather, Standard 4.51 would be directly on point.

Standard 4.51 provides that "[d]isbarment is appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client." In the instant case, Respondent testified that he owned and managed both a real estate law practice and a title agency; and yet he urged this Court to believe that he could not even read and understand basic closing documents, such as a HUD-1. *The Florida Bar v. Marrero*, 157 So.3d at 1023, fn 2. That degree of incompetency, even if accepted by this Court as a valid consideration, certainly demonstrates that Respondent does not understand the most

basic and fundamental legal doctrines or procedures of his exclusive area of practice. Further, his purported failure to understand such doctrines and procedures did, in fact, cause injury to lender Gonzalez, Countrywide Bank, and the legal system as a whole. Accordingly, if this Court determines that Respondent's purported lack of competency is a relevant consideration, then Standard 4.51 would be the appropriate standard to apply, and disbarment is the appropriate sanction.

Moreover, the Referee failed to apply Standards 5.11(f) and 7.1, which are the Standards which most accurately reflect this Court's prior holdings in this case, and the misconduct at issue herein. 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 its January 15, 2015 Opinion, this Court found that Respondent's misconduct was deliberate and knowing. Respondent was dishonest and misled both of the lenders, Gonzalez and Country Wide, through his omission of material facts where his silence was misleading. His silence misled Gonzalez and contributed to her belief that her funds were being used as an actual second mortgage on a property already owned by the borrowers, in order to make repairs and improvements on the property. His silence misled Country Wide Bank as to the source of the funds used to close the loan and contributed to its belief that

the buyers had placed their own funds at stake in the transaction, that there were no other encumbrances on the property, and that the deal transpired in accordance with the representations contained in the HUD-1. He further drafted, executed and witnessed a fraudulent mortgage document, containing the misrepresentation that the borrowers had the right to encumber the property named as collateral. He then, in turn, used that fraudulent mortgage document, and the proceeds therefrom, to facilitate the fraud on Country Wide bank. Additionally, Respondent took evasive actions to ensure that Country Wide could not learn the truth of the matter themselves. He intentionally failed to record the Gonzalez loan until well after the Country Wide closing, and omitted the Gonzalez loan from all the title insurance documents issued in the case. As this Court found, he knew that others would rely upon the documents he created, which contained the false and misleading statements and omissions described above. *The Florida Bar v. Marrero,* 157 So.3d at 1023-25. This is exactly the type of dishonest, fraudulent and deceptive conduct contemplated by Standard 5.11(f) , and demonstrates that disbarment is the appropriate sanction.

Similarly, the Referee failed to apply Standard 7.1 when making her recommendation. Standard 7.1 provides that "disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a

professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public or the legal system." In it's prior Opinion, this Court specifically found that, as an escrow agent, Respondent had a fiduciary duty to lender Gonzalez, to exercise reasonable skill and ordinary diligence in holding and delivering possession of the escrowed property. He breached this duty by providing the escrowed funds to the borrowers before the loan documents evidencing an obligation to repay were executed, and by releasing the funds for a purpose other than that for which they had been entrusted. The Court also found that he had a duty to inform Gonzalez that: the funds she provided were not being used in accord with her agreement in providing the loan; that he had not held her funds until a closing took place; and that he was delaying in recording her loan and recording her interest in the property. *The Florida Bar v. Marrero*, 157 So.3d at 1024-25. This Court further specifically found that Respondent breached his fiduciary duty to Country Wide Bank through his deliberate omissions and failures to inform Country Wide that the Gonzalez loan was a prior encumbrance on the property, and that the borrowers actually used the funds from the Gonzalez loan to close the Country Wide loan, rather than the borrowers own funds. *Id*., at 1025. He further breached his duty to Country Wide by deliberately failing to record the Gonzalez loan, or to include it on any of the

title insurance documents issued in this case, so that Country Wide was prevented from discovering the existence of the loan through its own due diligence. *The Florida Bar v. Marrero*, 157 So.3d at 1025. As this Court held:

> Respondent has an obligation to be truthful and forthright in his representations. He had an obligation to include that mortgage on the list of encumbrances existing against the property. Based upon these facts, which show that Respondent engaged in a pattern of knowing decisions and deliberate acts, the Court finds him guilty of a third violation of Rule 4-8.4(c). He was not truthful in his representations to Countrywide Bank and omitted material information.

