IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

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

v.

RICHARD SCOTT DRAUGHON,
Respondent.
_____/

REPORT OF REFEREE

I. Summary of Proceedings:

The undersigned was appointed as Referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar.

On November 4, 2009, The Florida Bar filed a formal complaint against Respondent, Richard Scott Draughon. The Bar charged Draughon with the commission of an act that is unlawful or contrary to honesty and justice in violation of Rule 3-4.3 of the Rules of Discipline of The Florida Bar and improperly interacting with an unrepresented person, in violation of Rule 4-4.3(a) of the Rules of Professional conduct of The Florida Bar.

An evidentiary hearing was held on August 17-20 and December 20, 2010. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Frances R. Brown-Lewis, Esquire

For The Respondent - John A. Weiss, Esquire

and Richard Scott Draughon, Esquire

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent Is Charged:

After considering all the pleadings and evidence, this Referee finds that, by clear and convincing evidence the Bar has proven the following facts:

The events leading to the Bar's complaint began in 1993 when Respondent was approached by his friend and client, John Pursley. Mr. Pursley wanted to purchase a certain residential property located in Johnstown, Pennsylvania, known as the Heather Lane property. Pursley, however, had recent financial problems and was unable to close the purchase through traditional mortgage financing. (Bar Exhibit 16, page 19; Final Hearing Transcript 503). Pursley wanted Respondent to facilitate a transaction in which Pursley would lease the property with the intent eventually to purchase it. (Bar Exhibit 16, pages 26-27, 41-42; Final Hearing Transcript pages 423, 426, and 429.) Respondent initially negotiated the purchase of the property with Joseph O'Kicki, the husband of the owner, Sylvia Onusic

O'Kicki. 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 out of the country 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. (Final Hearing Transcript page 81). Mr. O'Kicki was suspended from the practice of law in Pennsylvania in 1993 and subsequently disbarred in 1996. (Final Hearing Transcript page 80).

Respondent formed National Lease Management Corporation ("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 (Final Hearing Transcript page 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. (Final Hearing Transcript pages 153-155).

Prior to the transactions at issue, Respondent had experience in sophisticated commercial matters (Final Hearing Transcript pages 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. (Bar Exhibits 1, 3, 6, and 9); Final Hearing Transcript 407 and 413). In addition, he drafted the first promissory note and all subsequent notes from NLMC to Ms. Onusic. (Bar Exhibits 5, 8, and 10; Final Hearing Transcript pages 443-444).

The LOI was executed in March and April, 1993 (Bar Exhibit 4). Respondent signed on behalf of NLMC, as buyer and Sylvia Onusic (then known as Sylvia O'Kicki), executed the agreement, as seller, on her own behalf and as attorney-in-fact for her husband Joseph O'Kicki. NLMC purchased the Heather Lane property from the O'Kickis for $315,000 with $307,500 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. (Bar Exhibit 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.

(Bar Exhibit 6; Respondent Exhibit 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.

Under the LOI, the O'Kickis transferred the Heather Lane property to NLMC by a deed dated June 4, 1993 (Bar Exhibit 7). Ms. O'Kicki executed the deed at the American Embassy in Ljubljana, Slovenia. (Final Hearing Transcript page 83). She signed 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. (Bar Exhibit 4; Final Hearing Transcript page 96). Based on the terms of the LOI and Respondent's representation to her, Ms. Onusic, formerly known as Ms. O'Kicki, 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. (Final Hearing Transcript pages 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"). (Bar Exhibit 8). The Pursleys also guaranteed (Bar Exhibit 9) the Second Unsecured Promissory Note dated August

1, 1997, which had a maturity date of September 30, 2002, and entered into a new five-year lease agreement with NLMC (Respondent's Exhibit 5).

Without informing Ms. Onusic, Respondent, on December 8, 1997, recorded the deed to the Heather Lane property. (Final Hearing Transcript page 521). At that time, there was an outstanding balance of approximately $189,000 still owed by NLMC 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 Note identified in the LOI. Respondent, however, admitted that no money changed hands and the obligation under the Second Promissory Note remained outstanding at the time he recorded the deed. He also admitted that he 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. (Final Hearing Transcript page 330). Moreover, in a June 26, 1995, letter to Ms. Onusic, Respondent implored her to allow him to record the deed. (Respondent's Exhibit 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. (Bar Exhibit 40, pages 143-145).

