IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	CASE NO. SC09-2056
Complainant,	)	
	)	TFB No. 2008-30,318(07B)
v.	)	
	)	
RICHARD SCOTT DRAUGHON,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

Respondent will use the symbols and references set forth by the Bar in the Symbols and References section of its Initial Brief.

The Florida Bar will be referred to as such, or as the Bar, or as Complainant. Respondent will be referred to as such.

The transcript of the Final Hearing will be designated "T1" followed by the appropriate page number. The transcript of the sanctions hearing will be designated "T2" followed by the appropriate page number. If any other transcripts are referenced they will be described in full.

References to the Report of Referee will be by the designation ROR followed by the appropriate page number.

The Bar's exhibits will be designated B-Ex and Respondent's will be R-Ex followed by the appropriate number as accepted into evidence by the Referee.

JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Article V, Section 15, of the Constitution of the State of Florida.

STATEMENT OF THE CASE

Respondent accepts the Bar's Statement of the Case as set forth in its initial brief.

STATEMENT OF THE FACTS

Respondent accepts the Bar's statement of facts as a correct summary of the Referee's findings.

SUMMARY OF ARGUMENT

The Bar has not met its burden of showing that the Referee's recommendation that Respondent receive a public reprimand is contrary to the Florida Standards for Imposing Lawyer Sanctions and this Court's past decisions.

The Referee properly rejected the Bar's argument that Standard 5.12 applies to the case at Bar. That standard calls for a suspension for knowingly engaging in criminal misconduct. There was no criminal conduct involved in the matter before the Referee. If discipline is imposed, Standard 5.13, a public reprimand, is the proper standard to use in this case.

The cases cited by The Bar as support for its demand that Respondent be suspended for one year are all distinguishable. Many of the cases are distinguishable because they involved the representation of clients or a trustee type relationship. Neither of those situations is before the Court today. Perhaps the most important difference, however, is that Respondent in the case at Bar was not charged with a violation of Rule 4-8.4(c) prohibiting conduct involving dishonesty,

fraud, deceit or misrepresentation. In fact, the grievance committee found no probable cause for further disciplinary proceedings as to Rule 4-8.4(c).

In Point II, his first point on cross-appeal, Respondent asks this Court to dismiss these proceedings because the only rule violation found by the Referee was for Rule 3-4.3. Respondent submits that a finding of misconduct cannot be predicated solely on that rule. It is a jurisdictional statement, not a rule of conduct. It must be coupled with a rule in the Rules of Professional Conduct before it can be a basis for discipline. While the Referee found that Respondent's conduct was not honest, the Bar did not charge Respondent with engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

To allow the Bar to use Rule 3-4.3 as the sole basis for discipline is a violation of due process because its scope is so far-ranging that any act that remotely smacks of misconduct would fall within the penumbra of that rule.

Respondent argues in Point III that the Bar did not prove misconduct by clear and convincing evidence and that the charges against him should be dismissed.

In Point IV, Respondent takes issue with the Referee's finding of aggravating circumstances. Most significantly, the Referee considers Respondent's denial of the charges against him as a refusal to acknowledge

wrongdoing. This Court has stated that a referee cannot consider as aggravation a lawyer's refusal to admit the allegations brought by the Bar.

In Respondent's arguments in Point V he points out that the Referee improperly disregarded testimony as to Respondent's good reputation for honesty, integrity and excellence in the practice of law.

ARGUMENT

RESPONDENT'S ANSWER TO THE BAR'S INITIAL BRIEF

POINT I

A PUBLIC REPRIMAND AS RECOMMENDED BY THE REFEREE IS THE APPROPRIATE DISCIPLINE FOR RESPONDENT'S CONDUCT.

As acknowledged by The Florida Bar, this Court will not reject a referee's recommendation on discipline so long as the recommendation is authorized under the Florida Standards for Imposing Lawyer Sanctions ("Standards") and existing case law. Florida Bar v. Glueck, 985 So.2d 1052, 1058 (Fla. 2008). If a sanction is imposed, the discipline recommended by the Referee, a public reprimand, is appropriate and should be adopted by this Court.

In determining the discipline that he recommended, the Referee had to have considered the following: (1) the alleged misconduct occurred in the period from March, 1993 to October, 2001, when Respondent conveyed the Heather Lane property from his wholly owned corporation, NLMC, to himself; (2) that the

conduct did not involve the practice of law, or breach of a duty to a client, or a violation of a lawyer's duty to the court; (3) the conduct involved a commercial, arm's-length transaction that began in 1993, kept Dr. Onusic and her criminally convicted, disbarred lawyer husband from losing the Heather Lane property to foreclosure or utility liens and resulted in her receiving the benefit of a $7,500 down payment, over $205,000 in mortgage payments, plus interest, and an additional $56,000 in payments after the bankruptcy proceedings were over; (4) Respondent was represented by Pennsylvania counsel throughout his dealings with Dr. Onusic; and (5) the Grievance Committee found no probable cause for further disciplinary proceedings for a violation of Rule 4-8.4(c) of the Rules of Professional Conduct (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

A. The petition of The Florida Bar for a one-year suspension of Respondent under Standard 5.12 must be rejected because Respondent did not engage in any criminal conduct.

On page 22 of its brief, the Bar argues that the applicable standard for discipline in this case is Section 5.12 rather than 5.13. Section 5.12 of the Standards states that "Suspension is appropriate when a lawyer knowingly engages in criminal conduct…"

Respondent has not engaged in any criminal conduct. No criminal conduct was alleged by the Bar in its complaint. No criminal charges were brought against

Respondent. The Grievance Committee found no probable cause on Rule 4-8.4(c). Accordingly, Section 5.12 of the Standards does not apply and suspension under Section 5.12 is inappropriate.

The Florida Bar attempts to blur the distinction between civil and criminal conduct under Section 5.12 by arguing that Respondent's conduct was "unlawful". However, Respondent has not been convicted of any unlawful conduct in a trial on the merits. Further, Respondent's acts (even as characterized by the Referee) are not crimes.

The Referee applied Section 5.13 of the Standards in recommending a public reprimand. Section 5.13 of the Standards provides that "Public Reprimand is appropriate when a lawyer knowingly engages in … conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." If the Referee's findings of fact and his analysis of aggravating and mitigating factors are adopted, his recommendation of a public reprimand is authorized under the Standards and should not be second guessed.

The Florida Bar has accepted the findings of fact by the Referee. Under such findings the appropriate standard is either Section 5.13 or Section 5.14. Since Respondent is not guilty of any crimes, there simply is no basis for applying Section 5.12 under the findings of the Referee. Accordingly, The Florida Bar's request for suspension has no basis under the Standards and should be rejected.

B. The Referee properly relied upon Florida Bar v. Cocalis as a guideline for imposing discipline.

The Referee supported his recommendations based in part upon Florida Bar v. Cocalis, 959 So.2d 163 (Fla. 2007). Attorney Cocalis received a public reprimand under Section 5.13 of the Standards for misconduct under Rule 3-4.3 in connection with certain misrepresentations made in the course of practicing law. Also pending before the Referee and the Supreme Court were numerous alleged violations of the Rules of Professional Conduct by attorney Cocalis that included dishonesty, fraud, deceit and misrepresentation in violation of Rule 4-8.4(c).

On page 167 of its decision this Court stated that:

> While Cocalis's telephone call to Dr. Bernhardt was unprofessional and unethical, the Court is more troubled by Cocalis's "sharp practice"…. Under these circumstances, Cocalis's conduct offends our well-recognized policy that cases should be decided on the merits and not by a lawyer's stooping to sneaky or underhanded trial tactics. [Citations omitted.]

While The Florida Bar agrees with the Referee's reading that Cocalis validates Rule 3-4.3 as the sole basis for discipline in this case, The Florida Bar objects to Cocalis as a guideline for sanctions. In supporting this objection, The Florida Bar attempts to distinguish the two cases.

The Florida Bar argues that Cocalis should not serve as a guideline on determining the appropriate sanctions for Respondent because the Standards applicable to each case differ. The Court in Cocalis applied Section 5.13 of the

Standards in support of public reprimand, while The Florida Bar argues that Section 5.12 applies to Respondent. However, like Cocalis, Respondent did not engage in any criminal conduct and, therefore, Section 5.12 does not apply. Similar to the application of Section 5.13 to Cocalis by the Supreme Court, the Referee rejected the Bar's argument favoring Section 5.12 and applied Section 5.13 of the Standards in support of public reprimand for Respondent.

The Florida Bar also argues that Cocalis is inapplicable as a guideline because there are a greater number of aggravating circumstances in the instant case. The Florida Bar counts six aggravating circumstances and three mitigating factors in the case of Respondent, compared to one aggravating factor and three mitigating circumstances in Cocalis.

There are several problems with the Bar's arguments on aggravating and mitigating factors. The first problem is that The Florida Bar has the count wrong. The Referee found five aggravating factors, and four mitigating factors. ROR – p. 30 (line 15) through p. 31 (line 10). The second problem is that the Referee gave little or no weight to three additional mitigating factors: Respondent's reputation for honesty in the community, reputation for excellence in the practice of law and his efforts at restitution.

However, the bigger problem is that The Florida Bar embraces Cocalis as authority for sanctions under Rule 3-4.3, while also rejecting Cocalis as a sanctions

guideline. The two positions under are inconsistent and irreconcilable as applied to Respondent. Consistent with The Florida Bar position, the Referee read Cocalis as validating Rule 3-4.3 as the sole basis for Sanctions. Assuming the Referee's reading is correct and that his findings of fact in the instant case are supported by the record, Cocalis is the only sanctions guideline available under Rule 3-4.3 as the sole basis for discipline.

The arguments of The Florida Bar against Cocalis as a sanction guideline are inconsistent with the Bar's argument that Cocalis serves as a basis for imposing discipline on Respondent for violating Rule 3-4.3 without an alleged violation of any corresponding rule of the Rules of Professional Conduct. Since The Florida Bar has not challenged the findings of the Referee, there is no basis for The Florida Bar to argue that the sanction recommended by the Referee is not supported by Cocalis. Assuming for the purpose of argument that the Referee's findings of fact are correct, Cocalis in support for his recommendation that a public reprimand is appropriate for a violation of Rule 3-4.3 when there are no corresponding violations of the Rules of Professional Conduct.

C. The cases cited by The Florida Bar for suspension do not apply.

The Florida Bar cites several cases to support its argument for increased sanctions in this matter. None of these cases involves the application of discipline solely on the basis of Rule 3-4.3 as a stand-alone rule. All of the cases cited by The Florida

Bar supporting its petition involved violations of the Rules of Professional Conduct and are distinguishable from the case at bar.

