IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

SUPREME COURT CASE
No. SCO4 – 2460

COMPLAINANT,

v.

THE FLORIDA BAR FILE No.
2004-71, 265 (11L)

STEVEN RAY BROWNSTEIN,

RESPONDENT.

_____/

RESPONDENT'S ANSWER BRIEF

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For the purpose of this the Respondent's Answer Brief on Appeal, the Florida Bar will be referred to as The Florida Bar or the Bar. Steven Ray Brownstein will be referred to as either Respondent or by name. Other persons will be referred to by their respective surnames.

References to the transcript of the final hearing will be set forth as T and page number. References to the Report of Referee will be set forth as ROR and page number. References to the exhibits introduced at trial will be set forth as TFB Ex. and its letter designation.

STATEMENT OF THE CASE AND OF THE FACTS

It is respectfully submitted that the Statement of Facts as presented by the Florida Bar accurately outlines the factual underpinning of the allegations in the complaint, the Respondent's plea of guilty to the complaint and the violations of the respective Rules Regulating the Florida Bar.

However, the Florida Bar's recitation of the facts fails to appropriately outline that the Respondent, a highly respected member of the Florida Bar for thirty one years, as well as his community (T. 146-147), was suffering from a seriously advanced major recurrent and progressive mental illness (T. 36) that substantively and critically impaired the Respondent. The mental illness rendered the Respondent incompetent to practice law (T. 51).

The evidence presented below was unrebutted that the unrecognized and therefore untreated mental illness of the Respondent progressed to the point that the Respondent was "morbidly depressed" (T. 48) with "strong suicidal ideations" (T. 48, 205) and included symptoms such as spontaneously crying (T. 37), psycho-motor retardation (T. 38), avoiding phone calls and laying on his couch for hours at the office (T. 156-157), not filing his personal taxes, failing to file withholding tax forms or making the federal tax deposits for employees, ignoring the request by the Florida Bar for documents, and as charged in the complaint, not forwarding funds

received in trust to the appropriate parties and floating checks between business and personal accounts on insufficient funds.

The mental illness of the Respondent progressed until he sought the advice of undersigned counsel in December of 2004, who immediately referred the Respondent to Dr. John Eustace (T. 30, 205). Only then did the Respondent become aware of the breadth and depth of his mental illness and sought treatment. Prior to that time the Respondent knew something was wrong [1] and sought standard medical attention which failed to diagnose the mental illness.

The evidence presented below was unrebutted that the unrecognized mental illness of the Respondent was the sole cause of the acts complained of in the complaint and, that but for the mental illness, the acts complained of would never have occurred (T. 42).

After consultation with counsel and the first steps in treatment, the Respondent pled guilty to the complaint with the only issue to be determined by the Referee being a suitable sanction. After hearing detailed testimony from Dr. John Eustace, Myer Cohen, Executive Director of the Florida Lawyers Assistance Program (F.L.A.), Tod Aronovitz, former President of the Florida Bar, Ester Sardinia, the Respondent's secretary, as well as the Respondent; the Referee found the Respondent guilty of the rules violations as outlined in the Florida Bar's brief.

Appropriately, and critically, the Referee viewed all of the alleged acts as undertaken by a person with a mental impairment in making the following findings of fact:

> 1. Both the Operating Account (account #1400022665) and the Levey, Airan, Brownstein Account (account #0909079815-05) were both *de facto* the Respondent's accounts. The Levey, Airan, Brownstein Account was one which was used solely by the Respondent for income received by the Respondent for the Respondent's services. As such, the Respondent was liable on both accounts. In a typical check kiting scheme there is intent to defraud by multiple check deposits with the result being some third party or bank finally defrauded by the schemer. Here, there was no such intent. The Respondent testified and this Court accepts that the writing of the checks was done on the good faith belief that the checks would be covered by expected income or loans.
>
> 2. The transactions were over a short period of time and involved substantially less than the Respondent's average gross monthly income. Here, the Respondent averaged approximately $20,000 per month in gross income and had for several years prior to the month in question. Here, the checks started at $3,000 and after writing checks back and forth between the accounts for approximately five weeks the amount totaled $14,788. (Here, the checks cannot be totaled as each

[1] The Respondent thought that possibly had diabetes (T. 207).

check was written to include the previous check and so on.) Therefore, as this was an isolated occurrence when the Respondent's legal and banking practice is viewed over a period of many years, this Court accepts that the Respondent in good faith believed that his established income would have covered the checks and that an unusual lack of income over a period of five weeks led to the questioned transactions.

3. There was no victim or intended victim. As stated, if this was a check kiting scheme the Respondent was intending to defraud himself. When sufficient funds arrived to cover the overage, the questioned transactions immediately stopped. Further, and importantly, the Respondent enjoyed a good relationship with both banks both before *and after* these transactions. If the Respondent was involved in a classic kiting scheme it is highly unlikely that the Respondent's accounts in both banks would have remained in good standing.

4. Esther Sardinia, Respondent's secretary since 2000, observed Respondent's ability to function, work and live deteriorate throughout the years. In 2004, she noticed his hours had greatly decreased and when he was in this office, he regularly napped on his office sofa. Irrespective of his reduced work hours, she testified that although the amount of work diminished he still had income-producing clients.

Therefore, this Court finds that although the Respondent showed a

> lack of judgment in the Respondent's personal financial practices, there was no intentional check kiting scheme. Additionally, the court finds that any misuse of client's trust funds was not due to a dishonest motive but rather was due to the unrebutted expert testimony of a psychiatrist Dr. John Eustace, who diagnosed Mr. Brownstein as suffering from a mental disorder. (R.O.R. 7-8).