Ms. Onusic, while still in Slovenia, learned from a friend that the deed had been recorded (Final Hearing Transcript page 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. (Final Hearing Transcript pages 91 and 95). Respondent made it clear in the conversation that he had recorded the deed to protect her interest.

On January 1, 2001, prior to the Second Promissory Note's September 30, 2002 maturity date, Respondent executed a third unsecured promissory note from NLMC to Ms. Onusic for $110,000 plus interest, (hereinafter referred to as the "Third Promissory Note") Respondent testified that he did this in order to make the payment amounts owed to Ms. Onusic more affordable. (Final Hearing Transcript page 533). Respondent's former bookkeeper testified it was also to capture the unpaid interest which was accruing (Final Hearing Transcript page 158). The Pursleys did not execute a document personally guaranteeing the Third Promissory Note.

Kathleen Yurchak, an attorney for Ms. Onusic, testified 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 (Final

Hearing Transcript page 52). No such guaranty was produced in these disciplinary proceedings. Respondent, however, argues that Ms. Onusic could have legally pursued the Pursleys under the Third Promissory Note because they had guaranteed the Second Promissory Note (Final Hearing Transcript pages 534, 536-537). The bankruptcy court found this argument to have no merit. (Bar Exhibit 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 Note was paid by the Second Note is inconsistent with Respondent's testimony that the Pursleys' guaranty of the Second Note survived and extended to the Third 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. (Bar Exhibit 11). At the time he transferred the Heather Lane property there was an outstanding balance of over $110,000 remaining on the Third Promissory Note. Respondent did not notify Ms. Onusic of the transfer. (Final Hearing Transcript pages 98 and 529). Further, he did not

actually pay NLMC any consideration for the transfer despite the deed showing that $274,975 had been paid as consideration (Exhibit 11; Final Hearing Transcript pages 61, 62, 170, 192, 199, and 214).

Immediately thereafter, on October 2, 2001, Respondent took out a $274,975 mortgage (Bar Exhibit 13) on the Heather Lane property, 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. (Bar Exhibit 2; Final Hearing Transcript pages 54 and 161; Respondent Exhibit 10). He, however, did not use any of the loan proceeds to pay the approximately $110,000 outstanding balance owed to Ms. Onusic under the third promissory note. (Final Hearing Transcript pages 54, 99, and 161). Respondent testified that, upon advice of counsel, the transaction was structured as if the $274,975 in loan proceeds were paid by Respondent to NLMC in consideration for the conveyance of the Heather Lane property.

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. (Final Hearing Transcript pages 36 and 37). On or about October 25, 2005, the date the matter was set for trial, Respondent and his wife filed for bankruptcy (Bar Exhibits 17 and

18), which stayed the state court action. This bankruptcy proceeding was dismissed without prejudice. (Bar Exhibit 20). 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. (Final Hearing Transcript page 38-39).

Respondent filed a second bankruptcy petition in June 12, 2006. (Bar Exhibits 21 and 22). Ms. Onusic filed a Complaint to Determine Dischargeability of Debt in Respondent's bankruptcy court proceeding and sought a determination that Respondent and his wife personally owed her a $138,299.81 debt which was not dischargeable in bankruptcy. (Bar Exhibit 23 and 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. (Bar Exhibits 31-40).

The bankruptcy court found that Respondent's actions in conveying the Heather Lane property without consideration divested NLMC of any meaningful assets in which to run the company. The bankruptcy court indicated Respondent's actions left NLMC with assets of "de minimis value" such that Ms. Onusic could not collect on her judgment against NLMC. (Bar Exhibit1 – 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. (Bar Exhibit 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. (Bar Exhibit 1 – Memorandum Opinion, page 15-16). Respondent did not appeal the court's decision. (Final Hearing Transcript pages 26 and 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." (Final Hearing Transcript page 210).