In Florida Bar v. Hagendorf, 921 So.2d 611, 614 (Fla. 2006) the attorney received a two-year suspension for violating Rules 4-3.3 (candor toward the tribunal), 4-3.4 (fairness to opposing party and counsel), 4-4.1 (truthfulness in statements to others), 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 4-8.4(d) (conduct prejudicial to administration of justice). Respondent has not been found in violation of any of these Rules. Unlike Hagendorf, Respondent took his actions in connection with contract rights confirmed by counsel. Further, as acknowledged by the bankruptcy court and the Referee, Respondent did not make any affirmative misrepresentations.

Mr. Hagendorf, however, lied to the Court regarding the location of parties and attempted to secure title to a building he did not own. These two offenses alone remove the Hangendorf case from consideration for the case at bar.

The case of The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973), is also distinguished from the present matter. In Bennett, the Respondent violated his fiduciary responsibilities as trustee. The record of that case also reflects that Bennett lied to his business partners and engaged in improper self-dealing. He also acted, at least in part, as attorney for his associates. The Trial Court described Mr. Bennett's misconduct as:

> he had represented the price to his 'partners' to be $146,000 when in reality it was $140.000; that he had deceived the group into thinking that part of the Plaza was not subject to purchase when in fact it was and that Bennett received tax money from his `partners' for the Plaza and in fact the taxes were not paid and that Bennett fraudulently obtained the ownership of one of the store premises in the Plaza in his own right.

In imposing a one-year suspension for, basically, lying and trying to cheat his partners, the Supreme Court noted that Mr. Bennett had received a three-month suspension but two years earlier for similar misconduct.

Bennett does not support the Bar's argument for a one-year suspension. None of the Bennett circumstances are present in this instant matter. Respondent did not serve as trustee or counsel to Dr. Onusic. He had no prior discipline. Further, the trial record in this matter validates that Respondent made no affirmative misrepresentations.

The Florida Bar attempts to dramatize the conduct of Respondent by arguing that the fugitive status of Dr. Onusic's residence in Slovenia with her fugitive husband is analogous to the position of Bennett's partners, who relied on Bennett because they lived out of state. The problem with the analogy is that Respondent and Dr. Onusic were not partners in the transaction. And, Dr. Onusic returned to the U.S. and had access to counsel from mid-1998 onward.

Although the facts set forth in the decision imposing a 60-day suspension in Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984), are sparse, they are sufficient to

show this case is not on point. Adams breached his fiduciary duty as trustee to a group of investors. No such duty is involved here. Even if Adams is considered analogous, it would show that, at most, a 60-day suspension is appropriate.

The case of Florida Bar v. Neely, 587 So.2d 465 (Fla. 1991), is not even remotely analogous to the facts of the instant matter. It involved three separate instances of fraudulent misconduct in the course of representing three separate clients. Mr. Neely tied to steal a client's mother's house, he lied to a physician about settling a patient's case, and he stole money from a client by fraudulently billing her for fictitious expenses.

In Neely the client's mother, Ellen Plotts, was not represented by counsel and the respondent negotiated directly with her in completing the deed conveying her home. In the instant case Dr. Onusic was represented by counsel [Joseph O'Kicki] and Respondent did not negotiate or even speak to Dr. Onusic directly regarding these matters until years later. All rights exercised after the letter of intent was originally signed by Dr. Onusic were pursuant to the letter of intent. The Neely case also involved affirmative misrepresentations and breach of attorney responsibilities to a client, Kathleen Ross, which are not present in the instant matter. Finally, Mr. Neely had an extensive history of prior misconduct, including a 90-day suspension for similar misconduct, a public reprimand, a 60-day suspension, a three-month suspension and a 91-day suspension.

The Florida Bar attempts to dramatize the actions of Respondent in transferring the NLMC property from his wholly owned corporation to himself as analogous to Neely's actions in convincing his client's mother to transfer property to Neely's wholly owned corporation. However, Respondent's actions were pursuant to contract rights under the letter of intent as negotiated with Dr. Onusic's lawyer. Respondent took his actions only after consultation with his own Pennsylvania counsel. Unlike Neely, Respondent advised Dr. Onusic to consult with counsel as evidenced by his June 26, 1995 letter to her. R-Ex 12.

The case of Florida Bar v. Siegel, 511 So.2d 995 (Fla. 1987), a 90-day suspension is also not similar to the case at Bar. Ms. Siegel and Mr. Canter, her partner, engaged in mortgage fraud on three separate occasions, including the submission of a false affidavit. The lawyers in this case were lying to a bank while attempting to buy a building for their practice. All of their actions could have resulted in criminal proceedings. Respondent did not engage in any similar misrepresentations. Even if Siegel is applicable to the instant case it would call for, at most, a 90-day suspension.

The Florida Bar attempts to argue that Respondent failed to disclose essential matters to Dr. Onusic in violation of the standards in Florida Bar v. Davis, 373 So.2d 683 (Fla. 1979). At the outset, it must be stressed that Davis received a public reprimand. He breached a contract obligation directing the specific use of

proceeds for the purchase of real estate. Davis could not point to any alternative good faith interpretations of the contract justifying his actions.

These circumstances are simply not present in the instant case. The Florida Bar contorts the testimony of Dr. Onusic to suggest that Respondent "represented" to Dr. Onusic that the Pursley lease payments would be used to service the NLMC note. However, the record shows that Respondent did not communicate with Dr. Onusic until after the letter of intent and the deed conveying the property to NLMC was signed by Dr. Onusic and the first note was issued. There simply is no support in the record for the notion that Respondent made any such representations.

The Florida Bar also contorts the testimony of Anna Broshe to suggest that Respondent did not allocate the Pursley lease payments properly. The notion that some Pursley lease payments may have been allocated to other Pursley obligations is a half-truth and creates an impression that is simply invalid. Accounting allocations for tax purposes does not imply that the cash proceeds were not used to support the property. Repayment of sums advanced to NLMC to cover NLMC expenses does not constitute misallocation.

The Florida Bar analogizes the alleged failure to inform Dr. Onusic of the recording of the deed in 1997 and transfer and mortgaging of the property in 2001 as "essential matters". However, as validated by Respondent's legal experts, there was no obligation or legal duty to inform Dr. Onusic of these actions. Dr. Onusic

was not a client or partner of Respondent, and Respondent did not act in any capacity as her advisor or lawyer. The nature of the relationship between Respondent and Dr. Onusic is essentially buyer and seller under the terms of the letter of intent and there is no basis in the record for concluding that Respondent breached the letter of intent.

If anything, Davis supports the Referee's recommendation of a public reprimand.

The cases cited by The Florida Bar supporting their petition for an increase in sanctions are simply not applicable to the instant case. Most of them resulted in disciplines less than the one-year suspension that the Bar is seeking. All of them involved violations of Disciplinary Rules or Rules of Professional Conduct that the instant respondent did not violate. Therefore, the petition of The Florida Bar for increased sanctions should be rejected as inconsistent with the Standards and existing case law.

The Referee properly applied Section 5.13 of the Standards in recommending a public reprimand. Section 5.13 of the Standards provides that "Public Reprimand is appropriate when a lawyer knowingly engages in… conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on the lawyer's fitness to practice law".

Standard 5.0, Violations of Duties Owed to the Public, is appropriate because Respondent's behavior was not in connection with his duties as a lawyer. Respondent's role in the transaction was that of a buyer under a contract of sale. Respondent had no fiduciary responsibilities toward Dr. Onusic as a client, trustee, advisor or business partner.

Respondent does not suggest that because his actions were not in connection with his professional responsibilities as a lawyer that no sanctions should be applied. Respondent recognizes the obligations of attorneys under Bennett. He argues, however, that because Respondent was acting solely as a buyer, and not as counsel, a suspension is not appropriate. Conduct outside the practice of law, at times, warrants a lesser discipline. See, for example, Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla. 1986).

The trial record documents that the complaint against Respondent arises from a personal transaction involving a contract of eighteen years past. That contract was negotiated at arm's length with Dr. Onusic's husband, a lawyer. The case at bar did not arise in the course of Respondent's practice of law. Respondent relied upon the advice of Pennsylvania counsel and exercised contract rights negotiated with Dr. Onusic's lawyer in good faith. As acknowledged by the bankruptcy court and the Referee, Respondent did not make any affirmative misrepresentations. There is no criminal conduct. Respondent did not violate any

Rules of Professional Conduct. Under these circumstances, the only appropriate sanction is a public reprimand.

RESPONDENT'S INITIAL BRIEF ON CROSS-APPEAL

POINT II

THIS CASE SHOULD BE DISMISSED BECAUSE RULE 3-4.3 BY ITSELF CANNOT SERVE AS THE BASIS FOR DISCIPLINE.

Respondent argues that a discipline cannot be predicated solely on a violation of Rule 3-4.3. He submits, therefore, that this case must be dismissed.

The Report the Referee in this matter concludes that Respondent violated Rule 3-4.3 of the Rules Regulating The Florida Bar. Rule 3-4.3 provides as follows:

> The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an Attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor may constitute a cause for discipline.

The Referee concluded that Respondent violated this Rule despite a finding of no probable cause by the Grievance Committee as to whether

Rule 4-8.4(c) was violated and a finding of not guilty by the Referee as to Rule 4-4.3(a).

A. Rule 3-4.3 is a jurisdictional statement and was never intended to be a stand-alone rule for which lawyers could be disciplined.

The language of Rule 3-4.3, and its position in the Rules of Discipline rather than in the Rules of Professional Conduct, indicates it is a jurisdictional statement, not a rule describing prohibited conduct.

The "standards of professional conduct" referenced in Rule 3-4.3 are those set forth in Chapter 4 of the Rules Regulating The Florida Bar – i.e. the Rules of Professional Conduct. Rule 3-4.3 by its plain language is a jurisdictional statement. It grants the Supreme Court of Florida authority to apply discipline in the event that any act of misconduct violates any of the Rules of Professional Conduct set forth in Chapter 4 of the Rules Regulating The Florida Bar. Rule 3-4.3 also establishes the broad scope of the Rules of Professional Conduct in Chapter 4 to include any act whether it occurs "within or outside" of Florida and whether it occurs "in the course of the attorney's relation as an Attorney or otherwise."

This view is substantiated by the fact that the undersigned is aware of no reported case where Rule 3-4.3 was charged alone by The Florida Bar in any complaint bringing disciplinary charges. It appears that in every instance, Rule 3-4.3 was coupled in the Bar's complaint with an alleged violation of a Rule.