In finding that the mitigating factors outweighed the aggravating factors the Referee again reiterated the weight assigned to the Respondent's mental illness and stated:

> Secondly, the Respondent has offered the opinion of Dr. John Eustace who has opined that at the time of these events Mr. Brownstein was suffering from undiagnosed and untreated Major Depressive Disorder. Dr. Eustace gave the opinion that Major Depression is a serious, chronic, progressive, and relapsing disorder, which references have confirmed that attorneys are almost four times more likely to experience than the general population. Undiagnosed and untreated depression will have a negative effect on the attorney's behavior in the workplace and in certain circumstances like those exhibited here, interfere with the individuals ability to make moral and ethical judgments. Dr. Eustace further opined that this is a classic case of a good man, who through the course of his 58 years has had a series of significant psycho-social stressors, which when imposed on his biogenetic "template," triggered signs and symptoms of an illness,

which included the instant maladaptive behavior which was totally out of character. Finally, Dr. Eustace stated that Mr. Brownstein's diagnosis also can drive his movement into proper treatment and full recovery toward which he has already made significant strides and in Dr. Eustace's belief, with the combined process of the disciplinary system (The Bar), the medical treatment system (medication and psychotherapy), and the peer-professional advocacy and monitoring system (F.L.A., Inc.), Mr. Brownstein will recover and will demonstrate responsibility for his recovery. Once his recuperation and rehabilitation are fully documented, he will have, in Dr. Eustace's opinion, earned the return to his profession. (R.O.R. 7-8).

After consideration of the aggravating and mitigating factors presented the Referee fashioned the following sanction and safety net to protect the public:

Although the Florida Bar has suggested that the Respondent be disbarred, disbarment is inappropriate. For the reasons stated herein, this Court recommends:

a.) That Respondent is suspended for a period of three-years, and thereafter until he proves rehabilitation.

b.) That Respondent be placed on a minimum of five (5) years probation and thereafter a period of probation until he proves rehabilitation. That during the probationary period Respondent shall:

i.) be monitored by the Florida Lawyers Assistance Program at his sole cost and expense, and shall conform to the terms and conditions

of any contract applicable by and between himself and the Florida Lawyers Assistance Program,

ii.) attend regular mental health counseling sessions with a licensed mental health physician acceptable to the director of the Florida Bar's Legal Assistance Program,

iii.) deliver monthly reports to the Florida Bar regarding the physician's evaluation and confirmation of Respondent's continued ability to engage in the active practice of law,

iv.) submit annually to an independent psychiatric evaluation (Multiaxial Examination) at Respondent's expense, performed by a licensed psychiatrist of the Florida Bar's selection, and forward the evaluation report to the director of the Florida Legal Assistance Program for review as to mental impairment, current health conditions, improvement, competency, etc.,

v.) be directed to cooperate fully with any such evaluation otherwise requested by the Florida Bar or its authorized program directors. (R.O.R. 11-12).

The Florida Bar has filed its appeal on two grounds.

The first issues are presented on technical grounds and assert that the Referee failed to label the check writing improprieties as "check kiting" as well as assigning a dishonest or selfish motive to it and, therefore, erred in failing to find it an aggravating factor under Standard 9.22(b). The Florida Bar additionally asserts

that the Referee technically erred in failing to list as additional aggravating circumstances that the Respondent failed to comply with rules or orders of the disciplinary agency under Standard 9.22(e) and substantial experience in the practice of law under Standard 9.22(l).

Secondly, the Florida Bar argues in general terms that since the violations involve allegations of dishonesty, disbarment is the appropriate punishment.

Each of the Florida Bar's arguments will be addressed below.

SUMMARY OF ARGUMENT

If a society is judged on its treatment of the infirm, then so too should the Florida Bar.

Far from being a case about a dishonest attorney who stole from his clients, friends or bank, as argued by the Florida Bar, this is a case about a seriously mentally ill attorney whose slide into the darkness of depression and thoughts of suicide ended only when his illness was diagnosed and treatment began.

It is respectfully suggested that the Florida Bar has failed to recognize that the case before this Honorable Court is not about whether an unscrupulous and scamming lawyer was disciplined harshly enough. The case before this Court is about how an emotionally and mentally impaired attorney should be treated and the community safeguarded during his treatment and rehabilitation. As was heard by the Referee, an attorney is far more likely to suffer the immobilizing effects of depression. That is what happened here.

The Florida Bar suggests that the sole issue before this Court is whether the Referee's recommendation of a three (3) year suspension is appropriate. What the Florida Bar fails to mention in its brief is that the Referee went to great lengths both to fashion a suitable sanction under existing case authority, to safeguard the community against a future relapse and imposed sanctions far more restrictive than

the three-year suspension to which the Florida Bar objects.

The Respondent suggests that the issue before this Court is whether the recognition of the mental impairment and a three-year suspension and other omnibus sanctions and safeguards for the community imposed by the Referee are adequate under existing Supreme Court authority. The Respondent submits that the discipline imposed by the Referee both safeguards the community and is legally adequate given the very unusual factual circumstances of the instant case.

The Respondent acknowledges that the law in Florida is clear that the ultimate responsibility for determining discipline rests with this Court, however, as determined by the Referee at the conclusion of all the evidence, the above stated sanctions in addition to a three-year suspension is well supported by case law, is fair to society, fair to the attorney, and will sufficiently deter others from similar misconduct.

ARGUMENT

I. THE UNREBUTTED EVIDENCE PRESENTED ESTABLISHED THAT THE RESPONDENT WAS SUFFERING FROM A RECURRENT AND PROGRESSIVE MAJOR DEPRESSIVE DISORDER. SUCH MENTAL ILLNESS WAS FOUND BY THE REFEREE TO BE A SUBSTANTIAL AND OVERRIDING MITIGATING FACTOR THAT SHOULD WEIGH HEAVILY IN FAVOR OF SUPPORTING THE FINDINGS AND RECOMMENDED DISCIPLINE OF THE REFEREE AND IS SUPPORTED BY PRECEDENT FROM THIS COURT.

