IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC09-2056
[TFB Case No. 2008-30,318(07B)]

v.

RICHARD SCOTT DRAUGHON,

Respondent.
_____/

THE FLORIDA BAR'S INITIAL BRIEF

FRANCES R. BROWN-LEWIS
Bar Counsel
The Florida Bar
1000 Legion Place, Suite 1625
Orlando, Florida 32801-1050
(407) 425-5424
Attorney No. 503452

KENNETH LAWRENCE MARVIN
Staff Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Attorney No. 200999

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Attorney No. 123390

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

Cases

Rules Regulating The Florida Bar

Former Integration Rule of The Florida Bar

Former Code of Professional Responsibility

Florida Standards for Imposing Lawyer Sanctions

SYMBOLS AND REFERENCES

In this brief, The Florida Bar shall be referred to as "The Florida Bar" or "the Bar."

The transcript of the hearing held on August 17 through August 20, 2010, shall be referred to as "T1" followed by the cited page number(s). (T1–__)

The transcript of the sanction hearing held on December 20, 2010, shall be referred to as "T2" followed by the cited page number(s). (T2–__)

The Report of Referee dated February 7, 2011, shall be referred to as "ROR" followed by the cited page number(s). (ROR–__)

The Bar's exhibits will be referred to as "B-Ex." followed by the exhibit number. (B-Ex.__)

Respondent's exhibits will be referred to as "R-Ex." followed by the exhibit number. (R-Ex.__)

STATEMENT OF THE CASE

On November 4, 2009, the Bar filed a complaint against respondent, which was subsequently assigned Case No. SC09-2056 and The Honorable Waddell A. Wallace III was appointed as referee on November 25, 2009.

Judge Wallace held the evidentiary hearing on August 17 through August 20, 2010, and the sanction hearing on December 20, 2010. Judge Wallace entered his report of referee on February 7, 2011, recommending that respondent be found guilty of violating Rule 3-4.3 of the Rules Regulating The Florida Bar (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 recommended that respondent be publicly reprimanded and required to attend ethics school and professionalism workshop.

The Board of Governors of The Florida Bar considered the report of referee at its March 2011 meeting and voted to seek enhancement of the recommended discipline to a one-year suspension with attendance at ethics school and the professionalism workshop. The Bar then filed its Petition for Review on April 6, 2011.

STATEMENT OF THE FACTS

The Bar adopts the referee's findings of fact as set forth in his report. The following facts are taken from the report of referee contained in the appendix herein and as otherwise noted.

In 1993, respondent was approached by his friend and client, John Pursley, who wanted to purchase a certain residential property located in Johnstown, Pennsylvania, known as the Heather Lane property. Mr. Pursley, however, had recent financial problems and was unable to close the purchase through traditional mortgage financing. (B-Ex. 16, page 19; T1–503). Mr. Pursley wanted respondent to facilitate a transaction in which Mr. Pursley would lease the property with the intent eventually to purchase it. (B-Ex. 16, pages 26-27, 41-42; T1–423, 426, 429). Respondent initially negotiated the purchase of the property with Joseph O'Kicki, the husband of the owner, Sylvia Onusic O'Kicki, now known as Sylvia Onusic. Mr. O'Kicki had been unable to sell the property on his own and was experiencing financial difficulties, in part, because he had been suspended from his position as a Pennsylvania state court trial judge and was facing criminal charges. Ms. Onusic was in Slovenia during this period completing a course of study funded by her Fulbright Scholarship. In 1990, Mr. O'Kicki underwent several bypass surgeries and was diagnosed with cancer. Throughout 1992, Mr. O'Kicki underwent severe chemotherapy and radiation

treatment. (T1–81).

Respondent formed National Lease Management Corporation (hereinafter referred to as "NLMC") for the purpose of purchasing and managing the Heather Lane property so that Mr. Pursley and his wife could lease the property for their family's residence. Respondent was the sole shareholder, director and officer of NLMC and the Heather Lane property was the primary asset of NLMC (T1–185). Respondent was the only one responsible for making the decisions of the company and, as his former bookkeeper testified, he treated the assets of NLMC and that of his other fully-owned corporations as his own. On multiple occasions, respondent directed his bookkeeper to transfer NLMC funds to the payment of respondent's personal obligations or those of his law firm and other wholly-owned business entities. (T1–153-155).

Prior to the transactions at issue, respondent had experience in sophisticated commercial matters (T1–385, 503). Respondent drafted the material documents, including the Letter of Intent (hereinafter referred to as "LOI"), the leases associated with the sale and lease of the Heather Lane property to NLMC, and the guaranties executed by the Pursleys. (B-Ex. 1; B-Ex. 3; B-Ex. 6; B-Ex. 9; T1–407, 413). In addition, he drafted the first promissory note and all subsequent notes from NLMC to Ms. Onusic. (B-Ex. 5; B-Ex. 8; B-Ex. 10; T1–443-444).