This reading is consistent with Rule 3-4.2 which provides "Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline." The Rules of Professional Conduct are set forth in Chapter 4. Rule 3-4.3 is in Chapter 3 and is not a rule in the Rules of Professional Conduct. In fact, as jurisdictional and procedural statements, the Rules of Discipline provide guidelines and authority in administering the Rules of Professional Conduct set forth in Chapter 4. Therefore, the Rules of Discipline cannot be independently "violated" by members of The Florida Bar. There must be a showing of a violation of the underlying Rules of Professional Conduct. The Referee has concluded that Rule 3-4.3 (Chapter 3) can serve as an independent and exclusive basis for disciplinary action without a finding of any violation of the Rules of Professional Conduct (Chapter 4). This judgment nullifies the need for Chapter 4 of the Rules altogether. This interpretation renders the language of Rule 3-4.3 so incredibly broad as to conceivably include any alleged act deemed by The Florida Bar as "contrary to honesty." To embrace this argument is to jettison the standards and principles in Chapter 4 in determining whether an act of dishonesty has occurred, and eliminates all guidelines and notice to members of The Florida Bar of exactly what conduct is prohibited.

The Referee's reading of Rule 3-4.3 would render the rule void for vagueness under constitutionality standards applied by The United States Supreme

Court to lawyer regulation. In Gentile *v.* State Bar of Nevada, 501 U.S. 1030; 111 S.Ct. 2720, the Supreme Court reversed a disciplinary action against attorney Gentile in part based upon the conclusion that a Nevada Supreme Court rule governing lawyer extrajudicial statements to the press was void for vagueness. In examining the language and structure of the rule the Supreme Court observed on page 1048 (2731) of its opinion:

> As interpreted by the Nevada Supreme Court, the Rule is void for vagueness, in any event, for its safe harbor provision, rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline. Rule 177(3)(a) provides that a lawyer "may state without elaboration… the general nature of the …defense." Statements under this provision are protected "notwithstanding subsection 1 and 2 (a-f)." By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general nature of the …defense" "without elaboration" need fear no discipline, even if he comments on "the character, credibility, reputation or criminal record of a..witness," and even if he "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."
>
> Given this grammatical structure, and absent any clarifying interpretation by the state court, the rule fails to provide "fair notice to those to whom [it] is directed." Grayned v. City of Rockford, 408 U.S. 104, 112, 33 L. Ed. 2d. 222 92 S. Ct. 2294 (1972). A lawyer seeking to avail himself of rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic [*1049] terms of degree. In the context before us, these terms have no settled usage or tradition of

> interpretation [***907] in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Gentile is consistent with Florida law. See, e.g., Florida Bar v. Heller, 473 So.2d 1250, 1241 (Fla. 1985). There, in a concurring opinion, it was stated:

> It is a matter of fundamental fairness that one is only expected to respond to charges that have been specifically set forth in advance.

Under this standard, the rule must provide "fair notice to those to whom it is directed" and must establish the "principles for determining" when the rule is violated.

The interpretation of Rule 3-4.3 urged by the Bar in this matter violates this standard. Under the interpretation proposed by the Bar "any act that is…contrary to honesty" could serve as a basis for discipline without reference to the Rules of Professional Conduct. Boiled down to its essence, if Rule 3-4.3 is a "stand alone" rule of conduct, the Bar need not charge a violation of the Rules of Professional Conduct. They are not needed. Any act of misconduct would be prohibited by Rule 3-4.3. However, since such "acts" are not defined under Rule 3-4.3 and no principles are established under the rule for determining when such an act is "contrary to honesty", this application of the rule does not provide fair notice to lawyers of the acts that are prohibited.

B. The cases cited by the Referee to support his recommendation do not apply because there were no allegations of fraud or dishonesty under the Rules of Professional Conduct pending before the Referee.

The Referee cited three cases to support his recommendation that the Respondent violated Rule 3-4.3. In none of the cases was the issue of Rule 3-4.3 being the sole basis for discipline addressed by the Court. All three cases involved allegations of misconduct under Chapter 4 of the Rules of Professional Conduct before the Referee and, therefore, are not analogous to the case at bar.

In Florida Bar v. Arnold, 767 So.2d 438 (Fla. 2000), the Referee recommended that attorney Arnold be found guilty of violating Rule 3-4.3 in connection with felony convictions that were vacated on appeal. Also before the Referee was an allegation that Arnold had violated Rule 4-8.4(b) (Misconduct). For purposes of mitigating discipline, the Referee recommended that Arnold be found not guilty of violating Rule 4-8.4(b), thereby leaving Rule 3-4.3 as the sole basis for discipline in connection with his crimes.

In approving the Referee's recommendations on sanctions, the Supreme Court of Florida did not directly address the anomaly created by the Referee's application of Rule 3-4.3 while also rejecting Rule 4-8.4(b). However, consistent with an application of Rule 4-8.4(b), the Court did focus on the felony conviction of Arnold in examining whether disbarment was appropriate under Florida Standards for Imposing Lawyer Sanctions 5.22. The finding of the Court that

Arnold had met his burden in overcoming the presumption of disbarment served as a basis for accepting the recommendations of the Referee concerning the appropriate sanction.

The fact that the Florida court accepted the Referee's recommendations on sanctions does not imply that the Court accepted the Referee's recommendations on the precise rule that was violated. That issue was not appealed.

In Florida Bar v. Cocalis, 959 So.2d 163 (Fla. 2007), the Supreme Court of Florida only reviewed the sanctions recommended by the Referee, not the conclusion that Rule 3-4.3 had been violated. As in Arnold, the Bar alleged violations of numerous rules including 4-3.3(a)(1), 4-3.4(a) and 4-8.4 (a), (c) and (d) as the basis for sanctions under Rule 3-4.3. The Referee recommended no violation of the cited Rules of Professional Conduct and referred the case to the Bar's practice and professionalism program.

Troubled by the "sharp practices" of attorney Cocalis in handling a personal injury suit that served as the basis for Bar's complaint, the Supreme Court rejected the recommendations of the Referee and proceeded on its own analysis in determining the appropriate sanction. Recognizing that the Referee may have erred in concluding that Cocalis' conduct did not violate Rules of Professional Conduct 4-3.3 (a)(1), 4-3.4(a) and 4-8.4(a)(c)(d), the Court declined to address this

issue directly and merely concluded that Cocalis' "sharp practice" was "sneaky and underhanded" and was subject to discipline.

The Court's ruling in Cocalis should not be read as ratifying Rule 3-4.3 as a separate rule prohibiting conduct. Such a reading raises constitutionality concerns for vagueness. Instead, the better and more consistent reading is that the Supreme Court by implication ruled that Cocalis had violated one or more of the Rules of Professional Conduct pending before the Referee and, therefore, sanctions were appropriate pursuant to Rule 3-4.3.

This reading is also in line with the Court's reliance in Cocalis on Florida Bar v. Sayler, 721 So.2d 1152 (Fla. 1998). In Sayler the Court accepted the Referee's recommendations for sanctions pursuant to Rule 3-4.3 in connection with violations of Rules of Professional Conduct 4-4.4 and 4-8.4(d).

Based upon this analysis, sanctions pursuant to Rule 3-4.3 depend upon a corresponding allegation before the Referee that the Respondent violated at least one of the Rules of Professional Conduct. Therefore, the failure of The Florida Bar to allege fraud or any act of dishonesty as a violation of at least one of the applicable Rules of Professional Conduct before the Referee in this case precludes disciplinary action for fraud or dishonesty under Rule 3-4.3.

C. The Referee does not have jurisdiction to rule on any claim for dishonesty or fraud because the Grievance Committee voted no probable cause on these facts and claims.

In referring this matter to Grievance Committee on October 3, 2009, The Florida Bar cited possible violations of Rule 4-8.4(c) (Misconduct). Similarly, in the Notice of Probable Cause Vote, June 2, 2008, The Florida Bar again cited Rule 4-8.4(c).

Rule 4-8.4(c) provides that "a lawyer shall not: … engage in conduct involving dishonesty, fraud, deceit, or misrepresentation…" In referring the complaint to the Grievance Committee, The Florida Bar charged the committee to investigate and vote whether the acts of Respondent constituted "conduct involving dishonesty, fraud, deceit or misrepresentation."

The Grievance Committee rendered a vote of no probable cause on this question, thereby concluding that Respondent did not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation". The Notice of Probable Cause Finding did not list Rule 4-8.4(c) as a potential violation. Further, the complaint by The Florida Bar with the Florida Supreme Court did not list Rule 4-8.4(c) as a potential violation. Pursuant to Rule 3-7.4(j)(1), a finding of no probable cause by the Grievance Committee on the question of fraud and dishonesty terminates the investigation for fraud and dishonesty.

Since the Grievance Committee found that there was no probable cause for concluding Respondent engaged in "conduct involving dishonesty…[or]…fraud" under Rule 4-8.4(c), there is no basis for the proposition that Respondent's conduct

includes "…act[s]…contrary to honesty…" under Rule 3-4.3. The standards for honesty and fraud under both rules are the same. There is no basis for suggesting that "minor acts of dishonesty or fraud" are not covered under Rule 4-8.4(c). Nevertheless, the Referee concluded that Respondent violated Rule 3-4.3 for acts of dishonesty and fraud as the sole basis for his recommended sanctions against Respondent, thereby suggesting that Rule 4-8.4(c) is either redundant or inconsequential.

The Referee concluded that Respondent could be found guilty under Rule 3-4.3 for fraud and dishonesty despite the action of the Grievance Committee because the scope of Rule 4-8.4(c) applies for "traditional fraud or deceit arising from misrepresentations" but not for a "scheme that had the intent and effect of defrauding Sylvia Onusic as a creditor…" ROR, p. 28-29. Under this analysis, the Referee concludes that Rule 3-4.3 establishes an independent standard of fraud and dishonesty not within the scope of Rule 4-8.4(c).

The problem with this analysis is that while "misrepresentations" and "deceit" are listed as prohibited conduct under Rule 4-8.4(c), "dishonesty" and "fraud" are also listed (without qualification). There is no basis for the notion that Rule 4-8.4(c) only covers fraud or dishonesty based upon misrepresentations or deceit. By voting no probable cause on Rule 4-8.4(c), the Grievance Committee concluded that Respondent's conduct did not involve any acts of "fraud" or

"dishonesty" and, therefore, the Referee cannot rule on the question under the guise of Rule 3-4.3 without violating due process standards.

POINT III

THIS CASE SHOULD BE DISMISSED BECAUSE THE FLORIDA BAR FAILED TO PROVE MISCONDUCT BY CLEAR AND CONVINCING EVIDENCE.

The Florida Bar did not establish by clear and convincing evidence that Respondent's conduct was dishonest or fraudulent and, therefore, this case must be dismissed. Under the clear and convincing standard,

> the evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re: Davey, 645 So.2d 398, 404 (Fla. 1994).

To prove dishonest conduct the The Florida Bar must prove the element of wrongful intent by clear and convincing evidence. See, e.g., Florida Bar v. Lanford, 691 So.2d 480 (Fla. 1997); Florida Bar v. Neu, 597 So.2d 266, 268 (Fla. 1992) and cases cited therein; and Florida Bar v. Bariton, 583 So.2d 334, 335 (Fla. 1991). The Bar provided only circumstantial evidence to prove wrongful intent in the instant case. In Florida Bar v. Marable, 645 So.2d 438, 443 (Fla. 1994), the Florida Supreme Court said that circumstantial evidence fails to prove wrongful intent when that evidence is "inconsistent with any reasonable hypothesis of

innocence." The Florida Bar failed to meet this standard, and did not prove by clear and convincing evidence that Respondent committed any act of fraud or dishonesty.