Id. Accordingly, Respondent has breached his fiduciary duty and his duty of candor, and as such is in violation of duties he owes as a professional. He breached these duties in order to benefit another, specifically his known associate and the employee of his business partner. As a result of the breach of duties he owes as a professional, Gonzalez and Country Wide were harmed, as was the legal system as a whole. Accordingly, disbarment is the appropriate sanction in this case. Each of the Standards applicable to this matter demonstrates same.

Finally, the Referee erred in her findings regarding aggravating and mitigating factors, as well as the weight she assigned to those factors. In her Report of Referee, the Referee found only two factors in aggravation: that Respondent had a dishonest or selfish motive, and that he was indifferent to making restitution. (ROR 6-7). In mitigation, the Referee found that there was an absence of a prior

disciplinary record, that Respondent exhibited interim rehabilitation, possessed a good character or reputation, made full and free disclosure to the Bar, and possessed inexperience in the practice of law. (ROR 7-8). It is clear that, upon a proper weighing of the actual aggravating and mitigating factors present in this case, that disbarment is the appropriate sanction.

The Referee erred in failing to find several aggravating factors which are clearly present in this case, based on this Court's findings of fact in its prior Opinion. For instance, the Referee specifically declined to find Standard 9.22(c), a pattern of misconduct, and 9.22(d), multiple offenses, as aggravating factors in this case. Rather, the Referee agreed with Respondent that the events arose from one transaction, and as such found these factors were not applicable. The Referee's finding is clearly wrong and must be rejected by this Court.

Indeed, the Referee's finding directly contradicts the holdings contained in this Court's own prior Opinion in this case, in which it specifically found three separate violations of Rule 4-8.4(c) arising from Respondent's actions. By the very fact that this Court found multiple violations of the same Rule arising from these facts, it is clear that the Court has already found that Respondent engaged in multiple offenses. Such finding is also entirely consistent with this Court's prior precedent. As this Court has previously held, each individual instance of

dishonesty is a separate offense. *The Florida Bar v. Orta*, 689 So.2d 270 (Fla. 1997). In the case *sub judice*, Respondent engaged in numerous instances of dishonesty, deceit, and fraud, and therefore, the aggravator of multiple offenses is clearly applicable. He released escrow funds prior to the execution of a loan document evidencing an obligation to repay same and for a purpose other than that for which the funds were entrusted. He failed to disclose the improper and premature release of the escrow funds to lender Gonzalez. He failed to inform her that the funds were being used for a purpose other than that which she provided them. He failed to disclose that he was delaying recording of her loan, and recording her interest in same. He drafted, executed and witnessed a fraudulent mortgage document containing the misrepresentation that the borrowers had the right to encumber the property listed as collateral. He failed to inform Country Wide bank of the existence of the Gonzalez loan as a prior encumbrance on the property. He failed to inform Country Wide that the source of the funds used by the borrowers to close was the Gonzalez loan and not their own funds. He failed to disclose the Gonzalez loan on any of the title insurance documents he prepared in this case, and each separate title insurance document would, in and of itself, be considered a separate instance of dishonest conduct. He failed to record the Gonzalez loan until well after the Country Wide closing, thus ensuring that Country

Wide could not discover same through its own efforts. Each of these factors was clearly enunciated by this Court as separate instances of dishonesty. Accordingly, it is clear that Respondent did in fact engage in multiple offenses, and the Referee's finding to the contrary directly conflicts with this Court's prior pronouncement in this case.

Similarly, in making its third finding of violation of Rule 4-8.4(c), this Court unequivocally held that Respondent's actions in this case constitute a pattern of misconduct, and as such it was clear error for the Referee to find otherwise. The Court stated, "[b]ased upon these facts, which show that Respondent *engaged in a pattern of knowing decisions and deliberate acts*, the Court finds him guilty of a third violation of Rule 4-8.4(c) ." *The Florida Bar v. Marrero*, 157 So.3d at 1025 (emphasis added). Even without this Court's explicit finding of a pattern of misconduct in this case, it is clear that such existed. Respondent engaged in a series of misleading omissions that enabled the two transactions involving these fraudulent mortgages to proceed. He took evasive actions to ensure that Country Wide could not discover the existence of these facts for itself prior to the closing. As such, there was a pattern of misconduct.

