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 REPLY/CROSS-ANSWER 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

Cases **PAGE**

Rules Regulating The Florida Bar

Florida Standards for Imposing Lawyer Sanctions

Other Authorities

SYMBOLS AND REFERENCES

In this brief, The Florida Bar shall be referred to as "The Florida Bar" or "the Bar", National Lease Management Corporation shall be referred to as “NLMC”, Letter of Intent shall be referred to as “LOI”, and the subject residential property located in Johnstown, Pennsylvania shall be referred to as “the Heather Lane property”.

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.__)

Respondent’s Answer Brief and Initial Brief on Cross-Appeal will be referred to as "AB" followed by the exhibit number. (AB–__)

SUMMARY OF THE ARGUMENT

There is substantial, competent evidence in the record to support the referee's findings of fact and they should be upheld. Respondent has failed to overcome the presumption of correctness to overturn the referee's findings. The referee found respondent's conduct was not only contrary to honesty and justice but unlawful as well. Thus, the appropriate Florida Standards for Imposing Lawyer Sanctions in this case is Standard 5.12 which calls for a suspension from the practice of law absent mitigating and aggravating factors. Based upon the referee's finding that the aggravation outweighed the mitigation, herein, a one year suspension is the appropriate 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

MISCONDUCT PROVEN UNDER RULE 3-4.3 STANDING ALONE IS GROUNDS FOR DISCIPLINE.

Respondent's argument that rule 3-4.3 is a jurisdictional statement and cannot stand alone as grounds for discipline is without merit. The rule itself states that:

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

As a basis for concluding that rule 3-4.3 was not merely jurisdictional, the referee relied on this court's ruling in The Florida Bar v. Arnold, 767 So. 2d 438 (Fla. 2000). Therein, the Court upheld the referee's recommendation that Mr. Arnold be found guilty of violating rule 3-4.3 for engaging in a transaction knowing that the funds contributed by his client were from illegal drug smuggling. In The Florida Bar v. Cocalis, 959 So. 2d 163 (Fla. 2007), this court reprimanded an attorney for violating rule 3-4.3 and upon concluding a violation of rule 3-4.3, the Court did not address

whether the referee erred in concluding that the attorney's conduct did not violate rules 4-3.3(a)(1), 4-3.4(a), 4-8.4(c) and 4-8.4(d). Mr. Cocalis' misconduct consisted of telephoning the opposing party's expert witness without notice to the plaintiffs or their counsel and effectively soliciting the expert's opinion of the patient's medical condition, failing 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, and failing 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. See also The Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998), wherein Mr. Sayler was disciplined solely based upon a violation of rule 3-4.3 for sending a letter to opposing counsel and including news articles regarding the murder of an attorney who represented employers and servicing agents in worker's compensations cases. Rule 3-4.3 clearly indicates on its face that misconduct under the rule is a prosecutable offense and this court has sanctioned attorneys solely for violating Rule 3-4.3.

Respondent also argues that accepting rule 3-4.3 as independent grounds for discipline would make the rule void for vagueness and:

> renders the language of Rule 3-4.3 so incredibly broad as to conceivably include any alleged act deemed by The Florida Bar as 'contrary to honesty.' To embrace this argument is to jettison the standards and principles in Chapter 4 in determining whether an act of dishonesty has

> occurred, and eliminates all guidelines and notice to members of The Florida Bar of exactly what conduct is prohibited.

As support, respondent cites to the concurring opinion in The Florida Bar v. Heller, 473 So. 2d 1250, 1252-1253 (Fla. 1985), which stated that "It is a matter of fundamental fairness that one is only expected to respond to charges that have been specifically set forth in advance." Said argument is misplaced, as the misconduct which the referee found respondent guilty of was clearly set forth in the bar's Complaint and respondent was given an ample opportunity to respond and defend against the bar's allegations.

Respondent further argues that if the rule is a "stand alone" rule of conduct, then "any act of *misconduct* would be prohibited by Rule 3-4.3." (Emphasis added.) Clearly, respondent is overreaching. The respondent however neglects to see that the rule only prohibits conduct which is unlawful or contrary to honesty and justice. "Honesty and candor in dealing with others is part of the foundation upon which respect for the profession is based. The theme of honest dealing and truthfulness runs throughout the Rules Regulating The Florida Bar and The Florida Bar's Ideals and Goals of Professionalism." The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992). Respondent's conduct in transferring the Heather Lane property to himself with the actual intent to defraud Ms. Onusic was unlawful and the bar submits dishonest. Further, he made the transfer to himself without fair consideration and left

NLMC unable to meet the obligations of its creditors, primarily Ms. Onusic. His action was a fraud in violation of law, was clearly dishonest and was clearly within the parameters of rule 3-4.3.