A. Respondent has not been convicted of any unlawful act in a trial on the merits in any criminal or civil proceeding.

Contrary to the suggestion of The Florida Bar in its brief before this Court, Respondent has not been convicted of any unlawful conduct or act in any trial on the merits in any criminal or civil proceeding.

Respondent has not been arrested for any crime. Respondent has not been charged with any crime. Respondent has not been tried or convicted of any crime. No criminal conduct has been alleged by any party against Respondent. The Bar did not allege criminal conduct in its complaint.

Respondent was not convicted for any unlawful act or conduct by the Bankruptcy Court in the proceeding on discharge of the debt owed to Dr. Onusic by NLMC under §523(a)(2)(A) of the Bankruptcy Code. As noted by the Referee "… the bankruptcy judge's opinion was actually on exceptions to discharge, strictly speaking, as opposed to ruling on the fraudulent transfer, because he wasn't there ruling on the fraudulent transfer." T1 - p. 236 (lines 4-8). The conclusion of the bankruptcy court is only applicable to the question of discharge of the debt under applicable bankruptcy procedure and does not constitute any conviction for fraud, dishonesty or any other unlawful conduct.

The recommendations of the Referee in this matter are similarly limited. the Referee has reviewed the facts of this matter solely for purposes of considering whether Respondent violated any of the Rules Regulating The Florida Bar. This proceeding has not been a trial on the merits under any specific fraudulent transfer act, nor has the violation of any such statute or law been specifically alleged. The jurisdiction of the Referee in reviewing this matter is limited to the sole question of whether the underlying acts of Respondent violated any Rules Regulating The Florida Bar and does not constitute conviction for any unlawful acts.

B. The recording of the deed in 1997 does not show that Respondent acted with intent to harm Dr. Onusic.

The Referee found that the alleged failure of Respondent to disclose recording of the deed in 1997, 14 years ago, suggests that Respondent acted with intent to harm Dr. Onusic. The problem with this analysis is that the deed for the property was lawfully recorded in 1997 pursuant to contract rights granted to NLMC by Dr. Onusic in the letter of intent under paragraphs (8)6.b and (13) as confirmed to Respondent by Pennsylvania counsel. In response to direct questioning on this issue expert Michael Knoll testified as follows:

> Mr. Draughon:
> Q. Let me ask you: Did NLMC have the right to record the deed upon issuance of the second note?
> A. Yes. Yes, upon payment of the first note, which could be accomplished in one of two ways. One of which was the issuance of the second note. Absolutely.

> Q. Is there any requirements – in the documents that you reviewed, is there any requirement that NLMC had to give Dr. Onusic notice before recording the deed after the issuance of the second note? Is there any notice requirement?
> A. No, no. At that point, NLMC had the right to record.
> Q. And where does that right come from?
> A. Where does that right come from? Well, it comes from the letter of intent, you know, the binding agreement between Dr. Onusic and NLMC, which provides that the deed is to be held in escrow while the first note is – while the original promissory note is outstanding, but once it's paid, it can be recorded. And then that's exactly what had happened.

T1 - p. 304 (line 10) through p. 305 (line 4).

Expert Professor Knoll was also questioned by the Court on this very same issue, as follows:

> THE COURT: Do you think there's any ambiguity there as to whether the – there does remain, even under the 6(b), second note scenario, some balance remaining due under that first note so that the intent here really is not for that deed to go out of escrow? Any room for an ambiguity there?
>
> THE WITNESS: Right. It's hard to say with drafting that there's absolutely none. But I think it's really pretty tight, Your Honor, because it makes payment of the promissory note, cap p, cap n, the trigger. And this document clearly defines the promissory note as one note and provides for a second note to then come in after.

T1, p. 336 (line 16) through p. 337 (line 3).

This view of the letter of intent was confirmed by Respondent T1 - p. 425 (line 4) through p. 427 (line 9). Respondent testified that the deed was actually

recorded for NLMC by Pennsylvania counsel T1, p. 449 (lines 16) through p. 451 (line 6). Respondent also testified that he had consulted with Pennsylvania counsel before authorizing the recording of the deed to confirm the right of NLMC to record the deed.

The only evidence contravening the testimony of Professor Knoll and Respondent is the vague assertion by Dr. Onusic that she believed that the deed was not to be recorded until the first note was cashed out to her, and that she was not advised in advance of the intent to record the deed. This testimony is inconsistent with the contract she signed which granted Respondent the right to record the deed upon issuance of the second note without any obligation for advance notice beyond the 1993 letter of intent itself.

The Referee incorrectly suggests that the June, 1995 letter R-Ex 12 evidences an obligation to not record the deed without advanced written permission from Dr. Onusic. In the June, 1995 letter Respondent urged Dr. Onusic to allow the deed to be recorded before the maturity date of the original promissory note in September, 1997. (He also urged her in that letter to seek independent counsel for advice.) The June, 1995 letter is a request to allow early recording of the deed while the original promissory note was still outstanding – a right that NLMC did not have under the letter of intent. This request did not eliminate the right of NLMC to record the deed upon issuance of the second note in December,

1997 (two years later). In fact, part of the argument advanced in the June, 1995 letter by Respondent anticipated the unilateral contract right of NLMC to record the deed in 1997. R-Ex 12, p. 4. "There is no advantage in keeping NLMC from recording its deed. There is no advantage in waiting."

The Referee believed that the position of Respondent on the relationship between the first note and the second note is inconsistent with his prior testimony concerning the relationship between the third note and the second note. During the bankruptcy trial Respondent argued that the Pursley guarantee of the second note also applied to the third note because the third note was merely a restatement of the second note. The Referee viewed this testimony as inconsistent with the belief of Respondent that the second note extinguished the first note and, therefore, freed NLMC to legally record the deed. Respondent's position is based upon the argument that the retirement clause for the first note in the second note was enforceable as a matter of contract right under the letter of intent as signed by Dr. Onusic after it had been negotiated by Mr. O'Kicki. In other words, the parties had specifically agreed to this provision as part of the original contract. No such contract provision exists governing the extinguishment of the second note by the third note and, therefore, the third note is simply a restatement of the balance due under the second note.

The notion that recording the deed in 1997 was an act of dishonesty with intent to defraud Dr. Onusic is inconsistent with Respondent's 1998 offer to allow Dr. Onusic to record a lien on the property securing her note. Respondent had offered a lien in the June, 1995 letter. Respondent testified that the offer was renewed in 1998 T1 - p. 510 (line 24) through p. 512 (line 25). This offer was made long before the property was transferred to the personal name of Respondent in 2001. In 1998 the property was held by NLMC free and clear of all liens. The evidence shows that Dr. Onusic declined the offer because she did not want to create a public record of the note. T1 - p. 510 (line 24) through p. 512 (line 25).

The alleged failure of Respondent to advise Dr. Onusic in advance of the 1997 recording of the deed is not evidence of intent to harm Dr. Onusic. The contrary evidence shows that Dr. Onusic was advised of the right to record the deed in the form of the letter of intent itself. The evidence shows that Dr. Onusic learned of the recording within thirty days thereafter and could have objected at that time but did not. T1 - pp. 107, 446). The evidence shows that Dr. Onusic was offered a lien to secure her note shortly after the deed was recorded but declined for fear of creating a public record. As acknowledged by the Referee, two "well qualified expert witnesses" advocated a defense on this question substantiating Respondent's legal position that he had the unilateral contract right to record the deed in 1997 pursuant to the terms of the letter of intent. As further acknowledged

by the Referee, Respondent sought the advice of Pennsylvania counsel on the question, and proceeded in reliance thereon. While advising Dr. Onusic in advance of the recording may have been a "good idea" as suggested by the Referee, there simply was no obligation to do so and any failure to so advise is not "clear and convincing evidence" that Respondent intended to harm Dr. Onusic.

Respondent and the two expert witnesses testifying on behalf of Respondent provided evidence and testimony consistent with a "reasonable hypothesis of innocence" on the question of Respondent's intent in connection with recording of the deed in 1997. The Referee could not, therefore, find the evidence met the "clear and convincing standard" required to conclude that Respondent acted with intent to harm Dr. Onusic in recording the deed in 1997.

C. <u>The transfer and mortgaging of the property by Respondent in 2001 does not show intent to harm Dr. Onusic.</u>

The Referee concluded that Respondent acted dishonestly by transferring the property from his wholly owned corporation to himself in 2001 and subsequently mortgaging the property without using the proceeds thereof to cash-out Dr. Onusic. He further opined that the transfer of the property left NLMC insolvent. the Referee relied on the analysis conducted by the Bankruptcy Court along with the testimony of Bar expert Richard Thames to support his conclusions.

As pointed out by Professor Davis, the transfer of the property did not leave NLMC insolvent or with "de minimus assets". The Pursley lease remained in the

corporation, along with promissory notes. The remaining term under the lease and payments outstanding totaled approximately $100,000 and the promissory notes had a face value of more than $50,000 (including interest). Further, the million dollar house of Pursley in the World Golf Village purchased in 2002 along with condo originally purchased for approximately $300,000 evidenced that Pursley was not judgment proof at the time of the transfer. These facts refute the conclusion that leaving the corporation with the lease and notes showed intent to defraud Dr. Onusic. T1 - p. 359 (line 15) through p. 362 (lines 23).

The Referee found that because Pursley was not trustworthy and was delinquent in his several obligations to Respondent, Respondent could not have reasonably expected Pursley to honor his lease obligations to NLMC. However, this finding conflicts with the evidence that Pursley rendered payments under the lease from 1993 – 2000 as his primary residence and that negotiations were under way from 2001 – 2002 for Pursley to purchase the property. Pursley continued to occupy the property under his lease with NLMC until several months after expiration of the lease in September 30, 2002 T1 – p. 462 (lines 12-15). More important, the evidence showed that Dr. Onusic had a judgment against NLMC and could have proceeded directly against Pursley for breach of the lease ($100,000) and default on the Pursley notes ($50,000) which would have more

than covered the remaining balance due Dr. Onusic under the NLMC note [T1 – p. 494 (lines 15-19).

The Florida Bar argues that it was not reasonable for Respondent to expect Pursley to purchase the property once it was encumbered by the mortgage. This observation is speculative and incorrect. In fact, Pursley could have serviced the outstanding mortgage and the obligations of the third note to Dr. Onusic under a purchase agreement with NLMC. The advantage of such a structure would have been that Pursley would not have had to qualify for traditional financing, render any down-payment and his monthly payment would have been less than the monthly lease payment. Accordingly, the mortgage made it more likely that Pursley would buy the property because financing was already in place for the purchase.