The LOI was executed in March and April 1993 (B-Ex. 4). Respondent signed

on behalf of NLMC, as buyer, and Ms. Onusic executed the agreement, as seller, on her own behalf and as attorney-in-fact for her husband. NLMC purchased the Heather Lane property from the O'Kickis for $315,000.00 with $307,500.00 of the purchase price financed through an unsecured promissory note, hereinafter referred to as the "First Promissory Note", from NLMC to Ms. Onusic dated June 1, 1993. (B-Ex. 5). Mr. and Mrs. Pursley personally guaranteed payment of the First Promissory Note and agreed to lease the Heather Lane property from NLMC for 54 months. (B-Ex. 6; R-Ex. 4). Respondent represented to the O'Kickis that the rental income NLMC received from the Pursleys would be used to pay the obligations under the promissory notes payable from NLMC to Ms. Onusic.

Pursuant to the terms of the LOI, the O'Kickis transferred the Heather Lane property to NLMC by a deed dated June 4, 1993 (B-Ex. 7). Ms. Onusic executed the deed with the understanding, based on Paragraph 13 of the LOI, that respondent would hold the deed in escrow and not record it until she received full payment under the First Promissory Note. (B-Ex. 4; T1–96). Based on the terms of the LOI and respondent's representation to her, Ms. Onusic understood that respondent would use the lease payments from Mr. Pursley to pay the outstanding mortgages on the property and forward any remaining funds to her as payment on the First Promissory Note. (T1–85-86).

Upon being unable to pay the First Promissory Note in full, respondent drafted a second promissory note, as contemplated by the LOI, for $189,238.75, the outstanding balance owed on the First Promissory Note plus interest (hereinafter referred to as the "Second Promissory Note"). (B-Ex. 8). The Pursleys also guaranteed (B-Ex. 9) the Second Promissory Note dated August 1, 1997, which was unsecured and which had a maturity date of September 30, 2002. The Pursleys also entered into a new five-year lease agreement with NLMC (R-Ex. 5).

Without informing Ms. Onusic, respondent, on December 8, 1997, recorded the deed to the Heather Lane property. (T1–521). At that time, NLMC owed approximately $189,000.00 to Ms. Onusic for the Heather Lane property. It is apparent from the LOI, that from the outset the parties contemplated that NLMC might not be able to satisfy the First Promissory Note within the time set forth in the LOI inasmuch as the document provided for circumstances in which the maturity date could be extended and thereafter a second promissory note issued.

Respondent testified that he had a right to record the deed to the Heather Lane property because the Second Promissory Note paid off the First Promissory Note. He relied on Section 13 of the LOI, which states that the deed may be recorded upon payment of the "Promissory Note dated on the date of Closing is paid in Full." Respondent drafted the Second Promissory Note to state that it constituted payment in

full of the balance due under the First Promissory Note. No money changed hands and the obligation under the Second Promissory Note remained outstanding at the time respondent recorded the deed. Respondent never informed Ms. Onusic of his actions. Even respondent's own expert reluctantly admitted that it may have been a good idea for respondent to tell Ms. Onusic he was recording the previously escrowed deed so as to prevent any misunderstanding. (T1–330). Moreover, in a June 26, 1995, letter to Ms. Onusic, respondent implored her to allow him to record the deed. (R-Ex. 12). In the letter, respondent never indicated that he would have the right to record the deed upon issuing a replacement note for the balance due under the First Promissory Note.

Respondent's testimony that the execution of the Second Promissory Note entitled NLMC to record the deed without fully remunerating Ms. Onusic for the Heather Lane property is based on an aggressive and self-serving interpretation of Section 13 of the LOI. Moreover, such testimony is inconsistent with that previously given by respondent while under cross-examination during the proceeding in the United States Bankruptcy Court for the Western District of Pennsylvania. In that prior testimony, respondent indicated that he believed that Mr. Pursley's guaranty under the First Promissory Note remained in full force and effect after the Second Promissory Note was delivered because the First Promissory Note had not been paid in full. (B-Ex. 40, pages 143-145).

Ms. Onusic, while still in Slovenia, learned from a friend that the deed had been recorded (T1–96). When Ms. Onusic later questioned respondent, he told her he had filed the deed to protect them both against a potential lien being placed on the Heather Lane property by the Internal Revenue Service for taxes allegedly owed by her deceased husband. (T1– 91, 95). Respondent made it clear in the conversation that he had recorded the deed to protect her interests.

On January 1, 2001, twenty-one months prior to the Second Promissory Note's maturity date, respondent executed a third unsecured promissory note from NLMC to Ms. Onusic for $110,000.00 plus interest, (hereinafter referred to as the "Third Promissory Note"). Respondent testified that he did this in order to make the payments to Ms. Onusic more affordable. (T1–533). Respondent's former bookkeeper testified it was also to capture the unpaid interest which was accruing (T1–158). The Pursleys did not execute a document personally guaranteeing the Third Promissory Note.

Kathleen Yurchak, an attorney for Ms. Onusic, testified herein that in litigation against respondent in the bankruptcy court, she had requested from respondent evidence of a third guaranty but respondent never produced a document (T1–52). In these disciplinary proceedings, respondent also did not produce such a guaranty. Respondent, however, argued that Ms. Onusic could have legally pursued the Pursleys under the Third Promissory Note because they had guaranteed the Second Promissory

Note (T1–534, 536-537). The bankruptcy court found this argument to have no merit. (B-Ex. 1 – Memorandum Opinion page 14). If the obligations under the Second Promissory Note, which was the subject of an express guaranty by the Pursleys, were extinguished by the Third Promissory Note, Ms. Onusic could not have any legal recourse against the Pursleys. In summary, respondent's testimony that he had the right to record the deed because the First Promissory Note was paid by the Second Promissory Note is inconsistent with respondent's testimony that the Pursleys' guaranty of the Second Promissory Note survived and extended to the Third Promissory Note.