After two days of hearings and the painstaking review of voluminous case law, the Referee made findings of fact, conclusions of law and recommendations to this Court that are based soundly on existing case law and are fair to and safeguard society, fair to the attorney, and will sufficiently deter others from similar misconduct. Although the Respondent recognizes that this Court has the ultimate responsibility to determine the appropriateness of a recommended sanction, *The Florida Bar v. Niles*, 664 So.2d 504 (Fla. 1999), a referee's findings of fact come to the court with a presumption of correctness and should be upheld unless clearly erroneous or lacking in evidentiary support. *The Fla. Bar v. Stalnaker,* 485 So.2d 815 (Fla. 1986), *The Florida Bar v. MacMillan* 600 So.2d 457 (Fla. 1992). If the findings of the referee are supported by competent, substantial evidence, this Court

is precluded from reweighing the evidence and substituting its judgment for that of the referee. *The Fla. Bar v. Hooper*, 509 So.2d 289 (Fla.1987); ("We will typically not disapprove a referee's recommendation as long as the referees recommendation has a reasonable basis in existing caselaw. See *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997).") *The Florida Bar v. Cox*, 794 So.2d 1278, 1281 (Fla. 2001).

The Florida Bar has taken the position, both at the hearing before the Referee and in its brief to this Honorable Court that a three-year suspension is an inappropriate sanction for the acts of the Respondent and that only disbarment will suffice. In support of this position the Florida Bar cites a line of cases that, unlike the instant case, center on attorneys who were found to have committed violations of the Rules of the Florida Bar solely for personal gain or greed and who did not suffer from a mental illness. There is no precedent cited by the Florida Bar, nor does it exist, where this Court disbarred an attorney for acts committed while mentally impaired. [2] Further, in the majority of the cases cited by the Bar, those Respondents could not present even minimal mitigation.

Here, the record offers and supports both the substantive and substantial mitigation found by the Referee that this is a case about mental illness and not about

[2] This is not a case where either drugs, alcohol or any voluntary action played any role whatsoever in the mental impairment.

dishonesty.

Rulings of this Honorable Court support this view as found in *The Florida Bar v. Condon*, 632 So.2d 70 (Fla. 1994);*The Florida Bar v. Smith*, 866 So.2d 41 (Fla. 2004); and *The Florida Bar v. McFall*, 863 So.2d 303 (Fla. 2003).

In *McFall*, in upholding a three-year suspension under similar circumstances this Court held:

> "This Court will not "excuse an attorney for dipping into his trust funds as a means of solving personal problems," but it will recognize that "mental problems ··· may impair judgment so as to diminish culpability." *Florida Bar v. Shanzer,* 572 So.2d 1382, 1384 (Fla.1991); *see also Florida Bar v. Condon,* 632 So.2d 70 (Fla.1994). The record and the referee's findings in mitigation regarding McFall's medical and mental health problems, and the impact those conditions had on him, indicate that McFall had diminished culpability. Considering the unique facts of this case and the numerous mitigating factors, we conclude that disbarment is not warranted and that suspension is appropriate." 863 So.2d * 308.

In *The Florida Bar v. Condon*, 632 So.2d 70, 71-72 (Fla. 1994), this Court held:

> "Condon's misuse of trust account funds is one of the most serious offenses a lawyer can commit and disbarment is normally presumed to be the appropriate discipline. *The Fla. Bar v. Simring,* 612 So.2d 561 (Fla.1993); *The Fla. Bar v. Graham,* 605 So.2d 53 (Fla.1992); *The Fla. Bar v. Shanzer,* 572 So.2d 1382, 1383 (Fla.1991). However, as in the instant case, disbarment may be excessive discipline when

> mitigating evidence of mental or substance abuse problems cast doubt upon the intentional nature of the attorney's misconduct. *Graham,* 605 So.2d 53. We are in agreement with the referee that Condon's mental and emotional state, his continuing medical treatment, an absence of prior disciplinary action, and his showing of remorse are factors that, in this instance, mitigate against disbarment. However, we find that an eighteen-month suspension more properly reflects the severity of Condon's violations."

Here, the mental incapacity established of record before the Referee was far greater than that demonstrated in *McFall* or *Condon* and unlike *The Florida Bar v. Shanzer,* 572 So.2d 1382, 1384 (Fla. 1991), and, as such, the Referee appropriately found the mental illness to be the overriding factor and cause of the inappropriate acts.

II. THE UNREBUTTED EVIDENCE PRESENTED SUPPORTED THE REFEREE'S FINDING THAT ALTHOUGH THE CONDUCT OF THE RESPONDENT WAS DECEPTIVE; THE MENTAL IMPAIRMENT OF THE RESPONDENT PREVENTED IT FROM BEING FRAUDULENT.

The central underlying theme of the Florida Bar's argument to this Court is that the record fails to support the findings of the Referee.[3] This argument is disingenuous in the extreme. Not only are the Referee's findings and conclusions

[3] The Bars Brief boldly states: "…Respondent's misuse of client trust funds was not due to a dishonest motive, but rather to Respondent's mental disorder. (ROR 9). The Referee's findings and conclusions in this regard are negated by the record."

not negated by the record, they come to this Court on unrebutted testimony. [4]

This is a case about mental illness in which the Florida Bar failed to present a single witness (expert or otherwise) or evidence of any kind to address or rebut the clearly established illness of Mr. Brownstein. Instead, the Florida Bar relied below, and here, on argument, innuendo and aspersion.

At the final hearing the Florida Bar attempted to convince the Referee through the same argument made here and cross examination that the acts of Mr. Brownstein were not caused by his mental illness and that these types of sophisticated acts are totally inconsistent with a mental illness. The opposite is true as is evidenced by the following exchange:

> Dr. Eustace Page (T. 48-49)
>
> A. …I know we haven't gotten to that, but this was part of seeing an improvement of a person who, when I first saw him, was morbidly depressed and had strong suicidal ideations and now seeing him come back willing to face consequences and learn about what he had and take therapeutic steps.
>
> Q. Do you think his morbid depression in 2004 was because he got caught?
>
> A. No. Definitely in terms of adding psycho-social stressors, getting caught and facing the potential consequences was added to what was there, but Mr. Brownstein during the time that his behavior was going on already met criteria for major depressive disorder, recurrent and progressive

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[4] Unrebutted testimony cannot be arbitrarily ignored. *The Florida Bar v. Clement,* 662 So.2d 690 (Fla. 1995).

Q. What does recurrent mean, Doctor?

A. That it didn't happen just once. It wasn't just a bad day or it wasn't just the blues or it wasn't just going through rough times over a period of a few weeks or a few months; that this was a pattern that was recurring over the course of a lifetime with advancing consequences and advancing severity.