ARGUMENT

POINT II

THE BAR HAS PROVEN RESPONDENT'S VIOLATION OF 3-4.3 BY CLEAR AND CONVINCING EVIDENCE.

As stated in In re Henson, 913 So. 2d 579, 589 (Fla. 2005), "[i]n attorney discipline proceedings, this Court reviews a referee's findings of fact for competent, substantial evidence. See Fla. Bar v. Barrett, 897 So. 2d 1269, 1275 (Fla. 2005); Fla. Bar v. Vining, 761 So. 2d 1044, 1048 (Fla. 2000)." The record is replete with competent, substantial evidence supporting the referee's findings of fact. In his report, the referee provided numerous citations to the final hearing transcript, the bar's exhibits and respondent's exhibits to support his findings that the bar had proven by clear and convincing evidence the facts as outlined in his report. The bar, in its initial brief, provided even further citations to the record supporting the referee's finding of facts.

Respondent argues that the bar provided only circumstantial evidence to prove wrongful intent herein. The bar submits that respondent is really arguing that the referee should have believed his self-serving statements that he never intended to defraud or harm Ms. Onusic. Respondent's burden on review is to demonstrate that there is no evidence in the record to support the referee's findings or that the record

evidence clearly contradicts the conclusions. The Florida Bar v. Vining, 721 So. 2d 1164, 1167 (Fla. 1998).

The Bar has met its burden of proof by clear and convincing evidence, while the respondent has failed to meet his burden of establishing that the record is wholly lacking in evidentiary support for the referee's findings. The Court has consistently held that where a referee's findings are supported by competent substantial evidence, it is precluded from reweighing the evidence and substituting its judgment for that of the referee. Vining 721 So. 2d at 1167, quoting The Florida Bar v. MacMillan, 600 So. 2d 457, 459 (Fla. 1992). The referee was in the best position to assess credibility and to determine guilt, and his findings and recommendations are clearly supported by the record.

"In order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." The Florida Bar v. Fredericks, 731 So. 2d 1249, 1252 (Fla. 1999); see also The Florida Bar v. Brown, 905 So. 2d 76, 81 (Fla. 2005); The Florida Bar v. Barley, 831 So. 2d 163, 169 (Fla. 2002). Respondent's actions spanned over almost four years beginning on December 8, 1997, when he recorded the deed to the Heather Lane property without paying Ms. Onusic in full. Further, during the period he should have been paying off Ms. Onusic from the lease proceeds from Mr. Pursley, respondent chose to use the lease payments for his other endeavors and

companies instead of for the benefit of Ms. Onusic as intended in the LOI. (T1–155). Respondent testified in the bankruptcy proceeding that the lease payments were to be "the payment stream to take care of the promissory note to" Ms. Onusic. (B-Ex.40, page 138). Yet, respondent arbitrarily determined when and if to send payments to Ms. Onuisc pursuant to the promissory note. (T1–153-15; B-Ex.40, page 64).

Respondent's wrongful intent is further evidenced by his course of action in transferring, on September 17, 2001, the Heather Lane property from NLMC to himself and his wife. He did this without compensation to NLMC, leaving NLMC with little or no assets to meet its prime objective of paying the promissory note to Ms. Onusic. Respondent furthered his scheme to defraud when he, on October 2, 2001, obtained an approximately $275,000.00 loan from a financial institution using the Heather Lane property as security. Respondent intentionally used the loan proceeds for his personal benefit and chose not to pay the outstanding balance owed to Ms. Onusic. All aspects of respondent's actions evidence his wrongful intentions and dishonesty in this matter and support the referee's recommendation of misconduct under rule 3-4.3.