The uncontroverted fact and hard evidence that NLMC was left with a viable lease and several promissory notes, along with valid legal claims against a defendant with assets, all argues against speculation that the transaction left NLMC insolvent or that Respondent intended to harm Dr. Onusic. The facts simply do not support a conclusion of fraudulent intent. While experts may have disagreed on this point, such disagreement itself shows that the evidence on whether Respondent actually intended to cheat Dr. Onusic falls very short of the clear and convincing standard.

The Referee also suggests that the property was transferred without consideration as evidence of wrongful intent. The notion is that transferring the property from his wholly owned corporation to himself without consideration supposedly evidences intent to defraud Dr. Onusic.

There are three problems with this argument. First, Respondent took the property subject to the Pursley lease and continued using the property to service the lease through the lease term ending September 30, 2002. T1 – p. 360 (lines 3-15). The second problem is that Respondent assigned two notes with a value of approximately $50,000 to the corporation in connection with the conveyance. The third problem is that the deed documenting the conveyance recites consideration for the transfer as the face amount of the loan. As acknowledged by the Referee, the testimony of Respondent established that the structure of the transaction as framed by counsel for the corporation (Pennsylvania lawyer Dick Green) provided for constructive receipt of the loan proceeds by NLMC, capital gain treatment on the sale to Respondent as buyer of the property and a dividend to Respondent as the sole shareholder of the corporation. T1 – p. 538 (line 22) through p.540 (line 21).

The Referee stated that it matters not whether Respondent took the property directly or merely received a dividend of the loan proceeds. However, this conclusion is at odds with the uncontroverted testimony of expert Michael Knoll.

As testified by Mr. Knoll, this structure of the transaction precluded a finding of either intentional or constructive fraud under the law prohibiting fraudulent transfers in Pennsylvania and most every other state. There was no contractual obligation of NLMC or Respondent to use the proceeds of the loan to pay off the third note. T1 – p. 312 (line 8) through p. 314 (line 10). Legal experts Knoll and Davis both testified that conveyance and mortgaging of the property in 2001 did not breach the letter of intent and did not evidence any wrongful intent of Respondent to harm Dr. Onusic.

The facts show that Dr. Onusic did not have a lien on the property securing her note, despite the fact that she was offered such lien on at least two occasions before the transfer and mortgaging of the property in 2001. (Her lawyer-husband, who negotiated the original transaction in 1993, did not seek such a lien.) The conveyance was subject to the Pursley lease for due consideration, and did not leave NLMC without assets to service the NLMC note to Dr. Onusic. In light of these facts the claim that the transaction evidences intent to harm Dr. Onusic is not uncontroverted and does not meet the clear and convincing standard. Respondent advanced a "reasonable hypotheses of innocence" that is inconsistent with the proposition of wrongful intent and, therefore, any conclusions of wrongful intent do not meet the "clear and convincing standards" of the Supreme Court of Florida.

Simply put, Dr. Onusic had no lien on the Heather Lane property. There was no impediment to NLMC conveying the land to Respondent and his spouse. And, there was no requirement that Respondent give notice to Dr. Osunic when he did so.

D. <u>Respondent's cash-flow management of the transaction under the letter of intent does not evidence an intent to harm Dr. Onusic.</u>

The Referee based his conclusion of wrongful intent in part by suggesting that Respondent breached the letter of intent in not properly allocating all of the lease payments to NLMC. This position is based upon the testimony of Anna Broshe that Respondent allocated payments based upon the cash-flow needs of Respondent's respective businesses and that some lease payments may have been allocated to payables unrelated to NLMC.

The Referee has taken this testimony out of context. There was no evidence presented at trial that any Pursley lease payments were used for payables unrelated to the property. Ms. Broshe also testified that Respondent made many payments on the NLMC note from his own personal resources. Respondent estimated that, at times, he put $150,000 of his personal funds into NLMC. T2 – p. 89. Ms. Broshe testified that Respondent paid the monthly deficit on the property from his own personal resources. Ms. Broshe also testified that all of the NLMC note payments after Pursley stopped paying rent in December, 2000 were from Respondent's personal resources. T1 – p. 172 (line 12) through p. 174 (line 1).

This clarifying testimony of Ms. Broshe is consistent with the testimony of Respondent regarding cash-flow management of the transaction as well as the tax treatment of the lease payments in consultation with Ms. Broshe and the tax accounting firm of Cornelius Culpepper & Schou. This testimony validates that monies were advanced to NLMC by Respondent from his other business regularly, with occasional and sporadic re-payment. T1 – p. 522 (line 7) through p. 523 (line 12) see also p. 526 (lines 5-25).

There is scant evidence to support the proposition that not all of the lease payments were used to support the property. The evidence shows that lease payments were to cover more than just the note payments to Dr. Onusic. The chronic deficit resulting from costs directly related to the Heather Lane property including maintenance, insurance, taxes and other costs created a negative cash-flow situation that was resolved from the personal resources of Respondent. The lease payments from Pursley had to be allocated to cover all of the expenses of the property, not just the note to Dr. Onusic. T1 – p. 418 (line 9).

The evidence shows that as of December, 2000 (the last lease payment rendered by Pursley) the remaining lease obligation exceeded the balance due on the NLMC note to Dr. Onusic. The problem was that Pursley breached the lease and stopped making payments as of December, 2000, not that the lease payments were diverted to other purposes. Throughout the history of Respondent's dispute

with Dr. Osunic, there have never been any allegations or evidence that any of the Pursley lease payments were not properly allocated to NLMC and used to support the property, including the note obligations to Dr. Onusic. There is no allegation or evidence supporting any claim that Respondent breached the letter of intent.

The Florida Bar argues that Respondent "selfishly diverted lease payments to himself" contrary to "representations" to Dr. Onusic that the lease payments would be used to service outstanding mortgages with payment of remaining funds to her. This argument is simply not supported by the evidence.

The first problem is that Respondent made no representations to Dr. Onusic other than the terms of the letter of intent. The contract was negotiated between Respondent and Judge O'Kicki (as counsel for Dr. Onusic). The record shows that Respondent did not have any conversations with Dr. Onusic until later. T1 – p. 404 (lines 7-14).

The second problem is that The Florida Bar argument assumes that all of the Pursley lease payments were to be used to service the NLMC note to Dr. Onusic. However, this assertion is not consistent with the letter of intent. Under the letter of intent the installment payment to Dr. Onusic was $3,000 per month under the first note, while the Pursley lease payment was $4,500 per month. Similarly, the payment under the second note was $3,900 per month compared to the Pursley lease payment of $4,200 per month. These facts validate that while Pursley lease

payments were the intended source for servicing the note to Dr. Onusic, there was no commitment to forward all of the Pursley lease payments to Dr. Onusic. As pointed out above, in addition to the unsecured note payments, Respondent had to cover the costs of insurance, taxes, improvements and maintenance.

The third problem is that there is no evidence in the trial record of any cash diversions of the lease payments. The "allocations" complained by the Bar were simply not proven at trial. In fact, the record shows that Respondent did use the Pursley lease payments to pay off all outstanding mortgages taken out by O'Kicki, to pay the liens on the property, and render payment to Dr. Onusic. T1 – p. 427 (lines 19-24). The testimony of Respondent concerning tax allocations does not imply that the lease payments were not used to cover expenses on the property, including payments to Dr. Onusic. Any such allocations were simply income allocations with subsequent advances to NLMC as capital contributions for purposes of matching taxable income with tax losses. The cash still went to NLMC to cover the property. These arrangements do not breach the letter of intent.

Respondent put about $150,000 of his own funds into the Heather Lane property. T1 – p. 89. If funds from Pursley were, on occasion, used to reimburse some of those expenditures, it was not improper.

The conclusions of the Referee concerning wrongful intent based upon Respondent's cash-flow management of the transaction are speculative, and based upon circumstantial evidence that fails to consider the entire evidentiary record.

E. Respondent's dealings with Dr. Onusic did not evidence any wrongful intent.

The analysis of the Referee in concluding wrongful intent is also partly based upon the notion that Respondent was not forthright in his dialogs with Dr. Onusic and treated her unfairly by taking advantage of her situation. To support this conclusion the Referee emphasized Respondent's alleged failure to advise Dr. Onusic in advance of the recording of the deed in 1997 and the transfer and mortgaging of the property in 2001. the Referee suggests that Judge O'Kicki negotiated the letter of intent on behalf of Dr. Onusic shortly after his chemotherapy, thereby implying that Respondent took unfair advantage of the situation to secure his rights under the letter of intent. the Referee also suggests that Respondent was emboldened by the apparent lack of counsel available to Dr. Onusic while she was in Europe and after the death of her husband, Judge Joseph O'Kicki.

These suggestions and references fall far short of the "clear and convincing standard" required to conclude that Respondent acted with wrongful intent. The testimony shows that Dr. Onusic had changed her name only a few months before the transaction in 1993. T1 – p. 108. Joseph O'Kicki had been convicted of

crimes while in office, removed from the bench and was poised to flee the country before his sentencing on March 8, 1993 (the date of the letter of intent). T1 – p. 411. Dr. Onusic herself may have been a fugitive while living in Slovenia. B-Ex 42, p. 52 (line 16) through (line 20).

The Heather Lane property in 1993 was in foreclosure, subject to tax and utility liens and there were no other buyers. T1 – pp. 114, 115, 416, 424. The terms set forth in the letter of intent were the only option available to Mr. O'Kicki and Dr. Onusic. They also received $7,500 in cash at closing. Ultimately, Dr. Onusic received more than $205,000 in principal payments (plus interest thereon). The mortgages and liens on the property when the property was sold were cleared up before the second note was signed. Based upon this background, the terms in the letter of intent allowing the deed to be recorded in 1997 were reasonable and fair.

If NLMC had not rescued Mr. O'Kicki and Dr. Onusic, they would have lost the property to foreclosure. And, Mr. O'Kicki would not have had $7,500 in hand to use to flee from the United States to escape sentencing.

The evidence did not establish that Respondent was unfair or not forthright in dealing with Dr. Onusic. Dr. Onusic was represented by attorney O'Kicki in her negotiations and received help thereafter from attorney Arthur Cohen, attorney James Yelovich, attorney Dennis Wharton, Judge Leahy and, finally, attorney

Kathleen Yurchak. The evidence shows that Dr. Onusic did not negotiate the letter of intent, the first note, the second note or the third note directly with Respondent. Dr. Onusic admitted in prior depositions to having access to counsel in the United States while she was in Europe. The testimony of Dr. Onusic validates that she understood the role of Respondent. Finally, the June, 1995 letter (R-Ex p. 12) confirms that Respondent advised her to consult with counsel. There is no basis for concluding under these facts that Respondent somehow took undue advantage of Dr. Onusic.