Cross Examination by Ms. Reyes

Dr. Eustace Page (T. 72-77)

Q. I'm going to stop you right there. You said that he agreed. Did Mr. Brownstein tell you that he made $600,000 in the year 1997?

A. He told me that in the middle 90's, he had a very successful practice. He didn't tell me what the dollar figure was.

Q. So if there's a certain lifestyle that's presented and he is feeling grandiose and then in the next three or four years, he starts making substantially less, wouldn't it be part of that axis that needs to be at that same stage?

A. No, no. If, say, in periods of productivity, earned income is bona fide; in other words, if the person was confident, if they were working, if they were achieving, that's what it's all about. That's what we're there for. So in the medical model, the Axis IV, the psycho-social stressors during that period of time are probably very low; but then if something happens, if the person can't behave in that way any more, I don't have the energy to get up, my mind is distracted, there is an illness in the family, my thinking isn't clear, I have no energy, I'm afraid, the mortgage is due, the overhead is due, this is Axis IV. Now, Axis IV is psycho-social stressors are changing.

When that impacts on say as much as 75 percent of the population, it will be met automatically with altering of lifestyle, healthy compensation, positive adaptation, perhaps seeking help. In a depressed person, it doesn't. It further fuels the sleep disorder, the cognitive impairment, the maladaptive coping, and it's going to progress until there's some other consequence.

Q. When you state that he can think he can't get up, he can't sleep,

or he sleeps too much, but at the same time he can be scheming and be participating in a check kiting scheme?

A. Yes, yes. The licensed professionals by and large have above average IQ. The disease of depression is not a disorder of I.Q. or coping. It's a disorder of maladaptive coping. So the analogy -- I'll give you an analogy of the pharmacist who has anxiety disorder, major depressive disorder, the maladaptive coping, would be to seek help, to go to see somebody, do something. If your finances are low, you do something to cope with it. Instead, the person reaches for a pharmaceutical, a controlled substance, a violation of their profession, Drug Enforcement Agency rules, Controlled Substance Act. They're putting their profession on the line. They're not cognitively impaired in terms of knowing right from wrong. They're behaviorally impaired, impulsively doing a behavior to remedy the situation; but it's maladaptive, it's not appropriate, and it's connected to the symptoms that underlie. It's not to have a party or to primarily seek euphoria.

In the behavior that I think Mr. Brownstein was using, it makes sense. The area of his greatest Axis IV stressor was becoming finances. So the non-psychotic brain is going to remedy it by maladaptive behavior. It's going to do something that is wrong.

Q. But at the same time, he is playing golf frequently—

A. Yes.

Q, -- and he's --

A. Yes, yes, maladaptive behavior; totally out of character, not appropriate, doesn't make sense; not psychotic, but in the workplace, now faced with that environment, faced with the stressors, there's inanition – no energy, no ambition -- morbid thinking. So the environment plays a very important role in triggering the signs and symptoms of the diagnosis. In Mr. Brownstein's case, the area of his impairment was in his personal life, his family, and the workplace. In the so-called socio-cultural setting, he didn't have a problem yet, but if his disease had kept on going, he wouldn't be there at all.

Q. You mean like socially, he would still go out with his friends and act normal around his friends?

A. Yes, yes, because that's not an area of stressor. That's an area of

maladaptive coping. We would say therapeutically – the "shoulds" -- Mr. Brownstein should have been in a therapist's office. He should have been going through a comprehensive evaluation. He should have been getting financial counseling. He should have professional peers who are helping him with his problems. But no one knew. These people aren't expected to be diagnosticians or interventionists or therapists. It's now that that can happen. That's the medical thrust.

Q. I asked you the question whether he had told you he had made that amount of money during the late 1990's.

A. Yes.

Q. That lifestyle, wouldn't that create a stressor to still continue that type of lifestyle?

A. It could. Yes, it could.

Q. And isn't that also just plain greed?

A. No. I don't think so.

Q. Or ambition?

A. Again, ambition, motivation, success, proper reward for proper effort is not a disorder. I don't believe it's bad behavior. I don't believe it's a crime or any diagnosable condition. Does it induce stress? It could just as well reduce stress. I believe in that period in Mr. Brownstein's life, his depressive disorder, while it was kindling was in remission just as it had been at various other stages of his life. That's why his diagnosis is major depressive disorder recurrent, meaning that there were periods of depression and then self repair or circumstantial repair, environmental repair. There's another area in his life where there was counseling, there was help, but there was no real diagnostic assessment. It was -- actually, we called it "Bandaiding," but it worked.

Now, the prognosis for the workplace where the consequences are much more severe, the stage of illness is much more severe, the treatment has to be much more.

This above exchange was typical of the record below and the evidence

presented to the Referee. The depth of the Mr. Brownstein's illness is summarized in the following exchange:

> Cross Examination by Ms. Reyes
>
> Dr. Eustace (T. 82)
>
> A. Again, from a prosecutorial standpoint there may be a ledger that I don't know about or maybe a list that specifically I don't know about; but the nature of it, the violation of the oath, the violation of the expected behavior, I accept it. I absolutely accept it. Again, in the medical analogy, the person with coronary artery disease. If they have a left main -- in other words, there may be a whole series of pathologic contributors, but it doesn't change the diagnosis.
>
> So whatever you tell me, tell me. I accept it. I understand. I believe. I in no way attempt to excuse it or mollify it, But again in the medical model, these are the symptoms.
>
> This tells the depth of the problem. This is not early stage. This is not inconsequential. This isn't a mild case. This isn't a bad day at the office. This is a pattern that has happened at least twice before with lower consequences in Mr. Brownstein's life. Now, it's happening in the typical progressive fashion in the workplace and that's the natural history of the disorder is to manifest itself finally in the workplace and for a licensed professional, there's where the intervention is most likely to occur and that's what happened.