The execution of these various promissory notes, their legal significance and impact on Ms. Onusic and NLMC are further complicated because on September 27, 2001, respondent transferred the Heather Lane property from NLMC to himself and his wife, individually. (B-Ex. 11). At the time he transferred the Heather Lane property there was an outstanding balance of over $110,000.00 remaining on the Third Promissory Note. Respondent did not notify Ms. Onusic of the transfer. (T1–98, 529). Further, he did not actually pay NLMC any consideration for the transfer despite the deed showing that $274,975.00 had been paid as consideration (B-Ex. 11; T1–61, 62, 170, 192, 199, 214).

Immediately thereafter, on October 2, 2001, respondent took out a $274,975.00

loan on the Heather Lane property secured by a first mortgage to Community Bank of Northern Virginia (B-Ex. 13), which was free and clear of any outstanding liens. Respondent used the loan proceeds to pay his personal tax liabilities and reduce his personal installment debt. (B-Ex. 2; T1–54, 161; R-Ex. 10). He, however, did not use any of the loan proceeds to pay the approximately $110,000.00 outstanding balance owed to Ms. Onusic under the Third Promissory Note. (T1–54, 99, 161).

Respondent testified that, upon advice of counsel, the transaction was structured as if the $274,975.00 in loan proceeds were paid by respondent to NLMC in consideration for the conveyance of the Heather Lane property. (T1–477-478, 539-540). Respondent's expert witness testified that respondent paid $274,975.00 to NLMC for the property and that NLMC distributed this same amount to respondent as a dividend or other shareholder distribution. (T1–312-313). In either case (transfer of the real estate or cash distribution), the results are the same. Property worth $274,975.00 or more was transferred from NLMC without consideration at a time when the assets remaining in NLMC were clearly insufficient to satisfy the corporation's obligation to Ms. Onusic.

In addition, NLMC was not current on its obligations to Ms. Onusic when the conveyance took place. (Bar Exhibit 1 - Memorandum Opinion, page 12). The March, June, July and September 200l loan payments had not been made and these missed

payments only demonstrated NLMC's consistent failure to make payments when due under the various promissory notes. According to respondent, Mr. Pursley's lease payments were sporadic and Ms. Onusic testified that the payments under the three promissory notes were also sporadic. (T1–48, 86-87, 96, 98, 155, 457; R-Ex. 10; R-Ex. 12). Respondent's bookkeeper, however, testified that at least while she was employed by respondent, Mr. Pursley's lease payments were consistent and timely. (B-Ex. 40; T1–153, 159, 171). The problem, according to the bookkeeper's testimony, was that respondent decided how to allocate the rental payments. Sometimes the lease payments were allocated to NLMC's books and other times to respondent's other wholly-owned corporations. (T1–153-154).

Further, according to respondent's bookkeeper, even when the lease payments had been made, respondent decided when to forward monies to Ms. Onusic. Respondent would decide which debts and obligations he would fulfill regardless of whether they were his personal obligations, NLMC's obligations or his other corporations' obligations. (T1–153-156). The Pursley lease payments were intended as the source of funds for NLMC to pay the promissory notes given to Ms. Onusic. (T1–154). Respondent's actions clearly violate the intent of the LOI, which he drafted, compromised the integrity of NLMC and show respondent's lack of good faith and fair dealing with Ms. Onusic.

In 2003, Ms. Onusic sued respondent, his wife and NLMC in a Pennsylvania state court alleging the transfer of the Heather Lane property without consideration constituted fraud, fraudulent transfer or conversion. (T1–36, 37). On or about October 25, 2005, the date the matter was set for trial, respondent and his wife filed for bankruptcy (B-Ex. 17; B-Ex. 18), which stayed the state court action. This bankruptcy proceeding was later dismissed without prejudice. (B-Ex. 20). Thereafter, Ms. Onusic filed for summary judgment against NLMC, which consented to the entry of an order of summary judgment. The state court issued a judgment in favor of Ms. Onusic against NLMC for $134,425.16. (T1–38-39).

Respondent filed a second bankruptcy petition on June 12, 2006. (B-Ex. 21; B-Ex. 22). Ms. Onusic filed a Complaint to Determine Dischargeability of Debt in the proceeding and sought a determination that respondent and his wife personally owed her a $138,299.81 debt that was not dischargeable in bankruptcy. (B-Ex. 23; B-Ex. 32). The matter was fully litigated in the Bankruptcy Court, for the Western District of Pennsylvania, including a full-day evidentiary hearing on the matter. (B-Ex. 31-40).

The bankruptcy court found that respondent's actions in conveying the Heather Lane property to himself and his wife without consideration divested NLMC of any meaningful assets in which to run the company. The bankruptcy court indicated that respondent's actions left NLMC with assets of "de minimis value" such that Ms.