The only evidence offered in support of these propositions was the self-serving testimony of Dr. Onusic. However, her testimony conflicts with evidence to the contrary on the record and is simply not credible. She did not testify with any precision as to the timing or content of her allegations. By her own admission, her background includes a criminal charge for misrepresentation.[1] Her testimony is conflicted on the question of legal representation, her motives for not securing her note and alleged dealings with Respondent. These arguments fall short of the clear and convincing standard required for the Referee to conclude that Respondent did not deal with Dr. Onusic forthrightly or intended to harm her.

The evidence showing that Respondent failed to advise Dr. Onusic of the intent to exercise his rights is equally circumstantial. As supported by expert

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[1] At her deposition of January 18, 2005 Dr. Onusic was asked directly by Mr. Johnston concerning her criminal charges as follows: Q. **Do you remember what the charge was? Was it false swearing?** A. **Something like that**. [p.87 (line 25) through p. 88 (line 2).]

testimony on behalf of Respondent, there was no obligation of Respondent to advise Dr. Onusic in advance of either the recording of the deed or the conveyance of the property from NLMC to Respondent and his wife. Further, assuming Dr. Onusic had been advised in advance to her satisfaction, she had no legal grounds to object: Her consent was not required. Finally, any failure to advise in advance was not prejudicial to her subsequent right to object.

POINT IV

VARIOUS AGGRAVATING FACTORS FOUND BY THE REFEREE SHOULD BE DISREGARDED.

In considering the appropriate sanctions, the Referee based his recommendation of a public reprimand on a finding of aggravating circumstances not supported by the evidence.

A. The evidentiary record does not support the findings that Respondent acted from dishonest or selfish motive.

In finding that Respondent acted from dishonest or selfish motive, the Referee focused on the recording of the deed in 1997, transfer and mortgaging the property in 2001 and the cash-flow management of the transaction by Respondent under the letter of intent. The Referee suggests that Respondent diverted some of the Pursley lease payments to himself in lieu of servicing the NLMC note to Dr. Onusic and characterized this act as a breach of the letter of intent and evidence of dishonesty.

As testified by Respondent and two expert witnesses, the acts of Respondent in recording the deed in 1997 and subsequent transfer and mortgaging of the property four years later were pursuant to rights granted to Respondent by Dr. Onusic and upon the advice of Pennsylvania counsel. These actions were necessary to preserve the property and to keep the transaction (including payments under the note to Dr. Onusic) viable. As purchaser and owner of the property through his wholly owned corporation (NLMC) the position of Respondent was at odds with the position of Dr. Onusic as seller – as is the case with buyer and seller in any transaction. However, Respondent's assertion of those rights (especially after consultation with counsel) cannot be said to arise from "dishonest or selfish motive", even if the good faith judgment on these questions by Respondent and his Pennsylvania counsel turned out to be wrong.

The notion that Respondent diverted any of the Pursley lease payments to himself in lieu of servicing the NLMC note to Dr. Onusic is simply not supported by the record. the Referee focused on the testimony of Anna Broshe who testified that Respondent directed the allocation of the Pursley payments. However, this was only part of Ms. Broshe's testimony. She also acknowledged that Respondent advanced funds to NLMC to cover the Onusic note and acknowledged substantial and chronic deficits between the Pursley lease payments and NLMC note obligations that were covered by Respondent using resources from his other

corporations. Respondent estimated he put $150,000 of his own money into the property. T2 – p. 89.

The Referee conclusions concerning allocation of the Pursley lease payments also fails to consider the testimony of Respondent that cash advanced to NLMC to cover payments on the note to Dr. Onusic was occasionally re-paid to Respondent from the Pursley lease payments.

The Florida Bar has attempted to dramatize and embellish this flawed notion by alluding to the testimony of Respondent during his bankruptcy trial. Respondent suggested that in consultation with his tax advisors (Anna Broshe and Cornelius, Culpepper & Sehon), not all of the Pursley payments may have been allocated to NLMC because Pursley also owed legal fees to Respondent's law firm as well as other obligations. The actual tax allocation of Pursley payments were structured by Ms. Broshe and Respondent's tax advisors for purposes of minimizing tax obligations.

The tax allocation of these payments does not substantiate or even imply that any of the cash from the Pursley lease payments was diverted from NLMC to Respondent. Respondent testified that any use of Pursley lease payments for obligations in Respondent's other business were a re-imbursement for use of cash from these other businesses to cover NLMC obligations. Respondent's testimony on this issue comports with the substantiated fact that as of January, 2001 the

balance owed under the third note (which was current as of January, 2001) was equal to the balance owed under the remaining term under the Pursley lease.

The conclusions of the Referee on this question are also subtly flawed from another perspective. While it is true that the Pursley lease payments were the primary source of funds for servicing the NLMC note to Dr. Onusic, it is not true that the Pursley lease payments were to be used only for that purpose. Respondent testified (without rebuttal) that the Pursley lease payments were to be used to cover all costs of the property, including insurance, repairs (e.g., pipe damage, pool house demolition, roof damage), remodeling (e.g., kitchen, staircase, bedroom renovations – as requested by Pursley), improvements (e.g., front porch, back porch, fence – as requested by Pursley) and other related costs. T1 – p. 420 (line 10). Seller was well aware of these costs and the application of Pursley lease payments for these purposes in order to restore and maintain the premises as livable for the Pursley family as tenants. The application of the Pursley lease payments to cover these items cannot be said to derive from dishonest or selfish motive.

Finally, the record also shows that the total costs of the property far exceeded the total receipts under the Pursley leases. Respondent's unrefuted testimony was that this amount at the end of 2000 totaled more than $140,000 and was paid from the personal resources of Respondent. T1 – p. 458 (lines 11-18).

The record shows that Respondent did not act from selfish or dishonest motive. Respondent acted within his perceived contract rights under the letter of intent as buyer of the property and upon the advice of counsel. Respondent advanced funds to cover expenses (including payments to Dr. Onusic) from his own personal resources when Pursley lease payments were delinquent or inadequate. All Pursley lease payments were used to cover NLMC costs, including payments to Dr. Onusic. Respondent invested $140,000 to $150,000 from his own resources to cover NLMC obligations. T1 – p. 458; T2 – p. 89. As observed by The Florida Bar at trial "… it is clear that Mr. Draughon was trying to make the deal work." T1 – p. 269 (lines 2-3). Accordingly, the evidence does not support the proposition that Respondent acted from selfish or dishonest motive.

B. The evidence does not support the conclusion that Respondent is not remorseful or has failed to acknowledge the wrongful nature of his conduct.

The Referee concluded that one of the aggravating factors supporting his recommendation of public reprimand was that Respondent "has refused to acknowledge the wrongful nature of his conduct." This position embraces the argument by The Florida Bar that Respondent has not shown remorse.

First, denying allegations of misconduct cannot be considered an aggravating factor. Florida Bar v. Lipman, 497 So.2d 1165, 1168 (Fla. 1986). There the Supreme Court said:

> We agree with Lipman that it is improper for a referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct or on "lack of remorse" presumed from such refusal.

Secondly, the Referee's conclusion as to a lack of remorse is erroneous. In fact, the evidence shows that Respondent has expressed remorse, particularly regarding the impact on Dr. Onusic. T2 – p. 96. Respondent also expressed regret about his misjudgments.

The Florida Bar supports its allegations in this matter by quoting testimony from Respondent that at the time the property was mortgaged "… We could have maybe cashed Sylvia out at that time. It didn't seem to be a need to cash her out at that time." T2 – p. 96. The argument that Respondent ignored the needs of Dr. Onusic as a creditor under the NLMC note.

The balance of Respondent's testimony on this issue refutes this argument and reflects the fact that Respondent was concerned about Dr. Onusic and did make arrangements for her. As reflected in the following lines of his testimony, the reason Respondent saw no need to cash-out Dr. Onusic at the time of mortgaging is because he believed (at the time) that he had provided adequate security to cover the note. This security was the Pursley lease ($100,000), the Pursley notes ($50,000) and the remaining equity in the property ($125,000). In addition, discussions were under way with Pursley to purchase the property. Respondent testified that he believed in good faith that he would be able to get Pursley to either

purchase the property or resume lease payments since he had occupied the house as a primary residence for almost nine years previous. T1 – p. 546 (lines 12-24). As testified by expert Michael Knoll, there was no obligation to cash-out Dr. Onusic. Finally, contrary to the finding of the Referee, payments under the NLMC note were reasonably current at that time.

The suggestion that Respondent is not remorseful and has not acknowledged the wrongful nature of his conduct is not based upon the evidence. To the contrary, the evidence shows that Respondent has expressed regret and understands the wrongful nature of his conduct and its impact.

C. The evidence shows that Dr. Onusic was not vulnerable to Respondent's control over their financial transactions.

The Referee found that Dr. Onusic was vulnerable to Respondent's control over the financial transaction between NLMC and Dr. Onusic. However, the evidence shows to the contrary. Dr. Onusic, who was well-educated (with a Ph.D.) and had been married to a lawyer-judge for many years, had access to lawyers throughout the history of the transaction, as well as several opportunities to secure her rights with a lien on the property. She also had several opportunities to reach accommodation with Respondent for payment but simply refused.

The evidence shows that the initial terms of the transaction were negotiated between Respondent and Dr. Onusic's lawyer – her husband, Judge Joseph O'Kicki. Mr. Cohen described Judge O'Kicki as "an excellent lawyer." B-Ex – 42,

p. 57. Although Dr. Onusic testified that Judge O'Kicki had been ill the year before, Respondent testified that Judge O'Kicki was well during the negotiations – well enough to engage in vigorous discussions and to escape from Pennsylvania to Slovenia on the eve of his prison reporting date. The letter of intent, first note, second note and deed were not negotiated directly between Respondent and Dr. Onusic.

The evidence also shows that Dr. Onusic had access to lawyers throughout the transaction. T1 – p.113 (lines 18-25); p.101 (lines 21-25); p.13 (Lines 12-16); p.118 (line 22) through p.119 (line 9). Even while in Slovenia Dr. Onusic had telephone access to lawyer Yelovich, and met with attorney Cohen regarding her criminal charges on a trip to the United States during this period. B-Ex 42, pp. 23. 24. Dr. Onusic retained additional counsel after returning to the United States 1998.

During the trial Dr. Onusic objected that she was not advised in advance of the recording of the deed in December, 1997. Yet when she learned of the recording only several weeks later (T1 – p. 107) she did not object, nor did she accept Respondent's offer to let her file a lien on the property to secure her note.

Dr. Onusic complained during the trial that payments under the first and second notes were sporadic. However, she never issued any notice of default and as of the date of the third note more than $205,000 in principal had been paid, with

a balance remaining of about $110,000. This balance was roughly consistent with the amortization schedule for the second note.