The Referee did not simply accept this testimony but challenged Dr. Eustace on the issue (T. 55 - 65) and vigorously examined Mr. Brownstein. [5]

As is evidenced by the testimony of Dr. Eustace, the disease that Mr. Brownstein is afflicted with is a progressive disease that grows stronger over time

[5] The Referee's questioning of Mr. Brownstein was extensive. (T. 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 237, 238, 261, 262, 263, 264, 265, 266, 268,

and it classically is not discovered until its paralyzing effects are manifested in the workplace. A person can have weeks, months and years of totally unaffected behavior and then the disease can be triggered with its effects drawn out over an extended period. This is what the unrebutted evidence established here.

For this Honorable Court to fairly judge Mr. Brownstein it must understand that the symptoms of progressive and recurrent depression are insidious and the resulting inexplicable behavior easily misunderstood as simple bad acts. If the evidence presented showed that Mr. Brownstein was walking unclothed through his neighborhood in the middle of the night singing Jingle Bells then it would be readily apparent to all that a mental illness is present. However, to any observer Mr. Brownstein's individual acts in either writing checks as in the alleged "check kiting", or the trust account violation, when viewed in isolation appear to be simply dishonest. However, such is not the case and the evidence established otherwise.

III. THE TRUST FUND IMPROPRIETY AND THE "CHECK KITING" WERE WHOLLY THE RESULT OF THE MENTAL ILLNESS OF MR. BROWNSTEIN.

As was found by the Referee, it was this illness that caused Mr. Brownstein to commit the trust fund improprieties. (R.O.R. 9). As was explained by the Florida

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and 269.)

Bar in their brief, Mr. Brownstein received funds in trust in a bankruptcy case that he was obligated to forward to the client. Knowing full well that the funds were expected and despite contact from the Trustee he failed to comply with the request for almost six months with the certain knowledge that the matter would be brought to the attention of the court and the Florida Bar. Nonetheless, he did nothing. For a man of Mr. Brownstein's character and reputation, this behavior was and remains inexplicable on its face. However, once diagnosed with the paralyzing effects of the mental illness, the cause became clear.

In questioning Mr. Brownstein on this subject the Referee was again given evidence of the irrational and incomprehensible effects of the mental illness.

Examination of Mr. Brownstein by the Referee (T. 199)

> THE REFEREE: And they --- you have a duty at some time representing a client.
>
> THE REFEREE: I know. In that case, yes.
>
> THE WITNESS: That's exactly what I'm talking about.
>
> THE REFEREE: Okay.
>
> THE WITNESS: I think it's the perfect example, Your Honor, of where I was mental, that I knew this was going to happen. It was a matter of time. It went on for four months, five months --- I think at least four months where I didn't pay him and finally they filed a motion and knowing -- and I got the money four days before the hearing was going to take place. I could have avoided -- I could have done the same thing that I did and avoided it four months before and it would have been over and done. I didn't have the - I don't want to say -- it doesn't sound right, the mental capacity. I didn't have the emotional ability to face that and say, go do it, until I was, I was thrown under

the bus.

THE REFEREE: You couldn't ask for help.

THE WITNESS: Basically correct.

THE REFEREE: Okay.

THE WITNESS: That's correct; however one wants to define it, but I couldn't do that which would made things -- made this not happen, and I didn't have that ability.

This exchange best exemplifies the nature of the disease. Mr. Brownstein knew what he was supposed to do and could have very easily dealt with the problem appropriately and without repercussions. Nonetheless, he failed to take any action to prevent a patently looming major and life changing problem. As was explained by Dr. Eustace this is the classic progression of the disease with the attendant emotional paralysis taking greater hold as stressors are added.

As to the "check kiting", the Florida Bar has gone to unusual lengths to label the operating account transactions as check kiting with the mind that check kiting is a virtually automatic disbarment. Regardless of the label assigned, if this were a classic check kiting scheme it is of a brand rarely seen. [6]

[6] In the classic scheme there is a fraudulent reason for the unsupported deposits with the end goal being that the schemer benefits from the kited checks in the form of a cashed check or some third party holding an uncollectible check or the bank being responsible for the loss. Here that was not the case and the Referee found as much. Both of the accounts were solely in the name and under the responsibility of Mr. Brownstein. Mr. Brownstein was writing checks to himself and no one was defrauded.

As was found by the Referee, these transactions occurred over a short period of time (5 weeks) and involved two accounts on which Mr. Brownstein was the sole and only authorized signatory. There were no victims as in a classic check kiting scheme and Mr. Brownstein enjoyed good banking relationships both before and after the questionable transactions. [7]

It is undisputed and agreed that the transactions were sloppy and irrational. Most importantly, as was found by the Referee (R.O.R. 8 - 9), this was not an intentional and dishonest scheme and was again the result of the progressive and debilitating mental disease with which Mr. Brownstein is afflicted.

IV. THE FLORIDA BAR'S ARGUMENTS FOR DISBARMENT WERE CONSIDERED AND REJECTED BY THE REFEREE WHO WAS IN A BETTER POSITION TO VIEW THE EMOTIONAL STATE AND CREDIBILITY OF

[7] The Referee additionally negated the requisite intent that would be necessary for the check writing to be deemed check kiting in finding: "The transactions were over a short period of time and involved substantially less than the Respondent's average gross monthly income. Here, the Respondent averaged approximately $20,000 per month in gross income and had for several years prior to the month in question. Here, the checks started at $3,000 and after writing checks back and forth between the accounts for approximately five weeks the amount totaled $14,788. (Here, the checks cannot be totaled as each check was written to include the previous check and so on.) Therefore, as this was an isolated occurrence when the Respondent's legal and banking practice is viewed over a period of many years, this Court accepts that the Respondent in good faith believed that his established income would have covered the checks and that an unusual lack of income over a period of five weeks led to the questioned transactions." (R.O.R. 7-8).

THE WITNESSES AND THE RESPONDENT ON THE EXISTENCE OF A MENTAL ILLNESS AND THE BEHAVIOR RESULTING FROM THE MENTAL ILLNESS.