Respondent argues that the bankruptcy court's opinion is based on flawed factual findings. He testified that many of his decisions were based upon advice given to him by a Pennsylvania attorney, that he never intended to harm Ms. Onusic, and NLMC had sufficient assets after the transfer of the Heather Lane property.

The fact that Respondent's actions were in part based upon legal advice should only be considered as possible mitigation. Respondent may not abdicate his responsibilities to uphold the high ethical standards required of Florida lawyers

based upon the alleged advice of an out-of-state attorney. "When confronted with possible ethical conflicts, it is the lawyer's obligation to look to the rules of professional conduct and discipline for guidance. While it always may not be clear that a specific course of conduct is proscribed by the rules, an attorney must use sound judgment in applying these ethical standards to a given set of facts." The Florida Bar v. Machin, 635 So. 2d 938, 940 (Fla. 1994).

Respondent argues that he did not leave NLMC with insufficient assets in which to continue operations because he assigned the two Pursley promissory notes to NLMC and because he did not transfer the Pursleys' lease obligations to himself and his wife when he transferred the Heather Lane property, which was valued at over $400,000.00. Respondent loaned Mr. Pursley $20,000 and obtained from Mr. Pursley an unsecured promissory note dated July 15, 1998, in the amount of $20,000 plus interest, set to mature on July 15, 1999. (Exhibit 44). Thereafter on October 25, 2000, when Mr. Pursley was in default under the initial note, Respondent loaned Mr. Pursley an additional $20,043. Mr. Pursley executed a second unsecured promissory note to Respondent in the amount of $20,043 plus interest, set to mature on October 25, 2002. (Exhibit 44). Respondent testified that he loaned Mr. Pursley the funds so Mr. Pursley could pay outstanding tax obligations. Respondent admitted, however, that Mr. Pursley did not make any

payments on either promissory note. (Final Hearing Transcript pages 453, 505-506).

It is evident that when Respondent transferred the Heather Lane property to himself and his wife, Mr. Pursley was delinquent under the first Pursley promissory note and by the time Ms. Onusic filed her civil action against NLMC and Respondent in 2003, Mr. Pursley was delinquent under the second Pursley promissory note. Respondent also testified that Mr. Pursley, from the very beginning, was frequently late with the lease payments to NLMC and that the payments were sporadic. Respondent testified that at the maturity of the First Promissory Note, he talked to Mr. Pursley about buying the Heather Lane property and sought financing on behalf of Mr. Pursley, but such efforts were unsuccessful. Respondent further testified that the local banking contacts did not believe Mr. Pursley was reliable and refused to offer financing. Respondent went on to testify that, "I did not trust John [Pursley] any more than the bank did." (Final Hearing Transcript page 473). Respondent never took any actions against Mr. Pursley to collect on the notes and he always knew that Mr. Pursley had financial difficulties. Respondent and his expert witnesses testified that the Pursleys' notes had a significant value, and that when Respondent assigned his notes to NLMC, he left the corporation with viable assets in which to meet its primary objective which was

to pay off the loan to Ms. Onusic. Richard Thames, the Bar's expert witness, 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. (Final Hearing Transcript pages 213-216). Thames's testimony is more credible and much more persuasive than the conflicting testimony from Respondent and his experts.

Respondent's contention that the Pursleys' lease obligations to NLMC, which remained with the corporation, were sufficient to maintain the corporation's vitality after September 2001, is also without merit. Respondent testified that up until the summer of 2002, he expected Mr. Pursley to purchase the Heather Lane property and bring the lease current. (Final Hearing Transcript page 461). This was despite the fact that Mr. Pursley had not made any lease payment since December 2000 (Bar Exhibit 16, page 23).

In addition, Respondent understood from the beginning of his dealing with Mr. Pursley and the Heather Lane property that Mr. Pursley had walked away from several properties. He also knew that Mr. Pursley had other financial difficulties as evidenced by Mr. Pursley's inability to pay his tax obligations in 1999 and later in October 2000, some two months before Mr. Pursley made his last lease payment to

NLMC. Respondent could not reasonably expect Mr. Pursley to purchase the property once it was encumbered by a $274,975 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.