Respondent cites to The Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994) and argues that "circumstantial evidence fails to prove wrongful intent when that evidence is 'inconsistent with any reasonable hypothesis of innocence.'" Respondent

misconstrues Marable. The court in Marable acknowledged that "[c]ircumstantial evidence is often used to prove intent and is often the only available evidence of a person's mental state." Id. at 443. The court thereafter reviewed the issue of whether the attorney had the criminal intent necessary to prove the criminal offense of solicitation of burglary. Therein, the referee's decision regarding intent was based on taped statements made by Mr. Marable. The court determined that "deference to the trier of fact's direct observation of a witness's demeanor is less compelling when a tape-recorded voice is being judged rather than live testimony. Marable's conduct five weeks later does not shed light on his state of mind at the time of the comment. Marable's direct testimony that he was not serious about the comment and his explanation of the circumstances constitute a reasonable hypothesis of innocence not negated by the circumstantial evidence of his guilt." The court overturned the referee's finding that Mr. Marable committed the crime of solicitation of a burglary.

The court, however, stated that its rejection of the finding of criminal conduct did not compel the conclusion, as argued by Mr. Marable, that there was no ethical misconduct. The court found that "neither the charges of misconduct in this case, nor the referee's findings of misconduct" were "based entirely or even principally on the proposition that Mr. Marable committed a criminal offense. The allegations of misconduct and the charged rule violations" were "based primarily on Marable's

unethical behavior in involving himself and his client with the products of what he believed to be criminal activity." The court went on to state that "the evidence showed that after Marable had been deceived into thinking a burglary had taken place, he asked that the supposed photos be sent or brought to him." Thereafter he called his client and directed his client to receive and examine the photos. The Court upheld the referee's findings as being proven by clear and convincing evidence and sanctioned Mr. Marable with a 60-day suspension.

The respondent argues that he had a reasonable hypothesis of innocence and that the referee used circumstantial evidence to rebut said hypothesis. The respondent, however, never had a reasonable hypothesis of innocence to disprove intent. The referee specifically found that respondent's testimony (and argument) that he was allowed to record the deed without paying the first promissory note in full was "based on an aggressive and self-serving interpretation" of the LOI. More importantly, it was inconsistent with his prior testimony in the bankruptcy court. The next point of contention deals with whether respondent fraudulently transferred the Heather Lane property and whether it qualified as a "fraudulent transfer." Richard Thames, the bar's expert witness with 23 years of bankruptcy experience, testified that "[u]nquestionably, the transfer of the property from NLMC to Mr. and Mrs. Draughon would qualify as a fraudulent transfer" (T1–210) and that the transfer left NLMC decimated, leaving Ms.

Onusic with no viable option against NLMC (T1–213-216). The referee judged the bar's expert witness was "more credible and much more persuasive than the conflicting testimony from Respondent and his experts" and found that "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." ROR–15. The referee was in the best position to evaluate the demeanor and credibility of the witnesses and the referee's findings of fact should be upheld as they are supported by competent and substantial evidence. The bar submits that Marable is not dispositive to the facts herein as respondent's misconduct was not aligned to a criminal offense but rather under the bankruptcy code and state civil law. His conduct also was clearly contrary to honesty and justice.

This court held in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), that "clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."

Sylvia Onusic clearly and explicitly testified that respondent was not supposed

to record the deed until she was paid in full. There was still an outstanding balance owed to her when respondent, without notifying her, had the deed recorded. Ms. Onusic also testified that she was neither informed nor paid any monies when respondent transferred the Heather Lane property to himself and his wife nor when they received loan proceeds of approximately $275,000 using the property as security. She further testified that the Pursley rent payments were to be used to pay the notes and that she received only sporadic payments under the three promissory notes. (T1–85-86, 96, 98). It is clear from the LOI that paying Ms. Onusic's promissory note was a priority for NLMC and Ms. Onusic. (B-Ex. 4, page 3, paragraph 3b).

Anna Brosche, respondent's former bookkeeper, undoubtedly and unequivocally testified that while she was employed by respondent from October 1998 to November 2002, the Pursley lease payments were consistent and timely. She also testified that respondent treated NLMC assets and those of his other companies as his own. Respondent determined how the Pursley lease payments were allocated, including being allocated at times to pay his personal obligations, his law firm's obligations, or those of respondent's other corporations rather than NLMC. Further, she testified that respondent decided when to forward payments to Ms. Onusic. Additionally, Ms. Brosche testified that respondent issued a third promissory note to capture the unpaid interest which was accruing. (T1–153-156, 158-169, 171). It is

apparent that this was done for the benefit of respondent not Ms. Onusic. Finally, she testified that neither the Pursley notes nor the lease were listed as NLMC's assets. The evidence clearly and convincingly establish respondent's misconduct.