Onusic could not collect on her judgment against NLMC. (B-Ex. 1 – Memorandum Opinion, page 9). The bankruptcy court found that respondent and his wife knowingly and intentionally perpetrated actual fraud against Ms. Onusic and entered a judgment in her favor for the full amount she sought and determined the debt was not dischargeable. (B-Ex. 1 – Memorandum Opinion). The bankruptcy court found that NLMC's conveyance of the Heather Lane property to respondent and his wife, for which they paid no consideration, was "unquestionably fraudulent" and done with actual intent on respondent's part to defraud Ms. Onusic. (B-Ex. 1 – Memorandum Opinion, page 15-16). Respondent did not appeal the court's decision. (T1–26, 54). It was also the opinion of the Bar's expert witness, Richard Thames, that "[u]nquestionably, the transfer of the property from NLMC to Mr. and Ms. Draughon would qualify as a fraudulent transfer." (T1–210).

Respondent repeatedly failed to advise Ms. Onusic to seek independent legal counsel to protect her interests. (T1–92, 93, 97). He told Ms. Onusic he could be trusted, that he was a member of the Bar and that he was an officer of the court. According to Ms. Onusic, respondent stated that he would not "screw" her. (T1–133-134). In correspondence to Ms. Onusic, respondent characterized their relationship "as one of trust and cooperation" and reinforced his role as an "important asset," who "structured the transaction for the benefit of both parties." He also stated that he had

"taken a personal interest" in Ms. Onusic and her family over "the last several years." (R-Ex. 12).

Respondent's expert testified that after the transfer of the Heather Lane Property, NLMC still had sufficient assets to continue operations. (T1–360). Respondent had assigned two Pursley promissory notes (face value totaling approximately $40,000.00) to NLMC. He also testified that NLMC still had the Pursleys' lease obligations which respondent valued at approximately $100,000.00. (T1–479, 492, 544, 570-571; B-Ex. 44). It was evident however that when respondent transferred the Heather Lane property to himself and his wife, Mr. Pursley was delinquent under the first promissory note and by the time Ms. Onusic filed her civil suit against NLMC and respondent in 2003, Mr. Pursley was delinquent under the second promissory note. In fact, respondent admitted that Mr. Pursley had never made any payments on either promissory note (T1–453). He also testified that from the beginning of the lease arrangement, Mr. Pursley was frequently late with lease payments to NLMC and that he paid sporadically (T1–451, 460-461). Respondent admitted he never took any action to collect on the Pursley promissory notes and testified that he always knew that Mr. Pursley had financial difficulties (T1–460).

Respondent and his expert witnesses testified that the Pursley promissory notes had significant value. They stated that when respondent assigned the notes to NLMC,

he left the corporation with viable assets in which to meet its primary objective of paying off the loan to Ms. Onusic. It was not credible for respondent to believe that the Pursleys' lease obligations to NLMC were sufficient to maintain the corporation's vitality after 2001 (ROR–15). First, respondent had been negotiating with Mr. Pursley to purchase the Heather Lane property and bring the lease payments current for 18 to 20 months (T1–461) as Mr. Pursley had made no lease payments since December 2000 (B-Ex 16, page 23). In addition, from the beginning of his dealings with Mr. Pursley and the Heather Lane property, respondent knew Mr. Pursley had walked away from several properties and that Mr. Pursley had other financial difficulties, including his inability to pay his tax obligations in 1999 and later in October 2000. Further, respondent could not have reasonably expected Mr. Pursley to purchase the property once it was encumbered by a $274,975.00 mortgage. Respondent had no good faith basis to believe he was leaving NLMC with viable assets at the time he transferred without consideration, the Heather Lane property to himself and his wife. (ROR–16).

The bar's expert, an attorney with 23 years of bankruptcy experience analyzed the transaction and opined that respondent's actions in transferring the Heather Lane property to himself and his wife decimated NLMC and left Ms. Onusic with no viable options against NLMC. (T1–213-216). The bar's expert testimony is more credible and persuasive than the conflicting testimony from respondent and his experts. (ROR–15).

SUMMARY OF THE ARGUMENT

The referee found respondent guilty of engaging in an unlawful and dishonest scheme to defraud Sylvia Onusic, a vulnerable widow, of more than $110,000.00. Respondent's fraudulent behavior resulted in Ms. Onusic expending her limited resources in order to pursue respondent in bankruptcy and civil court. His misconduct in this matter not only failed to maintain the high ethical standards to which all attorneys must adhere but it also damaged the integrity of the legal profession and should be taken most seriously. The public reprimand recommended by the referee is unsupported by the existing case law or the applicable Florida Standards for Imposing Lawyer Sanctions nor does it comport with the purposes of discipline.

The Bar submits that based on the nature of the facts, the available case law and the Florida Standards for Imposing Lawyer Sanctions, the appropriate level of discipline is a one-year suspension from the practice of law with the requirement that respondent attend ethics school and the professionalism workshop.

ARGUMENT

POINT I

A ONE-YEAR SUSPENSION WITH PROOF OF REHABILITATION IS THE APPROPRIATE DISCIPLINE IN THIS MATTER GIVEN THE FACTS, CASE LAW, AND STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The referee found that respondent's transfer and mortgaging of the Heather Lane property (or distribution of its proceeds) constituted a fraudulent transfer under both federal and state law and was done with actual intent to hinder or delay Ms. Onusic as a creditor of NLMC. This action was not only unlawful but also contrary to honesty and justice in violation of Rule 3-4.3. (ROR–25). Based on the referee's findings of fact, the Florida Standards for Imposing Lawyer Sanctions and the available case law, the appropriate level of discipline is a one-year suspension from the practice of law with the additional requirement of attendance at ethics school and the professionalism workshop.