The referee is in the best position to judge the credibility of the witnesses, and this Court defers to the referee's assessment and resolution of any conflicting testimony. See *The Florida Bar v. Batista* 2003 WL 1883661 (Fla. 2003); ("The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect.") *The Florida Bar v. Fredericks*, 731 So. 2d 1249, 1251 (Fla. 1999); *Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991); (where testimony conflicts, referee is charged with responsibility of assessing credibility based on demeanor and other factors). *Florida Bar v. Hayden*, 583 So. 2d 1016, 1017 (Fla. 1991).

The Florida Bar argued for disbarment before the Referee based upon the Florida Bar's position that Mr. Brownstein did not suffer from mental illness sufficient to be a mitigating factor against disbarment. This argument was rejected by the Referee and now the Florida Bar is, in effect, asking this Honorable Court to substitute the Referee's findings and judgment with that of this Court. "Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary

support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *The Florida Bar v. Wohl,* 842 So.2d 811 (Fla. 2003); *Florida Bar v. Sweeney*, 730 So.2d 1269, 1271 (Fla.1998) (quoting *The Florida Bar v. Spann,* 682 So.2d 1070, 1073 (Fla. 1996)).

The Respondent would urge that this is particularly applicable in a matter involving the factual determination of a mental illness and the issue of fraudulent or selfish intent which is critical to this Court's review. Here, the record cannot connote the possible malingering, emotion, credibility or tears of the witnesses that testified before the Referee, and, as such, it is respectfully asserted that in this type of case the findings of the Referee be assigned even greater weight.

V. THE ISSUE OF INTENT IS A FINDING OF FACT AND THE REFEREE FOUND, ON UNREBUTTED TESTIMONY, THAT THE RESPONDENT DID NOT HAVE A DISHONEST, FRAUDULENT OR SELFISH MOTIVE AND THEREFORE CORRECTLY FOUND THE LACK OF AN AGGRAVATING FACTOR UNDER STANDARD 9.22(b).

The Florida Bar argues that the Referee, in her report, specifically found conduct by the Respondent that constitutes aggravation under Standard 9.22(b), which declares dishonest or selfish motive as an aggravating factor, yet failed to consider this aggravation in her disciplinary recommendation. The Florida Bar

arrives at this conclusion by arguing that the Referee specifically found Respondent guilty of violating Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation (R.O.R. 10), a necessary element of which is intent, yet failed to find dishonest or selfish motive and, instead, found the absence of same as a mitigator. The record below fully supports the distinction made by the Referee.

As previously outlined in the statement of the case, the mental illness of Mr. Brownstein progressed to psycho-motor retardation (T. 38), wherein he was emotionally paralyzed to the point of avoiding phone calls and laying on his couch for hours at the office (T. 156-157), not filing his personal taxes, not filing the withholding tax forms or making the deposits for employees and finally ignoring the request by the Florida Bar for documents which led to his emergency suspension. Only then, after consultation with counsel and the intervention of mental health care professionals, was he able to even address these proceedings. In lieu of disputing the facts as outlined in the complaint, he pled guilty to the facts with the only issue remaining being evidence of his illness, intent, and motive in mitigation.

As such, the violation of Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation was based on a plea and not proof and the plea was not entered based on Mr. Brownstein's admission to dishonesty or fraud but based on undersigned counsel's view that his actions involved deceit

or misrepresentation. They are not the same.

First, there is a critical difference that is recognized by this Court between fraud and deceit that is not acknowledged by the Florida Bar. In *The Florida Bar v. Varner* 780 So.2d 1,5 (Fla. 2001), this Court delineated the distinction between an attempt to deceive as opposed to an attempt to defraud and held:

> "However, the cases relied upon by the Bar as supporting a ninety-one-day suspension are likewise distinguishable from the instant case. The Bar likens this case to fraud cases in which this Court imposed disbarment. *See* *Florida Bar v. Cramer*, 678 So.2d 1278 (Fla.1996) (attorney with prior disciplinary record was disbarred for making fraudulent representations to lenders and failing to respond to the Bar's inquiry); *Florida Bar v. Forbes*, 596 So.2d 1051 (Fla.1992) (lawyer disbarred following felony conviction for bank fraud and making materially false statements in obtaining loans). As discussed, the basis for finding Varner guilty of violating rule 4-8.4(b) was that the conduct at issue involved an attempt to deceive, not an intent to defraud. Thus, the fraud cases relied upon by the Bar are distinguishable."

It would appear that this Court in *Varner* has defined fraud as misleading conduct for the purpose of financial gain or selfish motive, whereas deception is misleading conduct for other non-selfish purposes, like here, where actions resulted from mental disease. Here, the Referee specifically found the absence of such motive because the unrebutted evidence established that but for the advanced mental illness of Mr. Brownstein the complained of acts would not have occurred (T.42).

Secondly, the element of intent must be shown to find a violation of Rule 4-8.4 (c). In *The Florida Bar v. Fredericks,* 731 So.2d 1249 (Fla. 1999), and as stated by the Florida Bar in their brief, in order to sustain a violation of Rule 4-8.4(c), the Bar must prove intent. *The Florida Bar v. Brown*, 905 So. 2d 76, 81 (Fla. 2005). Here, notwithstanding that the Respondent entered a plea to the violation, the Florida Bar did not and could not prove dishonest, fraudulent or selfish intent. Here the Referee found no such intent and specifically found the absence of such intent due to Mr. Brownstein's mental illness. (R.O.R. 7-8)

Therefore, the Referee correctly considered the plea to the violation of Rule 4-8.4 (c) in determining an appropriate sanction, but correctly found the absence of a dishonest or selfish motive on the evidence presented. As such, a plea to a violation of Rule 4-8.4 (c) does not *de facto* establish aggravation under Standard 9.22(b) and the Referee, therefore, properly excluded aggravation under Standard 9.22(b) and, correspondingly, correctly viewed it as a mitigator.

VI. ANY TECHNICAL ERRORS MADE BY THE REFEREE IN FAILING TO FIND AGGRAVATING FACTORS UNDER STANDARD 9.22(e) AND STANDARD 9.22(l) IN THE REPORT AND RECOMMENDATION WERE HARMLESS. AT MOST, REMAND FOR CLARIFICATION SHOULD BE ORDERED.