Respondent also argued that the bankruptcy court's opinion that he committed actual fraud was flawed and should not be sustained because of its finding that he had sufficient equity in his Florida homestead to collateralize a loan to pay his financial obligations to the Internal Revenue Service and to his credit card creditors instead of relying on the Heather Lane Property. Even if one accepts Respondent's argument that he did not have sufficient equity in his $1.7 million residence (which he purchased in 1999 for $1.2 million) to collateralize a loan, his actions with respect to Ms. Onusic still constitute fraud. The bankruptcy court's finding as to Respondent's equity in his home is not material or essential to the finding that Respondent committed a fraudulent transfer with the actual intent to hinder or delay Ms. Onusic as a creditor of NLMC.

Respondent's expert witness testified that Respondent paid $274,975 to NLMC for the property and that NLMC distributed this same amount to Respondent as a dividend or other shareholder distribution. In either case (transfer

of the real estate or cash distribution), the results are the same. Property worth $274,975 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.

"The chief purpose of bankruptcy is to provide a 'fresh start' for the honest but 'unfortunate debtor'," but such relief is not available to a debtor who engaged in dishonest or other untoward conduct. (Bar Exhibit 1 - Memorandum Opinion, page 9). The issue before the bankruptcy court was whether Respondent's conveyance of the Heather Lane property from NLMC to himself and his wife was the culmination of a fraudulent scheme to deprive her of the means to recover payment from NLMC and whether such constituted actual fraud within the meaning of Section 523(a)(2)(A) of the Bankruptcy Code. The facts indicate that 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 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. (Final Hearing Transcript pages 48, 86-87,

96, 98, 155, and 457; Respondent's Exhibits 10 and 12).

The bankruptcy court found that Respondent took preemptive action against Ms. Onusic. In order "to have equity with which to obtain a loan and hold the IRS at bay," Respondent decided that NLMC would convey the Heather Lane property to himself and his wife without paying any consideration for the transfer before Ms. Onusic took action and acquired a judgment lien against the property. Respondent's actions, which were knowing and intentional, deprived Ms. Onusic of the opportunity to take action against NLMC to satisfy the amount owed under the Third Promissory Note apart from the Heather Lane property, NLMC had assets of little or no value upon which Ms. Onusic could levy to satisfy a judgment. (Bar Exhibit 1 - Memorandum Opinion, pages 13-14). The court went on to find that NLMC's conveyance of the property, for which it was paid no consideration, was "unquestionably fraudulent" as to Ms. Onusic under Chapter 12, Section 5104(a)(1) of Pennsylvania Commonwealth Statutes. (Bar Exhibit 1 - Memorandum Opinion, page 15).

The bankruptcy court's findings were based on the evidentiary standard of the greater weight of the evidence. The Referee does not accept the bankruptcy court's findings as established under the doctrines of res judicata or collateral estoppel. Instead, the Referee has considered much of the same evidence

considered by the bankruptcy court and has independently arrived at substantially the same ultimate findings: In fraudulently transferring the Heather Lane property to himself, Respondent acted with the actual intent to defraud Ms. Onusic as a creditor of NLMC, in violation of Section 523(a)(2)(A) of the Bankruptcy Code and Chapter 12, Section 5104(a)(1) of Pennsylvania Commonwealth Statutes. 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, in violation of Pennsylvania law. See 12 Pa. C.S.A. §5104(a)(2) and (b).

There is conflict among federal courts as to whether a transfer such as that made by Respondent with actual intent to defraud creditors is such a fraud as to provide grounds for an exception to discharge under Section 523(a)(2)(A) of the Bankruptcy Code. The bankruptcy court's conclusion that such a fraudulent transfer is grounds for an exception to discharge is supported by significant authority, including decisions of the Seventh Circuit Court of Appeals and the Sixth Circuit Board of Bankruptcy Appeals. See McClellan v. Cantrell, 217 F. 3d 890, 893 (7th Cir. 2000), and Mellon Bank, N.A. v. Vitanovich, 259 BR 873, 877

(6th Cir. BAP 2001). Other courts have held to the contrary. See, for example, Hill v. Lewis, 210 WL 1379770 (E.D. Tex. 2010). In any event, this legal issue over the interpretation of the Bankruptcy Code is not material to this Referee's recommendation. What is material is that 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.