This Court's scope of review of a referee's recommendation as to discipline is greater than that afforded to the referee's findings of fact because this Court has the ultimate responsibility for ordering the appropriate disciplinary sanction. As a general rule, the Court will not second-guess a referee's recommendation of discipline as long as the discipline is authorized under the Florida Standards for Imposing Lawyer

Sanctions and has a reasonable basis in existing case law. *The Florida Bar v. Glueck*, 985 So. 2d 1052, 1058 (Fla. 2008). The discipline recommended by the referee, a public reprimand with attendance at ethics school and professionalism workshop, is not, however, supported by the existing case law or the Florida Standards for Imposing Lawyer Sanctions. Rather based upon the serious misconduct herein, the case law and the applicable standards, a rehabilitative suspension is warranted.

The practice of law is a privilege, not a right. R. Regulating Fla. Bar 3-1.1 states "A license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause." See also, *Petition of Wolf*, 257 So. 2d 547, 548 (Fla. 1972) (The license to practice law is a privilege, not a right...). The conditional privilege to practice law is encumbered by an attorney's obligation to uphold the high ethical standards of the legal profession. "Lawyers are officers of the Court and members of the third branch of government. That unique and enviable position carries with it commensurate responsibilities" (See *The Florida Bar v. Levine*, 498 So. 2d 941, 942 (Fla. 1986)); conditions (See *The Florida Bar v. Massfeller*, 170 So. 2d 834, 839 (Fla. 1964)); and special burdens (See *State v. Fishkind*, 107 So. 2d 131, 132 (Fla. 1958)).

The Supreme Court of Florida has long held that "[i]t is essential to the well-being of the profession that every lawyer square his personal and professional conduct

by the precepts of the Code of Ethics." *Dodd v. The Florida Bar*, 118 So. 2d 17, 21 (Fla. 1960). Respondent failed to uphold such standards in his personal dealings when he intentionally defrauded Ms. Onusic out of over $110,000.00. In addition, despite knowing that the Pursley's lease payments were intended as the source of funds for NLMC to pay the promissory notes given to Ms. Onusic, respondent selfishly diverted lease payments to himself to the detriment of NLMC's ability to satisfy its obligations to Ms. Onusic. (ROR–20). Clearly, respondent's conduct violated the LOI, compromised the integrity of NLMC and showed his lack of good faith and fair dealing with Ms. Onusic. (ROR–21). Indeed, respondent testified that "We could have maybe cashed Sylvia [Onusic] out at that time [when respondent borrowed on the Heather Lane property]. It didn't seem to be a need to cash her out at the time." (T2–83).

Respondent's egregious misconduct in this matter should not be taken lightly. The facts herein clearly warrant more than a public reprimand. The referee repeatedly stated in his report, that respondent engaged in actual intentional fraud to hinder a creditor:

> In fraudulently transferring the Heather Lane property to himself, ***respondent acted with the actual intent to defraud*** Ms. Onusic as a creditor of NLMC... Respondent also made transfers from NLMC to himself without fair consideration, at a time when the transfers left NLMC unable to satisfy its obligations to existing creditors, primarily including Ms. Onusic. These acts constitute an independent ground for

> concluding that ***Respondent committed a fraud*** on Ms. Onusic, as a creditor of NLMC... (Emphasis added). (ROR–19).
>
> ...***Respondent acted with an actual intent to defraud*** Ms. Onusic as a creditor of a corporation he wholly owned and controlled, that action violated well-established law prohibiting fraudulent transfers recognized in Pennsylvania and most every other state, and constituted action that is unlawful or contrary to honesty and justice in violation of Rule 3-4.3 of the Rules of Discipline. (Emphasis added). (ROR–20).
>
> Whether or not they were actionable fraudulent transfers in themselves, Respondent's diversions to himself of the lease payments to NLMC by Mr. Pursley reflects a willingness to benefit himself, even to the detriment of NLMC's ability to satisfy its obligations to Ms. Onusic. Such action corroborates the finding that ***Respondent acted with actual intent to defraud*** NLMC's creditors when transferring and mortgaging the Heather Lane property. (Emphasis added). (ROR–20).
>
> ...
>
> Respondent's transfer and mortgaging of the Heather Lane property (or distribution of its proceeds) constituted a ***fraudulent transfer*** under both federal and state law and ***was done with the actual intent*** to hinder or delay Ms. Onusic as a creditor of NLMC. It was an action that was not only unlawful, but contrary to honesty and justice. (Emphasis added). (ROR–25).

Herein, the referee considered as mitigation respondent's absence of a prior disciplinary record and considered the fact that the fraudulent transfer occurred when respondent was suffering extreme economic pressure. (ROR–31). See Fla. Stds. Imposing Law. Sancs. 9.32(a) and 9.32(c), respectively. The referee also found as mitigation that "respondent had some degree of communication with [or] assistance from Pennsylvania attorneys in the transactions leading to the fraudulent transfer and

that well-qualified expert witnesses were able to advocate a defense for respondent, although based upon what the referee finds to be a strained and aggressive interpretation of the transaction documents and surrounding facts." (ROR–31).