Dr. Onusic could have objected to the third note as outside the terms of the letter of intent, but she did not. Dr. Onusic could have objected to the 2001 transfer and mortgaging of the property through her counsel, but she did not. When Dr. Onusic received a judgment against NLMC in 2005, she could have proceeded directly against Pursley on the delinquent lease payments, but she did not even try. Dr. Onusic had counsel to help her assert these legal rights but she simply chose not to proceed.

The record shows that Dr. Onusic consistently chose an adversarial and confrontational position that worked against her interest in receiving payment. In addition to declining to pursue her claim against Pursley, Dr. Onusic also refused to vote in favor of Respondent's bankruptcy reorganization plan which had included her for the full amount of her claim at $3,000.00 per month. Respondent's failure to get enough affirmative votes on the plan ultimately resulted in dismissal of the bankruptcy and worked to the detriment of Respondent as well as all creditors, including Dr. Onusic.

The evidence shows that Dr. Onusic was not any more vulnerable to Respondent's control than any other creditor and, in fact, she had legal rights that she declined to exercise. Further, she took confrontational positions that may have

been consistent with her legal rights but which worked against her personal interests in receiving payment.

D. Respondent did not have substantial experience in the practice of real estate law at the time of the transaction.

The Referee found that Respondent has substantial experience in the practice of law as an aggravating circumstance, suggesting intent to harm Dr. Onusic. This finding is simply not supported by the evidence.

The trial record shows that Respondent had only been admitted to the practice of law for five years at the time of the original transaction and had no residential real estate experience. This was the very reason Respondent sought Pennsylvania counsel in the matter. Pennsylvania counsel reviewed and edited the letter of intent and the notes. Pennsylvania counsel prepared the original deed and recorded the deed in 1997 after confirming that right under the letter of intent. Pennsylvania counsel also recorded the deed conveying the property to Respondent in 2001 (again, after confirming these rights). T1 – p. 402 (line 1) through p. 403 (line 3).

The letter of intent also evidences that Respondent was somewhat inexperienced in real estate matters. The transaction was unorthodox and risky, such that experienced real estate counsel would be hesitant to advise such structure for a client. However, Respondent was assuming the risks on his own behalf through his wholly owned corporation and had the matter reviewed (and approved)

by Pennsylvania counsel. Still, the non-traditional aspects of the transaction led to misunderstandings, particularly once Dr. Onusic because personally involved in the transaction as originally negotiated by her lawyer.

The notion that Respondent somehow used his real estate experience to outwit Judge O'Kicki (Dr. Onusic's husband and counsel) is also not supported by the record. Judge O'Kicki was an experienced lawyer more than thirty years senior to Respondent. The evidence also showed that Judge O'Kicki at least consulted with attorney Cohen on the transaction at the time of negotiation. T1 – p. 409 (lines 15-21).

This aggravating factor was not appropriately found and should be disregarded by this Court.

E. <u>The evidence shows that Respondent has made restitution to Dr. Onusic.</u>

The Referee concluded that "…until January, 2011, Respondent had shown an indifference to making restitution." The evidence shows that until January, 2011, Respondent was simply unable to make restitution, despite great efforts to do so.

As recognized by the Referee and supported by the evidence, the source of the payments to Dr. Onusic was the Pursley lease payments. When the Pursley lease payments stopped as of December, 2000, the source of funds supporting the NLMC note was no longer available.

The first step taken by Respondent to show concern for Dr. Onusic was to start making the payments from his own personal resources. All of the payments made in 2001 before and after transfer and mortgaging of the property were from the personal resources of Respondent. T1 – p. 172 (line 12) through p. 174 (line 1).

As 2001 continued Respondent began negotiations with Pursley to purchase the property and re-financed all of his obligations in a loan re-structuring that also included a second mortgage on his personal residence. Subject to this refinancing in September, 2001 Respondent made an additional payment to Dr. Onusic with plans to close sale of the property to Pursley by end of year. T1 – p. 485 (line 18) through p. 486 (line 11).

When it became apparent that Respondent could not personally support the payments and Pursley would not purchase the property or bring his lease payments current, Respondent attempted to sell or lease the property to an independent third party for purposes of servicing or liquidating the mortgage and the NLMC note. T1 – p. 485 (line 17) through p. 481 (line 6). Respondent also cooperated with Dr. Onusic in allowing her to obtain an unchallenged judgment against NLMC on her note so that she could proceed against the assets of NLMC, which included the outstanding Pursley lease obligations ($100,000) and the Pursley notes ($50,000) as well as the Pursley guaranty of the NLMC note. When these efforts proved

unsuccessful and Respondent's business had collapsed Respondent filed bankruptcy protection against all creditors, including Dr. Onusic.

Bankruptcy counsel for Respondent petitioned for discharge of the NLMC note since it was not a personal obligation of Respondent. When the petition was rejected, Respondent included Dr. Onusic in the bankruptcy reorganization plan for the full amount of her claim at $3,000 per month. Dr. Onusic refused to accept the plan.

Respondent also proceeded in his 2002 claim for $230,000 in outstanding legal fees against MortgageFlex (plus interest over a nine year period) as a source of funds to pay Dr. Onusic. However, MortgageFlex was able to delay resolution of the dispute in part by referring to The Florida Bar complaint and Dr. Onusic's claims. Respondent had repeatedly advised Dr. Onusic (through her counsel) that the MortgageFlex recovery would be used to satisfy her NLMC judgment, even going so far as to offer a percentage in settlement. Dr. Onusic refused to accept these offers.

Respondent was able to finally settle the claims of Dr. Onusic through settlement negotiations with MortgageFlex on the eve of trial (scheduled for February 8, 2011). Under the arrangement, Respondent agreed to release MortgageFlex from all legal fee claims ($230,000) upon the condition that MortgageFlex satisfy the claims of Dr. Onusic against Respondent. The settlement

amount paid to Dr. Onusic was a matter of confidential negotiation exclusively between MortgageFlex and Dr. Onusic. Respondent received a full release from Dr. Onusic of her claim and released MortgageFlex from all fee claims. Respondent later learned in these Bar proceedings that Dr. Onusic had accepted a payment of $50,000 from MortgageFlex for release of her claim against Respondent.

During the period from 2002 through January, 2011 Respondent had great financial difficulty resulting in extended bankruptcy proceedings. The failure of the bankruptcy plan, the collapse of Respondent's business and resulting litigation created extreme economic circumstances that precluded the resources to address Dr. Onusic before January, 2011. However, Respondent's lack of ability to pay Dr. Onusic should not be considered as indifference in light of all the efforts he made to address her concerns as well as the eventual settlement. These facts argue against the notion that Respondent was indifferent to making restitution as an aggravating factor in concluding Respondent intended to harm Dr. Onusic.

F. The economic harm suffered by Dr. Onusic, while unfortunate and regrettable, was commensurate with the risks she took when she sold the property to NLMC under the terms of the letter of intent.

The economic harm suffered by Dr. Onusic has been most regrettable and frustrating. Nevertheless, these consequences arise from the risks she and her husband took when selling the property under the terms of the letter of intent.

The facts substantiated during trial show that the Heather Lane property was in foreclosure, a second mortgage was in arrears, and there were two or three years of back taxes owed at the time Dr. Onusic and her husband sold the property to Respondent. T1 – pp. 114, 115, 416, 424. There were no other buyers. Judge O'Kicki was poised to flee the country to avoid imprisonment on criminal conviction (T1 – p. 411) and Dr. Onusic was already living in Slovenia. Dr. Onusic and her husband were aware that Pursley was not perceived as an honest and reliable tenant. The terms of the letter of intent did not provide for a lien on the property securing her note. Instead, she and her counsel agreed to rely on the Pursley lease for security.

The transaction worked well for the benefit of all parties so long as Pursley honored his lease obligations and Respondent's business remained healthy enough to make-up the differences on any short-falls. Under this arrangement, Dr. Onusic received more than $205,000 in principal payments plus interest. However, the transaction fell apart when Respondent's business came under pressure pursuant to

the events of September 11th, the "Dot.Com bust", and Pursley's refusal to honor this lease.

The transfer and mortgage of the property in 2001 was a remedial action of Respondent to stabilize the economic pressures and keep the property servicing the Pursley lease. Respondent's actions were based upon the assumption that Pursley would either bring his lease current or buy the property. Respondent also assumed that his business (as refinanced) would provide sufficient cash-flow to address any short-falls in making Dr. Onusic whole. Finally, Respondent assumed that the property could be sold as a contingency if these assumptions proved invalid.

All these assumptions proved invalid, resulting in terrible misjudgments and unfortunate circumstances. Not only did Pursley refuse to buy the property or honor the payments due under his lease, but he abandoned the property in such a state that it could not be rented or sold at any price. Respondent's business deteriorated further, resulting in extended litigation and bankruptcy.

While Dr. Onusic did not have any lien on the property securing her notes she did have rights under the letter of intent that she could have exercised but did not. She also had an opportunity to participate in Respondent's reorganization plan, but chose to object instead. She was, finally, able to negotiate settlement of her claim in connection with Respondent's claim against MortgageFlex.

These circumstances may not have arisen under a more traditional residential real estate purchase. However, such a transaction was not possible and in such event the property would likely have been lost by Dr. Onusic in 1993. Likewise, had Respondent not mortgaged the property in 2001, the collapse would have occurred much sooner and while Dr. Onusic may have had access to the property to recover her note in 2002, the property proved unsellable. In light of these circumstances the transaction under the letter of intent proved the best benefit to Dr. Onusic in spite of the business misjudgments of Respondent and compromises to Dr. Onusic.

POINT V

THE REFEREE DISREGARDED SUBSTANTIAL MITIGATION IN HIS REPORT.

The Referee identified four mitigating factors he considered in formulating his recommendations of a public reprimand as the appropriate sanction: (1) "Respondent's absence of a prior disciplinary record"; (2) that "Respondent was suffering extreme economic pressure"; (3) that "Respondent had some degree of communication with…[or]… assistance from Pennsylvania attorneys…"; and (4) that "…well-qualified expert witnesses were able to advocate a defense for Respondent" ROR – p. 31. The Referee should also have considered unrefuted testimony validating Respondent's reputation for integrity and honesty in the

community and Respondent's reputation for excellence in the practice of law. Finally, the Referee did not give sufficient weight to restitution.

A. <u>Respondent relied heavily on Pennsylvania counsel in the transaction, including document drafting, negotiations, filing and legal opinions in connection therewith.</u>

The Referee's observation that "Respondent had some degree of communication with our assistance from Pennsylvania attorneys in the transactions …" suggests only de minimus or token involvement in the transaction by Pennsylvania counsel. However, the trial record reflects that Respondent relied heavily on Pennsylvania counsel throughout the entire history of the transaction.