Therefore, it is clear that multiple offenses and a pattern of misconduct must be applied as aggravators in this case. Upon making such findings, it is necessary

for this Court to engage in its own re-weighing of the aggravating and mitigating factors, because a pattern of misconduct and multiple offenses involving dishonesty are considered cumulative misconduct, and same is treated more severely by this Court than are isolated acts. *The Florida Bar v. Orta*, 689 So.2d 270 (Fla. 1997) (holding that disbarment is the appropriate sanction for an attorney who was found guilty of multiple instances of dishonesty). Upon any proper re-weighing of the aggravating and mitigating factors, it is clear that disbarment is the appropriate sanction for Respondent's cumulative misconduct.

Additionally, Standard 9.22(g), refusal to acknowledge the wrongful nature of his conduct, is also present in the instant case. Respondent did not once truly acknowledge the nature and extent of his wrongdoing, nor accept responsibility for same, except to state, at the sanctions hearing and well after this Court had found him guilty of multiple offenses, that "I should have been a better lawyer. I should have read more, looked at things in more detail…." (TR. 58). Such token statements do nothing more than play lip service to the idea of accepting responsibility for his misconduct. Rather, such statements conclusively demonstrate his consistent refusal to acknowledge the part he played in these transactions and his facilitation of the fraud perpetrated in this case. Indeed, his sanctions hearing testimony is fully consistent with the prior position he has taken

throughout the disciplinary process. He took the position, in his first written response to the grievance, that there was no reason for a Florida Bar investigation because Gonzalez thought she was getting a second mortgage and ultimately, in fact, received a second mortgage. (TR.I at 115-116; TFB Ex 6). He asserted that since a second mortgage was eventually recorded, this was a situation of no harm, no foul. (TR.I at 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.I at 368). He testified that there was in fact both a recorded first mortgage and a recorded second mortgage on the property. (TR.I at 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.I at 392). Clearly, these statements demonstrate that Respondent has, throughout these proceedings, and still even at the Sanctions hearing, refused to acknowledge the wrongfulness of his conduct. In his eyes, he just should have been more careful. This aggravator clearly applies to this case, and the Referee erred in finding to the contrary.

Finally, the referee erred in refusing to find Standard 9.22(h), the vulnerability of the victim, as an aggravating factor in this case. It was clear

through the testimony at the Final Hearing as to Guilt, that lender Gonzalez was an unsophisticated and uneducated lay person, who just happened to have money to invest. She testified that she trusted Respondent and Pedrosa to do right by her, and always relied exclusively upon the representations of Pedrosa in making her loans. (TR.I at 49-50). She clearly did not understand how to, or even that she should, engage in her own due diligence regarding her loans. Similarly, Country Wide Bank relied upon the representations of Respondent in conducting the loan transaction, and was, therefore, in this instance, a vulnerable victim. Respondent, through his deliberate delay in recording the Gonzalez loan, and deliberate omission of same at every point throughout the Country Wide closing, ensured that Country Wide could not discover the existence of the Gonzalez loan for itself. As such, the bank was vulnerable to the misleading and deceit of Respondent and his cohorts. *See The Florida Bar v. Arcia*, 848 So.2d 296, 298 (Fla. 2003)(finding that the law firm for which Arcia worked was a vulnerable victim, and applying same as an aggravator in the case because the firm trusted Arcia and provided him with access to its clients).

Although mitigating factors were present in this case, the Referee did not properly weigh those factors against the substantial aggravation present in this case. Respondent did offer evidence of good character and reputation, at the sanctions

hearing; however, under the facts and circumstances of this case, such evidence is not sufficient to overcome the severity of the misconduct coupled with the applicable aggravating factors. In *The Florida Bar v. Travis*, 765 So.2d 689 (Fla. 2000), this Court disbarred an attorney for misappropriation of client funds and rejected an argument that good works should lessen the severity of the sanction. This Court stated that "[a]n attorney does not perform such good works so that they can be used as a credit against such severe misconduct. The public has a right to have confidence that all lawyers who are members of The Florida Bar are deserving of their trust in every transaction." *Id*., at 691. Accordingly, disbarment is the appropriate sanction 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 recommended discipline of ninety days and impose instead an Order of Disbarment.

Jennifer R. Falcone, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal and that a copy has been furnished by United States Mail to Richard Benjamin Marx, Attorney for Respondent, 66 West Flagler Street, 2nd Floor, Miami, FL 33130-1800 and via Email to crimlawmarx@aol.com; and to Adria E. Quintela, Staff Counsel, The Florida Bar, via Email at aquintel@flabar.org on this 14th day of July, 2015.

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Jennifer R. Falcone, Bar Counsel