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. Respondent claimed that Mr. Pursley's lease payments were sporadic. Anna Brosche, Respondent's bookkeeper, however, testified that at least while she was employed by Respondent, Mr. Pursley's lease payments were consistent and timely. (Bar Exhibit 40; Final Hearing Transcript page 153, 159, and 171). The problem,

according to Ms. Brosche's testimony, was that Respondent decided how to allocate the rental payments. Sometimes the rent payments were allocated to NLMC's books and other times to Respondent's other wholly-owned corporations. (Final Hearing Transcript pages 153-154).

Further, according to Ms. Brosche, Respondent decided when to forward monies to Ms. Onusic, even when the lease payments had been made. 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. The Pursley lease payments were intended as the source of funds for NLMC to pay the promissory notes given to Ms. Onusic. (Final Hearing Transcript pages 154-155). 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 responding to the fraudulent transfer claim, Respondent emphasizes that he offered Ms. Onusic a lien on the Heather Lane property after he had NLMC convey it to him and his wife and they mortgaged it to pay his law firm's tax and other obligations. Respondent argues there was sufficient equity in the property to protect her lien even with the $274,975 first mortgage. It is highly doubtful that such a subordinate mortgage could afford Ms. Onusic any significant recovery,

particularly when, by Respondent's own testimony, the property was virtually unsellable because Mr. Pursley had severely damaged the property and because of a downturn in the real estate market.

After the death of Mr. O'Kicki, Respondent repeatedly failed to advise Ms. Onusic to seek independent legal counsel to protect her interests. (Final Hearing Transcript pages 92, 93 and 97). He told Ms. Onusic he could be trusted, 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. (Final Hearing Transcript pages 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." (Respondent Exhibit 12).

At the time of Respondent's initial dealings with Ms. Onusic, she was represented by her husband or his attorney. Later, however, Judge O'Kicki passed away and Ms. Onusic relocated to Europe where she had no practical access to legal assistance. This was apparent to Respondent. Respondent suggested to Ms. Onusic on occasion that because he was an attorney, she could be assured that he would not mislead or take advantage of her. Ms. Onusic, however, always knew

Respondent represented an adverse party and her contemporaneous communications and trial testimony indicated that she understood Respondent was not representing her interests and that they maintained an arms-length relationship to each other.

III. Recommendations as to Whether the Respondent Should Be Found Guilty:

This Referee makes the following recommendations as to guilt or innocence:

Respondent should be found not guilty of violating Rule 4-4.3(a) of the Rules of Professional Conduct of The Florida Bar.

Respondent should be found guilty of violating Rule 3-4.3 of the Rules of Discipline of The Florida Bar.

IV. Rule Violations Found:

In his communications with Ms. Onusic, Respondent reiterated on multiple occasions that he was acting fairly and responsibly toward Ms. Onusic and that the entire NLMC transactions had provided significant benefit to her. Moreover, the Referee finds that Respondent was emboldened in his actions by the knowledge that, while she was in Europe, Ms. Onusic apparently was without the benefit of advice of her own independent legal counsel. Nevertheless, the Referee finds that the Bar's proof fell short of the standard of clear and convincing evidence showing that Respondent stated or implied to Ms. Onusic that he was disinterested.

Similarly, the evidence was less than clear and convincing that Ms. Onusic somehow misunderstood that Respondent was acting on behalf of his own corporation whose interests were directly adverse to hers. The Referee thus concludes that the Bar failed to prove, by clear and convincing evidence, that Respondent was guilty of violating Rule 4-4.3(a).

Even though Respondent was not acting in a formal attorney-client relationship, he was still a member of The Florida Bar and bound by its ethical rules. The Supreme Court of Florida has repeatedly held that attorneys are held to higher standards of conduct than non-lawyers in personal business dealings. The Florida Bar v. Hosner, 520 So. 2d 567 (Fla. 1988).

In fact, the Court stated in The Florida Bar v. Bennett, 276 So. 2d 481 (Fla. 1973):

> 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.

In The Florida Bar v. Adams, 453 So. 2d 818 (Fla. 1984), 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)." Adams was suspended for 60 days for failing to notify a business partner of the sale of some property while acting as trustee for a group of investors and failing to make a timely accounting of the funds received from the sale.