The Florida Bar additionally asserts that the Referee erred in failing to find aggravating factors under Standard 9.22(e) and Standard 9.22(l).

Standard 9.22 (e) lists as an aggravating factor "bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency". As stated, due to the emotional paralysis suffered by Mr. Brownstein, he failed to respond the requests of the Florida Bar as he failed to address other document and filing requirements of the IRS, which resulted in his emergency suspension. This evidence was submitted to the Referee via the plea of Mr. Brownstein and addressed in the report. (R.O.R. 3). The Referee did, however, fail to mention this fact in the analysis of the aggravating factors. Nonetheless, in light of the Referee finding the absence of dishonest, fraudulent or selfish intent due to Mr. Brownstein's illness, it can safely be said that when the report is viewed as a whole, there would likewise be no finding of bad faith, or that it can be inferred from the language and tenor of the report there is no finding of bad faith, as required under Standard 9.22 (e).

Standard 9.22 (i) lists as an aggravating factor "substantial experience in the practice of law". Again, the Florida Bar is correct that the Referee failed to mention this fact in the analysis of the aggravating factors. As Mr. Brownstein's experience was not in issue and the Referee clearly had this evidence before her when making

the findings and recommendations (R.O.R. 12) [8], this omission is meaningless when the report is viewed as a whole.

It is respectfully suggested that when the report is viewed as a whole, an error in failing to find aggravating factors under Standard 9.22(e) and Standard 9.22(l) were technical, procedural and harmless and did not either prejudice the Florida Bar or work a miscarriage of justice. F.S. § 59.041 states in material part:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

An order of the trial court will not be disturbed unless the complaining party has been prejudiced or a miscarriage of justice has occurred. *Fagg Mill Work & Lumber Co. v. Greer*, 102 Fla. 955, 136 So. 679 (1931); *Buchanan v. Smith*, 103 Fla. 1130, 140 So. 775 (1932); and *Woodruff v. Lantana Finance Corporation*,

[8] See also (R.O.R. 14) "The Court has reviewed the evidence in this case and has assigned great weight to the opinion of Dr. Eustace to explain otherwise inexplicable behavior for a person of Mr. Brownstein's experience, character and standing in the community."

102 Fla. 950, 136 So. 712 (1931). Further, it has long been the law that, where as here, the assignment of error is that which was clearly before the Court, but excluded in the order, it is merely technical and harmless error. *Huffstetler v. Our Home Life Ins. Co.,* 67 Fla. 324, 65 So. 1 (1914). (Where the errors complained of are purely technical, and not fundamental or prejudicial, the judgment will be affirmed.) *Southern Express Co. v. Williamson*, 66 Fla. 286, 63 So. 433 (1913); (Reversals by Supreme Court on grounds of error in matters of procedure are for prejudicial, and not merely formal, errors.) *Davis v. Wilson*, 139 Fla. 698, 190 So. 716 (1939).

Therefore, the Report and Recommendations and the record as a whole, show that the judgment rendered accorded with justice. [9]

Finally, in the event that this Honorable Court is of the opinion that the technical errors complained of could have resulted in a different recommendation, then it is respectfully requested that this matter be remanded for clarification. See Justice Wells dissenting opinion in *The Florida Bar v. Mason*, 826 So.2d 985 (Fla. 2002), suggesting remand *in lieu* of rejection of the Referee's factual

[9] Reversal is not authorized for correction of such technical errors as might have occurred if it would lead to rendition of new judgment identical with that appealed from,. *E.O. Roper, Inc. v. Wilson & Toomer Fertilizer Co.*, 116 Fla. 796, 156 So. 883 (1934).

determination.[10]

VII. THE BEST EVIDENCE THAT THE RESPONDENT SHOULD NOT BE DISBARRED WAS HIS ADMISSIONS TO THE REFEREE OF UNKNOWN, UNCHARGED, AND UNDISCOVERABLE PRIOR ACTS WHICH EVIDENCES HIS PROGRESS IN TREATMENT.

Prior to his illness, Steven Brownstein was an honest and well respected member of the Bar and the community who could not even contemplate the acts that he ultimately engaged in. The best example of the type of person he was pre-illness is outlined in the following cross examination of Tod Aronovitz, recent former President of the Florida Bar.

> Cross Examination by Ms. Reyes
>
> Tod Aronovitz (T. 146-147)
>
> THE WITNESS: It would not change my opinion. These things that you're saying are just not consistent with the man, the friend, and the lawyer that I have known and known so well for so many years.
>
> Q. But you know Mr. Brownstein then and you really didn't know him, did you?
>
> A. The best way that I can answer that question is this. When I was a very young lawyer, I came to learn early on that they didn't teach me everything in undergraduate school and law school. I had the opportunity to see, unfortunately, some individual clients who had emotional problems or mental impairments; people who would come

[10] The existence of aggravating and mitigating circumstances are considered factual determinations by a Referee. *The Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001).

into my office -- I can remember when I started out on Flagler Street in the Ainsley Building and I can remember one or two clients way back when and they looked right when they the came in the door, but then after a period of two months or three months of representing them, I could see that these people weren't right and I had to withdraw from the case or deal with the fact that they just weren't right.

I can only tell you that the person that I have known over the years was a person who is honest, who really cared about the practice of law, and these examples that you're asking me about, whether it's filing tax returns or not paying the withholding on a secretary, that is not the Steve Brownstein that I have known. When you know somebody very closely, someone who you talk to about very personal subjects, you come to know their values.

I'm just saying that the Steve Brownstein that I have known wouldn't violate Florida Bar rules, wouldn't violate the law, or act in an irresponsible way, and that's the best answer I can express. (T. 146-147).

Against this backdrop, the Florida Bar has additionally argued that Mr. Brownstein should be disbarred because he made the following admission during his testimony about writing a check from a trust deposit in the early 1990's and thereafter immediately repaying the funds.

Direct Examination by Mr. Baron.

Steven Brownstein (T. 271)

Q. You said you got a settlement?

A. I don't remember -- I wish I could tell you specifically. It was in response to a question that you asked me, did I ever before -- I want to answer it truthfully. It was never asked of me. I wanted to be truthful. There was a one time where that happened.