Respondent testified that he retained Pennsylvania counsel (Dick Green) to represent his wholly owned corporation at the start of the negotiations for the transaction, including review of the letter of intent and legal research of many of the matters reflected therein (e.g. status of foreclosures, mortgages, liens and taxes on the property). Respondent testified that the first note and the second note were also reviewed by attorney Green. attorney Green also prepared the deed and advised Respondent concerning signature issues in connection with the deed. T1 – p. 543 (lines 2-19).

Respondent also testified that he consulted with attorney Green on the deed escrow provision under the letter of intent and that attorney Green advised that NLMC had the right to record the deed upon liquidation of the first note by the

second note. Attorney Green recorded the deed in December, 1997 in connection with such advice.

Attorney Green also advised Respondent on the status of the property throughout the transaction, including negotiations on real estate taxes and assessments by Cambia County. Attorney Green advised Respondent on the status of lien releases by holders of mortgages originally placed on the property by the seller. Attorney Green used his connections in the Johnstown Community to help source financing for the property.

As corroborated by the testimony of Anna Broshe, attorney Green also advised Respondent in connection with transfer and mortgaging of the property in 2001. Attorney Green advised Respondent that he had the right to mortgage the property and advised that the property could be transferred to the personal name of Respondent as the sole shareholder of NLMC in connection with the lender's last minute request for such transfer. Attorney Green did not advise that there was any risk of fraud or dishonesty in connection with such transfer.

Upon the retirement and subsequent death of Dick Green as counsel for NLMC, Respondent retained Pennsylvania attorney Ron Carnavelli to help with the transaction. T1 – p. 486 (line 23) through p. 487 (line 17). Attorney Carnavelli represented NLMC and Respondent in disputes with Dr. Onusic, including negotiations with Kathleen Yurchak as counsel for Dr. Onusic. Attorney Carnevelli

also negotiated with counsel for Pursley in the lease dispute. Attorney Carnavelli represented NLMC and Respondent in the Pennsylvania state court litigation and was instrumental in advising (and orchestrating) the judgment against NLMC that was eventually granted to Dr. Onusic on the NLMC note. Mr. Carnavelli was also instrumental (albeit unsuccessful) in helping Respondent look for a buyer or tenant for the property in 2003-2005.

Respondent retained attorney Carnavelli's partner, Jim Walsh, to represent Respondent in bankruptcy proceedings extending from 2005-2008. T1 – p. 487 (line 18) through p. 488 (line 4). Pennsylvania attorney Jim Walsh advised Respondent on the bankruptcy filing, prepared and filed the requisite documents, and represented Respondent in all proceedings and hearings. The bankruptcy hearing on discharge of the Onusic debt was handled by Joe Gula, a Pennsylvania associate lawyer working for Jim Walsh at the time.

The undisputed evidence in the trial record validates that Respondent was represented by Pennsylvania counsel throughout the eighteen-year history of the transaction and that such counsel was intimately involved in drafting and reviewing documents and advising Respondent. The record also shows that Respondent relied upon such advice in dealing with the respective business pressures of the transaction. These facts should be afforded full weight as mitigating circumstances.

B. <u>The testimony of Experts Michael Knoll and Jeffery Davis was unrefuted and should be afforded full weight as mitigating factors.</u>

The Referee noted that legal experts Michael Knoll and Jeffrey Davis were "well qualified" and "able to advocate a defense for Respondent". However, the Referee also expressed that, in his opinion, the defense was based upon "what the Referee finds to be a strained and aggressive interpretation of the transaction documents and surrounding facts." This reservation suggests that the Referee did not allocate full weight to the testimony of these experts in considering mitigating factors under Standard 9.32.

The testimony of legal expert Michael Knoll opined that Respondent had the right to record the deed in 1997 pursuant to the terms of the letter of intent, and that the structure of the transfer and mortgaging of the property in 2001 was not a fraudulent transfer under the Pennsylvania Fraudulent Transfer Act. Similarly, Florida professor and expert Jeffrey Davis opined that the facts of the transaction did not validate any intent to harm Dr. Onusic. Both experts testified as to the law of fraudulent transfers generally, and expressed disagreement with the analysis and conclusions of the bankruptcy court in refusing to discharge the Onusic claim. Professor Davis opined that the decision was factually inaccurate and that, in his opinion, the transfer of the property left Dr. Onusic with adequate security and legal recourse.

This testimony was unrefuted. The sole bankruptcy expert offered by The Florida Bar did not focus on the law of fraudulent transfers, but limited his opinion to the question of discharge of the debt under Bankruptcy procedure. Even assuming the validity of Mr. Thames' opinion, the scope of his observations are limited to the question of discharge under §523(a)(2)(A) of the Bankruptcy Code.

The breadth and depth of the analysis and opinion of legal experts Michael Knoll and Jeffrey Davis far exceeds the more limited scope of Mr. Thames' review and opinion. The testimony of these experts on behalf of Respondent should be allocated full weight as mitigating factors under Standard 9.32.

C. Respondent's efforts at restitution should be given full weight as a mitigating factor.

At the outset we must stress that "restitution" is not the proper word to use. Payment of an unfulfilled contractual obligation is the issue before this Court. NLMC bought the Heather Lane property for $315,000. A down payment of $7,500 was made. It was followed by about $205,000 in principal payments (not counting interest). Respondent paid an additional $6,000 in 2008. Finally, Dr. Onusic received $50,000 as satisfaction of her outstanding claims against Respondent.

Although the Referee recognized Respondent's efforts at settling the dispute with Dr. Onusic and did observe that Respondent gave up valuable consideration, he concluded that such efforts were not substantial mitigating factors in

recommending discipline. His opinion appears based upon the idea that restitution was very late and that Dr. Onusic was not made whole.

The source of the payment to Dr. Onusic was the claim of Respondent against MortgageFlex for legal fees owed in connection with Respondent's representation of MortgageFlex in a settlement with Merrill Lynch for $2.6 million. The claim for legal fees was more than $400,000 (including interest) and arose in October, 2002 when Respondent filed a complaint in state court for the fee. Litigation ensued with typical motions, discovery, and several attempts at mediation.

Respondent had offered to allow Dr. Onusic to participate in the proceeds of the litigation in years prior, but Dr. Onusic (through counsel) had always refused. Respondent finally obtained a fixed trial date of February 8, 2011. On the eve of the trial Respondent's counsel negotiated with MortgageFlex counsel a settlement arrangement allowing MortgageFlex to negotiate directly with Dr. Onusic to settle her claims against Respondent. Respondent agreed to release MortgageFlex for all legal fees in exchange for release from Dr. Onusic.

Respondent was not privy to the negotiations between MortgageFlex and Dr. Onusic. Respondent did not place any limits on amounts to be paid to Dr. Onusic, nor did Respondent communicate directly with MortgageFlex or Dr. Onusic (or their respective lawyers) on the amounts to be paid. These matters were handled

directly and solely between MortgageFlex and Dr. Onusic (and their respective counsel).

Dr. Onusic presumably settled her claim for full value. Respondent's claim of $400,000 was adequate to cover a full range of valuations. The fact that Dr. Onusic accepted less than the face amount of the debt in full satisfaction of her claim was a matter between her and MortgageFlex.

These efforts at restitution should not be dismissed lightly. Respondent gave up a claim of more than $400,000. Respondent attempted to resolve the litigation earlier and allow Dr. Onusic to receive payment therefrom. Similar to her objection to the bankruptcy reorganization plan which provided for payment of her claim in full, Dr. Onusic chose an advisorial posture that actually worked against her interest. Dr. Onusic should not be heard to say that restitution was late when she participated in creating the delay. Likewise, the Referee should not dismiss the effort because the payment amount was less than the face value of the debt, particularly when Dr. Onusic herself negotiated the matter with a separate third party independent of any influence from Respondent. Under these circumstances, Respondent's efforts at restitution and payments to Dr. Onusic in connection therewith should be given full consideration as a mitigating factor in determining the appropriate discipline.

D. Respondent's reputation for honesty and integrity in the community as well as his highly regarded reputation for excellence in the practice of law should also be considered as mitigating factors.

Standard 9.32(g) provides that "character or reputation" maybe considered as a mitigating factor. Respondent's witnesses during the sanctions hearing provided unrefuted testimony that Respondent has a very high reputation for honesty and integrity in the community. The record of the sanctions hearing also validates that Respondent is highly regarded by other lawyers as well as his clients for excellence in the practice of law. These mitigating factors were ignored by the Referee.

Charles Johnston testified that Respondent is well respected by his clients; has a very strong work ethic; is very well prepared; maintains excellent files and is very ethical. Mr. Johnston testified that Respondent "has a high level of moral integrity and character". Mr. Johnston also testified that lawyers in the legal community have a high regard for Respondent's work ethic and legal ethics. Mr. Johnston has practiced law in Jacksonville since 1978 and has known Respondent professionally since 1989.

Daniel T. Perkins retired as a Major in the Marine Corps and is the president and majority shareholder of MTS Technologies (a disabled minority owned government contractor in Washington, D.C.). Mr. Perkins and his company have been represented continually by Respondent since 1991. Mr. Perkins testified that

Respondent provided sound business and legal advice; that Respondent was "a man of his word" that he trusted Respondent and had referred him to others; and that Respondent was an "honorable and ethical lawyer".

Both witnesses know Respondent professionally and have worked closely with him for the past twenty years. They are highly regarded themselves in their own communities. Their unrefuted testimony validating Respondent's reputation for integrity and honesty should be given full consideration in mitigation.

CONCLUSION

In his cross appeal Respondent asks this Court to dismiss these proceedings against him because Rule 3-4.3 cannot be the sole basis for a disciplinary sanction. He further asks this Court to dismiss these proceedings because the Bar failed to prove misconduct by clear and convincing evidence.

Should this Court deny Respondent's request to dismiss these proceedings the public reprimand recommended by the Referee should be the discipline imposed. The Bar has not me its burden of showing that the Referee's recommended discipline is not supported by the Florida Standards for Imposing Lawyer Sanctions and by the Court's prior disciplinary holdings. In fact, the cases cited by the Bar do not support the discipline demanded by the Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Brief were hand-delivered to the Honorable Thomas D. Hall, Clerk, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that copies were sent by U.S. Mail to Frances Brown-Lewis, Bar Counsel, The Florida Bar, The Gateway Center, 1000 Legion Place, Suite 1625, Orlando, Florida 32801-5200, and to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this 30th day of June, 2011.

____

John A. Weiss

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

Undersigned counsel does hereby certify that Respondent's Answer Brief and Initial Brief on Cross-Appeal in the matter of The Florida Bar, Complainant, v. Richard Scott Draughon, Respondent, Case No. SC09-2056, TFB No. 2008-30,318(07B), is submitted in 14-point proportionately spaced Times New Roman font, and that the brief has been sent as an attachment in Word format to an email to the Supreme Court Clerk's office which was scanned and found to be free of viruses, by Norton Anti-Virus for Windows.

____
John A. Weiss
Counsel for Respondent