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 also contrary to honesty and justice. Such conduct, therefore, violates Rule 3-4.3 of the Standards of Conduct of the Rules of Discipline, under the Rules Regulating The Florida Bar. Rule 3-4.3 provides that the standards of professional conduct are not limited to specific acts prohibited by the Rules Regulating The Florida Bar. Instead, Rule 3-4.3 makes clear that:

> "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."

Respondent argues that Rule 3-4.3 is a mere jurisdictional statement making reference to the fact that violations of Rules of Professional Conduct may result in discipline. Respondent further argues that no attorney has been disciplined for violating only Rule 3-4.3 and no other Chapter 4 Rule of Professional Conduct. This Referee, however, finds that Respondent's argument is not supported either by the text of the applicable rules or the decisions of the Supreme Court. Instead, the Referee concludes that Rule 3-4.3 establishes an independent standard of conduct, the violation of which may be cause for discipline.

In The Florida Bar v. Cocalis, 959 So. 2d 163 (Fla. 2007), the Referee issued a report finding that, while the attorney's conduct was unprofessional, it did not violate Rules 4-3.3(a)(1), 4-3.4(a), and 4-8.4(a)(c) and (d), as charged by the Bar. The Referee conducted a second, separate hearing to determine whether the attorney's conduct violated Rule 3-4.3 and, if so, what discipline to recommend. The Referee's second report stopped short of concluding that the attorney violated Rule 3-4.3, but instead recommended that the attorney's case be diverted and the

attorney required to take a course on ethics and professionalism. On appeal, the Supreme Court approved the facts as found by the Referee, but was unwilling to agree that diversion was appropriate. In so acting, the Court held:

> "We need not address whether the Referee erred in concluding that Cocalis's conduct did not violate Rules 4-3.3(a)(1), 4-3.4(a), and 4-8.4(a)(c) and (d), because we conclude that Cocalis's conduct violated 3-4.3 and that his misconduct was more than "minor," making true diversion inappropriate."

The court went on to impose a pubic reprimand and other sanctions, as appropriate discipline for a violation of Rule 3-4.3 standing alone. Cocalis relied on an earlier decision in The Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998), in which the Supreme Court disciplined an attorney with a public reprimand and other sanctions solely for "violation of the rules against the commission by a lawyer of any act unlawful or contrary to honesty and justice, including Rule 3-4.3."

There are other examples in which the Supreme Court has imposed disciplinary sanctions for a stand-alone violation of Rule 3-4.3. In The Florida Bar v. Arnold, 767 So. 2d 438 (Fla. 2000), an attorney pled guilty to violating 18 USC Section 1957 (1986), by engaging in a transaction in which he knew that the funds contributed by his client were derived from the illegal sale of drugs. The Referee found the attorney guilty of violating Rule 3-4.3, but also recommended that the

attorney be found not guilty of violating the remainder of the charges, consisting of alleged violations of Rules 3-4.4 and 4-8.4(d). The Supreme Court accepted the Referee's recommendations and disciplined the attorney for violating only Rule 3-4.3.

Based on this analysis of the applicable Rules Regulating The Florida Bar, and decisions of the Supreme Court, this Referee recommends that Respondent be found guilty of violating Rule 3-4.3 and disciplined accordingly.

In the investigative stage of these proceedings, the Bar's Grievance Committee found that there was no probable cause to support a charge that Respondent violated Rule 4-8.4(c) of the Rules of Professional Conduct by engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." Respondent argues that such a finding precludes the Bar's prosecution of him for violation of Rule 3-4.3 of the Rules of Discipline. The Referee finds, however, that the Bar's formal complaint against Respondent does not allege traditional fraud or deceit arising from misrepresentations Respondent made to induce a detrimental alliance by a victim. Instead, the Bar alleges that Respondent engaged in a scheme that had the intent and effect of defrauding Sylvia Onusic as a creditor of a corporation that was wholly-owned and controlled by Respondent. Such action by Respondent, undertaken with an actual intent to hinder or delay a

creditor, is distinguishable from a charge based on fraudulent misrepresentation and, if established, would constitute a violation of Rule 3-4.3 prohibiting any "act that is unlawful or contrary to honesty and justice." The Referee thus concludes that the Bar's prosecution of formal charges of a violation of Rule 3-4.3 is not barred by any action of the investigating grievance committee.