In aggravation, the referee considered (1) respondent's dishonest or selfish motive, (2) respondent's refusal to acknowledge the wrongful nature of his conduct, (3) Ms. Onusic's vulnerability to respondent's control over their financial transactions, (4) respondent's substantial experience in the practice of law and (5) respondent's indifference to making restitution until January 2011. (ROR–30-31). See Fla. Stds. Imposing Law. Sancs. 9.22(b), 9.22(g), 9.22(h), 9.22(i), and 9.22(j), respectively. The referee also found that Ms. Onusic suffered significant financial harm through respondent's actions (ROR–29) and concluded that the aggravation outweighed the mitigation in this case. See Fla. Stds. Imposing Law. Sancs. 12.1(b) and ROR–31, respectively.

The referee cited to *The Florida Bar v. Cocalis*, 959 So. 2d 163 (Fla. 2007), to support his recommendation of a public reprimand. In representing the defendant in a personal injury case, Mr. Cocalis telephoned the opposing party's expert witness without notice to the plaintiffs or their counsel and effectively solicited his opinion of the patient's medical condition. He also failed to advise the opposing counsel that he had inadvertently received the patient's medical records from another physician prior

to trial and that the records differed from the medical records attached to that physician's deposition. The records now contained notes of a telephone conversation between the physician and opposing counsel that were damaging to the plaintiff's case. Mr. Cocalis also failed to inform the trial court that the records he sought to have admitted at trial were not the same records attached to the physician's deposition.

This Court accepted the referee's findings of fact but disapproved the referee's recommendation of diversion, "conclud[ing] that Cocalis's conduct violated 3-4.3 and that his misconduct was more than 'minor,' making true diversion inappropriate." The Court imposed a pubic reprimand and ordered Mr. Cocalis to enroll in the bar's Practice and Professionalism Enhancement Program and to attend the bar's ethics school. The attorney had substantial experience in the practice of law, he had no prior discipline, he cooperated with the bar throughout the proceedings, and he recognized the impropriety of his conduct. The Fourth District Court of Appeal, in the underlying civil case noted that it did not comport with fundamental fairness for an attorney [Mr. Cocalis] to mislead his opponent and then reap the benefit of his own misconduct." *Bradley v. Brotman*, 836 So. 2d 1129, 1135 (Fla. 4th DCA 2003). The appellate court condemned the actions of Mr. Cocalis.

The instant case is distinguishable from *Cocalis* as the starting level of discipline is different. In *Cocalis,* the Court found that Fla. Stds. Imposing Law.

Sancs. 5.13 and 6.13 which provide for a public reprimand were applicable. Due, however, to the seriousness of respondent's conduct, Fla. Std. Imposing Law. Sancs. 5.12 is the applicable standard. "Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice". The referee herein repeatedly found that respondent knowingly engaged in unlawful conduct or conduct contrary to honesty and justice. His actual intentional fraud caused significant financial harm to a vulnerable member of the public. (ROR–29).

Further, in *Cocalis*, the referee found only one aggravating factor and three mitigating factors. Conversely, the instant referee found six aggravating circumstances and determined that the aggravating circumstances outweighed the three mitigating circumstances. (ROR–31). Hence, even if a public reprimand was the presumed appropriate level of discipline in both cases, respondent's greater aggravation would call for an enhancement to suspension. In addition, unlike the attorney in *Cocalis*, respondent has never recognized the impropriety of his conduct.

The referee also cited to *The Florida Bar v. Sayler*, 721 So. 2d 1152 (Fla. 1998), which was relied on by the *Cocalis* Court. The Court disciplined Mr. Sayler with a public reprimand, required him to complete the bar's Practice and Professionalism Enhancement Program and placed him on a six-month probation with the condition

that he be evaluated by Florida Lawyer's Assistance, Inc., and receive any recommended treatment.

The conduct in *Sayler* is wholly dissimilar to the instant case and should not be used as precedent to determine the applicable discipline in this matter. Mr. Sayler represented his wife in a highly contested worker's compensation case, wherein a multitude of allegations were made between the attorneys involved. Mr. Sayler sent a letter to opposing counsel and included news articles regarding the murder of an attorney who represented employers and servicing agents in worker's compensations cases. In the disciplinary proceedings, Mr. Sayler argued that the articles were relevant to his wife's case because it showed that worker's compensation claimants' rights were being abused. The referee found that the articles had no specific bearing on Ms. Sayler's case and that Mr. Sayler knew or should have known that the letter, with the attached articles, would only embarrass, frighten or otherwise burden the opposing counsel who had already stated she feared Mr. Sayler.

The referee herein and the *Sayler* referee both found the attorney's refusal to acknowledge the wrongful nature of his conduct and his substantial experience in the practice of law as aggravating factors. The referee herein, however, also found that the respondent had a dishonest or selfish motive, that Ms. Onusic was very vulnerable to respondent's control over their transactions, and that until January 2011 respondent

had shown an indifference to making restitution. (ROR–30-31). The considerable aggravating factors herein also distinguish the *Sayler* case from this matter.

This Court has noted that a judgment must be fair to society, fair to the respondent, and severe enough to deter others who may be tempted to become involved in like violations. *The Florida Bar v. Spear*, 887 So. 2d 1242, 1246 (Fla. 2004), citing *The Florida Bar v. Lord*, 433 So. 2d. 983, 986 (Fla. 1983). In addition, this Court "has moved towards stronger sanctions for attorney misconduct" and has stressed that "basic, fundamental dishonesty is a serious flaw which cannot be tolerated..." *The Florida Bar v. Hagendorf*, 921 So. 2d 611, 614 (Fla. 2006).