Q. And was it accidental? Did you take money in trust because you

thought --

A. No.

Q. -- a check had cleared and you had written against it or -

A. Oh, I did know that was one of the checks; but no. There was a time when there was money and, you know, it was relatively insignificant, $2,000, $2,500, that I think that I took. I put it back very shortly thereafter.

Q. Okay, and that happened during a time when you had an exacerbated depressive state?

A. There's no question about it. I'm sorry, yes.

From this admission, the Florida Bar attempts to establish that Mr. Brownstein is a dishonest lawyer who could never be again trusted with the responsibility of a license to practice law. The opposite is true.

Far from being evidence that Mr. Brownstein can never again be trusted, it is the best evidence that he can. If Mr. Brownstein were the dishonest schemer that he is portrayed to be by the Florida Bar, the last thing that he would have admitted to during his sworn testimony is an event over ten years prior that no one in this world was aware of other than him. This trust account impropriety, although it occurred during an episode of depression, was unknown and incapable of discovery. Possibly more importantly is the fact that it occurred during his most successful years financially and is therefore inexplicable even using the Florida Bar's theory that these events were all strictly financially and selfishly motivated.

It is respectfully suggested that this Honorable Court juxtapose this testimony against the person who was incapable of answering a phone, contemplating suicide and incapable of responding to the Florida Bar resulting in his emergency suspension. This testimony is forthrightness in its purest form and was made by the man that Tod Aronovitz described and is evidence of a man who is on the road to recovery and who may well prove rehabilitation and be reinstated to the Florida Bar if, and when, his treatment has progressed to the point where his rehabilitation and stability are sufficiently documented.

VIII. THE SUSPENSION RECOMMENDED BY THE REFEREE IS SUPPORTED BY CASE LAW AND IS FAIR TO SOCIETY, FAIR TO THE RESPONDENT AND WILL SUFFICIENTLY DETER OTHERS FROM SIMILAR MISCONDUCT.

After two days of hearings and the painstaking review of voluminous case law, the Referee made findings of fact, conclusions of law and recommendations to this Court that are based soundly on existing case law and are fair to and safeguard society, fair to the attorney, and will sufficiently deter others from similar misconduct. In fashioning the omnibus sanctions and restrictions that will not permit Mr. Brownstein to ever practice law again unless and until he can establish his fitness and competency the Referee stated:

> "Dr. Eustace stated that Mr. Brownstein's diagnosis also can drive his movement into proper treatment and full recovery toward which he has already made significant strides and in Dr. Eustace's belief, with the combined process of the disciplinary system (The Bar), the medical treatment system (medication and psychotherapy), and the peer-professional advocacy and monitoring system (F.L.A., Inc.), Mr. Brownstein will recover and will demonstrate responsibility for his recovery. Once his recuperation and rehabilitation are fully documented, he will have, in Dr. Eustace's opinion, earned the return to his profession." (R.O.R. 13).

The Referee went on to state:

> "The Court heard evidence presented from Michael Cohen, Esq., CEAP, Executive Director of the Florida Lawyers Assistance Program. Mr. Cohen testified as to the nature of the Florida Lawyers Assistance Program and the monitoring and support groups that Mr. Brownstein will participate in as part of the recommended sanctions. This Court is convinced that the Florida Lawyers Assistance Program will sufficiently monitor and support Mr. Brownstein during the course of his rehabilitative suspension and be in a position to intelligently advise the Florida Bar of Mr. Brownstein's progress toward the rehabilitation that must be evidenced prior to reinstatement." (R.O.R. 15).

IX. THE THREE-YEAR SUSPENSION RECOMMENDED BY THE REFEREE SHOULD BE DEEMED REHABILITATIVE AND BE DEEMED TO HAVE COMMENCED *NUNC PRO TUNC* FROM THE DATE OF THE EMERGENCY SUSPENSION.

In light of the fact that the acts of the Mr. Brownstein were found to have been wholly caused by a mental illness it is respectfully requested that this

Honorable Court order that the suspension be deemed rehabilitative and not punitive.

Secondly, although the Referee denied the Respondent's request that the ordered suspension be deemed to have commenced *nunc pro tunc* from the date of the emergency suspension (T. 326), this Court has routinely ordered that suspensions ordered after review be deemed to have commenced *nunc pro tunc. The Florida Bar v. Carlon***,** 820 So.2d 891 (Fla. 2002); *The Florida Bar v. Hochman***,** 815 So.2d 624 (Fla. 2002); (the discipline on the underlying misconduct is typically made effective, *nunc pro tunc*, on the effective date of the felony suspension). *See The Florida Bar v. Korones*, 752 So.2d 586, 592 (Fla.2000); (disbarring lawyer effective, *nunc pro tunc*, on the effective date of the felony suspension) *The Florida Bar v. Marcus*, 616 So.2d 975, 978 (Fla.1993).

Additionally, as the term of suspension recommended by the Referee is *de facto* indefinite and will continue until Mr. Brownstein can document his recovery and fitness, ordering the suspension to have commenced *nunc pro tunc* will in no way prejudice either the Florida Bar or the community at large.

CONCLUSION

It is respectfully suggested that the Referee's recommendation was well founded in case law and that the omnibus sanctions recommended are fair to society, fair to the attorney, and sufficient to deter others from similar misconduct, *The Florida Bar v. Poplack,* 599 So.2d 116, 118 (Fla. 1992), and that the Respondent should be given the benefit of the experienced analysis by the Referee, of both the evidence presented and the character of the Respondent.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this pleading was sent via U.S. mail on June 2, 2006 to Vivian Maria Reyes, Bar Counsel, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131; John Anthony Boggs, Director of Lawyer Regulation, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; and John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street Tallahassee, Florida 32399.

Richard Baron

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Richard Baron, Esq.

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

I HEREBY CERTIFY that the brief of Respondent is submitted in 14 point proportionately spaced Times New Roman font and that the computer disk on which this brief is submitted has been scanned to free of viruses, by Norton Anti Virus for Windows.

Richard Baron

Email – E-Filing Signature

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Richard Baron, Esq.