V. Recommendation as to Disciplinary Measures to Be Applied:

In considering a recommendation as to discipline, the Referee has considered the Standards for Imposing Lawyer Discipline adopted by The Florida Bar. Under Standard 3.0, the Referee has considered the duty Respondent violated, Respondent's mental state, the potential or actual injury caused by Respondent's misconduct, and the existence of aggravating or mitigating factors. 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. Respondent acted with actual intent to violate Ms. Onusic's rights as a creditor. Ms. Onusic suffered significant financial harm through Respondent's actions. Since the time of the fraudulent transfer in 2001, Ms. Onusic has been

owed in excess of $100,000.00 by Draughon's wholly-owned corporation, NLMC. In 2008, Respondent personally made payments to Ms. Onusic totaling $6,000.00. Until January 2011, however, Ms. Onusic has held a judgment against Respondent for the balance owing in excess of $100,000.00. In transactions in January 2011, Respondent caused a third party to purchase the judgment from Ms. Onusic, and in that transaction Ms. Onusic received a payment of $50,000.00 and assigned away any further rights in the judgment or claims against Respondent. (Respondent's Exhibit 14). Respondent gave up valuable consideration in order to arrange the purchase of the judgment from Onusic, and the Referee considers this as having some weight in mitigation. However, such restitution was made very late and did not render Ms. Onusic whole for the loss she sustained as a result of Respondent's actions. Accordingly, in light of the entire record, Respondent's efforts at restitution are not substantial mitigating factors in determining the recommendation for discipline.

The Referee also considered the Bar's Lawyer Sanctions Standard 9.1 on aggravation and mitigation. As to the mitigating factors listed in Standard 9.22, the Referee finds that Respondent acted from a dishonest or selfish motive, that he has refused to acknowledge the wrongful nature of his conduct, that Ms. Onusic was very vulnerable to Respondent's control over their financial transactions,

Respondent had substantial experience in the practice of law and that until January 2011, Respondent had shown an indifference to making restitution. As to the mitigating factors in Standard 9.32, the Referee has considered Respondent's absence of a prior disciplinary record, the fact that the fraudulent transfer occurred when Respondent was suffering extreme economic pressure, the fact that Respondent had some degree of communication with our 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. All things considered, the Referee finds that the aggravating circumstances outweigh the mitigating circumstances, and thus appropriate discipline should be imposed for committing acts that were unlawful and contrary to honesty and justice and that resulted in significant economic harm to a member of the public. Accordingly, the Referee recommends that public reprimand is the appropriate sanction, as provided in Lawyer Sanctions Standard 5.13. The Referee further recommends that Respondent be ordered to attend appropriate classes by The Florida Bar on both ethics and professionalism.

VI. Personal History and Past Disciplinary Record

After the finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(m)(1)(D), this Referee considered the following personal history and prior disciplinary record of the Respondent:

Date admitted to bar: 02/25/1987

Prior disciplinary convictions and disciplinary measures imposed therein: none.

VII. Statement of Costs and Manner in Which Costs Should be Taxed

This Referee finds the following costs were reasonably incurred by The Florida Bar:

A.	Grievance Committee Level Costs	
	Bar Counsel Travel Costs	$ 24.01
B.	Referee Level Costs	
	1. Court Reporter Costs	$ 3,337.10
	2. Bar Counsel Travel Costs	$ 1,861.40
C.	Administrative Costs	$ 1,250.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	$ 747.30
	2. Witness Fees	$ 4,072.15
	3. Copy Costs	$ 197.25
	TOTAL ITEMIZED COSTS:	$11,489.21

The Bar's two formal charges against Respondent arise from the same set of operative facts. No significant costs were incurred by the Bar in prosecuting the alleged violation of Rule 4-4.3(a) that would not also have been incurred in the prosecution of the violation of Rule 3-4.3.

It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this _____ day of February, 2011.

_____
Waddell A. Wallace, III
Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

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