In *Hagendorf*, the attorney used the legal system to seek revenge on his business landlord with whom he was involved in litigation. He made misrepresentations to the court regarding where the defendants were located while seeking quiet title to a building that he did not own. The bar initiated its proceedings after Mr. Hagendorf was disciplined in Nevada. He was found guilty of violating Rules Regulating The Florida Bar regarding candor toward the tribunal, fairness to opposing party and counsel, truthfulness in statements to others, conduct involving dishonesty, fraud, deceit or misrepresentation, and conduct prejudicial to the administration of justice. The Court imposed a two-year suspension and stated that "Indeed, were it not for the fact that the Bar agreed with the referee's recommendation, this Court might have

disbarred him." Likewise, this Court should not hesitate to impose a lengthy suspension for respondent's unlawful and dishonest conduct that resulted in significant economic harm to Ms. Onusic.

Respondent's actions harmed a member of the public and negatively influenced her perception of the profession's integrity. (T2–47). As the late Justice Ehrlich stated in his separate opinion, concurring in part and dissenting in part, in *The Florida Bar v. Seldin*, 526 So. 2d 41, 45 (Fla. 1988), "No other member of society is entrusted with so much. The public must have confidence that one to whom so much is entrusted will not breach that confidence. The conduct demanded of lawyers by our Code distinguishes the lawyer from others." Respondent breached that confidence and he should be suspended from the practice of law with the requirement that his reinstatement be conditioned on proof of rehabilitation.

The misconduct in this case is similar to that in *The Florida Bar v. Bennett*, 276 So. 2d 481 (Fla. 1973). The attorney in *Bennett* received a one-year suspension. Mr. Bennett was sued in circuit court by four of his co-investors in a business deal for "fraudulent misrepresentation and breach of fiduciary duties." Several of the attorney's investment partners were outside the state. The referee found that these others had this additional reason for looking to Mr. Bennett in the matter. Ms. Onusic likewise lived outside the state. She also had an additional reason for relying on

respondent as he had repeatedly reiterated that he was acting fairly and responsibly toward her, that he was an attorney, and that the entire NLMC transaction provided significant benefit to her. (ROR–22, 23).

The referee in *Bennett* found that the attorney told his partners that the price of the property purchased was $146,000.00 when it was $140,000.00 and that part of the shopping center was not for sale when it was. In addition to lying, the attorney also failed to pay the taxes on the property after his partners gave him the money to do so and fraudulently acquired ownership of one of the store premises in his own right. The referee found Mr. Bennett guilty of failing to promptly pay taxes for which his principals had sent money and misrepresenting to his principals that a parking lot was not included in the sale of a portion of the property when in fact it was included. Mr. Bennett was found guilty of "the commission by a lawyer of any act, contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline". Article XI, par. 2, of the Integration Rule of The Florida Bar, in effect at the time of the commission of the acts giving rise to the disciplinary proceeding. Respondent likewise has been found guilty of unlawful and dishonest conduct.

Like the Court in *Bennett*, the referee herein recognized that even though

respondent was not acting in an attorney-client relationship, he was as a member of The Florida Bar bound by its ethical rules and the fact that attorneys are to be held to higher standards of conduct than non-lawyers in personal dealings. (ROR–24). The Court stated at 482:

> Some may consider it 'unfortunate' that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. In a sense, 'an attorney is an attorney is an attorney', much as the military officer remains 'an officer and a gentleman' at all times. We do not mean to say that lawyers are to be deprived of business opportunities; in fact we have expressly said to the contrary on occasion; but we do point out that the requirement of remaining above suspicion, as Caesar's wife, is a fact of life for attorneys. They must be on guard and act accordingly to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing.

This Court has imposed serious sanctions against attorneys who engage in dishonest and fraudulent conduct. In *The Florida Bar v. Neely*, 587 So. 2d 465 (Fla. 1991), the attorney was disbarred for, among other things, falsely and fraudulently inducing his client's mother, without advising the mother to seek independent counsel, to convey her homestead to a corporation the attorney owned. The attorney did this knowing that the woman had fairly limited education. In addition, Mr. Neely falsely and fraudulently caused a mortgage to be placed against the homestead without the woman's knowledge or consent. Mr. Neely also fraudulently induced a third party to loan his corporation $15,000.00 based upon the aforesaid fraudulent deed. Herein,

respondent transferred the Heather Lane property without Ms. Onusic's knowledge and consent and later obtained a $274,975.00 loan using the property as security. Mr. Neely also failed to pay over that portion of a settlement held in escrow for a client's treating physician, and misrepresented to another client the amount of travel costs and expenses reimbursable by the client. Respondent transferred lease payments from NLMC to himself, his law firm or his other business entities. The referee found Mr. Neely guilty of violating former Integration Rule 11.02(3)(a) (engaging in conduct contrary to honesty, justice, or good morals) and former Disciplinary Rules 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) and 1-102(A)(6) (engaging in other conduct reflecting adversely on his fitness to practice law).

Respondent's failure to forward payments under the promissory note to Ms. Onusic, despite receiving payments from Mr. Pursley, and his decisions to attribute the lease payments to his personal obligations and his other corporations' obligations, reflect adversely on his fitness to practice law. In addition, his failure to inform Ms. Onusic of the transfer of the Heather Lane property from NLMC to himself and his wife and, thereafter, mortgaging the property for almost $275,000.00, while all done outside of the attorney-client relationship, were reprehensible and worthy of discipline. The Supreme Court noted "[i]t is uncontested that an attorney can be disciplined for

failing to completely disclose essential matters in business transactions with non-clients. E.g., *The Florida Bar v. Davis*, 373 So. 2d 683 (Fla. 1979); *The Florida Bar v. Bennett*, 276 So. 2d 481 (Fla. 1973)." *The Florida Bar v. Adams*, 453 So. 2d 818 (Fla. 1984).

In *The Florida Bar v. Siegel*, 511 So. 2d 995 (Fla. 1987), the referee found the attorneys guilty of engaging in a deliberate scheme to misrepresent facts to the bank in order to secure full financing for the purchase of their law office. The facts also showed that the attorneys gave the seller a junior mortgage without informing the bank and contrary to their agreement with the bank. The referee also found that the attorneys misrepresented the amount of the down payment to the bank, submitted a personal financial statement that did not disclose the existence of the junior mortgage, and submitted a sworn affidavit to the bank that contained misrepresentations of facts. The referee recommended the attorneys receive a public reprimand, and be suspended from the practice of law for two weeks. The Court determined that this sort of fraudulent activity could not be sufficiently disciplined by a two week suspension and public reprimand and instead imposed a 90-day suspension. The bar submits that a public reprimand does not sufficiently discipline respondent nor does it suitably address the serious misconduct or act as an effective deterrent to like-minded attorneys.

An attorney's ethical obligation of honesty is not bound by contractual duties.

The attorney's ethical obligations are separate and distinct from any contractual obligations by which he or she may be bound. Additionally, attorneys must be and are held to the highest of ethical standards and, unlike non-attorney citizens, are subject to discipline for a breach of those standards. Attorneys are held to the highest ethical standards not only because the Rules of Professional Conduct mandate such a level of conduct but more importantly so as to not damage the public's trust in the legal profession. *The Florida Bar v. Brown*, 905 So. 2d 76, 82 (Fla. 2005); *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333, 338 (Fla. 2008). Indeed, the referee herein specifically found that:

> Respondent violated the duty of every lawyer not to commit any act that is unlawful or contrary to honesty and justice, by engaging in a fraudulent transfer with actual intent to hinder or delay Ms. Onusic as a creditor of Respondent's corporation, NLMC. ***This is a significant duty held by lawyers and is founded upon the integrity that is essential to the public's trust and confidence in our legal system.*** (Emphasis added.) (ROR–29).

When choosing to increase discipline recommended by a referee, this Court has stated that "if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it." *The Florida Bar v. Wilson*, 425 So. 2d 2, 4 (Fla. 1983). The discipline recommended by the referee in this case does not measure up to the gravity of respondent's misconduct and therefore should be increased to a rehabilitative suspension.

CONCLUSION

In this matter, respondent was found guilty of actual intentional fraud to delay or hinder a creditor. The referee's recommended sanction of a public reprimand is disproportionate to the level of respondent's egregious misconduct. The nature of respondent's misconduct reflects adversely on the reputation and dignity of the legal profession and merits a one-year suspension from the practice of law.

WHEREFORE, The Florida Bar prays this Honorable Court will enhance the referee's recommendations of a public reprimand with attendance at ethics school and professionalism workshop to a one-year suspension with attendance at ethics school and professionalism workshop and tax costs now totaling $12,150.21 against respondent with interest accruing at the legal rate 30 days after this Court's order becomes final.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Attorney No. 123390

KENNETH LAWRENCE MARVIN
Staff Counsel
The Florida Bar
651 East Jefferson Street

Tallahassee, Florida 32399-2300
(850) 561-5600
Attorney No. 200999

AND

FRANCES R. BROWN-LEWIS
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida 32804-6314
(407) 425-5424
Attorney No. 503452

By:

_____

Frances R. Brown-Lewis
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief have been sent by First Class Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by electronic filing to the Clerk of the Court; a copy of the foregoing has been furnished by First Class Mail to Richard Scott Draughon, Respondent, 2 Raughon, 830 A1A North, Suite 13, Ponte Vedra Beach, Florida 32082-3290; a copy of the foregoing has been furnished by First Class Mail to John A. Weiss, Esquire, Co-Counsel, Counsel for Respondent, 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, Florida 32309; and a copy of the foregoing has been furnished by First Class Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _____ day of _____, 2011.

Respectfully submitted,

_____
Frances R. Brown-Lewis
Bar Counsel

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

Undersigned counsel does hereby certify that the Answer Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

Frances R. Brown-Lewis
Bar Counsel
Attorney No. 503452

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC09-2056
[TFB File No. 2008-30,318(07B)]

v.

RICHARD SCOTT DRAUGHON,

Respondent.
_____/

APPENDIX TO COMPLAINANT'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850)561-5600
Attorney No. 123390

KENNETH LAWRENCE MARVIN
Staff Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850)561-5600
Attorney No. 200999

Frances R. Brown-Lewis
Bar Counsel
The Florida Bar
1000 Legion Place, Suite 1625
Orlando, Florida 32801-1050
(407)425-5424
Attorney No. 503452

INDEX

PAGE