Respondent's own testimony supports the referee's findings of fact. Respondent testified that the Heather Lane property was the primary asset of NLMC. He drafted the conveyance documents, the LOI, the leases, promissory notes and guaranties. He even went so far as to say that Ms. Onusic could have gone after Mr. Pursley under the third promissory note as Mr. Pursley had guaranteed it. He, however, never produced any such guarantee to Ms. Onusic's attorney in the bankruptcy case despite being asked to produce documentation to support such a guaranty. (T1–52).

Respondent expects this court to believe that he did not decimate NLMC, that Ms. Onusic could have gone after Mr. Pursley to recoup her losses and that he is innocent of any acts of dishonesty in his dealing with Ms. Onusic. The record shows otherwise. The bankruptcy court indicates that respondent left NLMC with assets of de minimis value after the conveyance of the Heather Lane property to himself and his wife. B-Ex. 1. He used none of the loan proceeds to pay off the promissory note to Ms. Onusic. (T1–54, 99, 161).

It is apparent from respondent's own testimony that he had no reasonable belief that Ms. Onusic could have fared better by pursuing a legal claim against Mr. Pursley.

By respondent's own admissions, Mr. Pursley had never made any payments on either promissory note given to respondent. Further, respondent, an experienced commercial lawyer, had never sought to collect on the notes. He advocated on one hand that Mr. Pursley was a prime source of payment for Ms. Onusic, yet on the otherhand acknowledged that from the beginning of the lease arrangement, Mr. Pursley was frequently late with lease payments to NLMC, that he paid sporadically and that he was untrustworthy. Further, respondent was aware of Mr. Pursley's financial difficulties with the Internal Revenue Service and that Mr. Pursley had walked away from several properties. (T1–405, 460, 473, 503-504; ROR–15-16).

To show that the referee erred in his conclusions, respondent points to his own and his expert witnesses' testimony that he had a right to record the deed. The referee however, found the testimony was "aggressive and self-serving" and "strained and aggressive". More importantly, the referee found that "such testimony is inconsistent with that previously given by respondent" in the bankruptcy proceeding. (ROR–7). With respect to his assertion that he did not leave NLMC with de minimus assets, respondent points to his expert witnesses' testimony that the Pursley notes had significant value and were assigned to NLMC.

It is not enough for respondent to point to testimony in the record that contradicts his position. "It is for the referee to weigh the credibility of the witnesses

before him…Any conflicts in the evidence are properly resolved by the referee sitting as this Court's finder of fact." The Florida Bar v. Lipman, 497 So. 2d 1165 (Fla. 1986) (citations omitted). The referee resolved the conflicting expert testimony when he found the bar's expert more credible and convincing than respondent and his experts. "'Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.' Fla. Bar v. Wohl, 842 So. 2d 811, 814 (Fla. 2003) (quoting Fla. Bar v. Sweeney, 730 So. 2d 1269, 1271 (Fla. 1998))."

The referee's findings are not clearly erroneous and have substantial competent evidentiary support in the record. Thus, the Court should uphold the referee's findings of fact.

POINT III

STANDARD 5.12 OF THE FLORIDA STANDARD FOR IMPOSING LAWYER SANCTIONS IS THE APPLICABLE STANDARD IN THE INSTANT CASE.

Respondent argues that Standard 5.12 is inapplicable as he was not arrested for nor convicted of any unlawful conduct and therefore, Standard 5.13 is the applicable standard in this case.

"The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly." Fla. Std. Imposing Law. Sancs. 1.1. Fla. Std. Imposing Law. Sancs. 5.0 deals with the failure of an attorney to maintain personal intergrity. It applies to cases involving the commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation.

The bar has not suggested that respondent was arrested for or convicted of a crime. The bar did, however, allege and the referee found that respondent's conduct was unlawful and contrary to honesty and justice. The fact that respondent has not been charged with or convicted of a crime does not negate the unlawfulness of

respondent's conduct nor does it negate the fact that it was contrary to honesty and justice. In The Florida Bar v. Behm, 41 So. 3d 136 (Fla. 2010), the referee recommended that Mr. Behm be found guilty of violating rules 3-4.3 and 4-8.4(c) for his failure to file tax returns. The referee, like here, expressly found that Mr. Behm's conduct was unlawful. As in the instant case, Mr. Behm was not charged with any crime but his conduct was nevertheless "unlawful." The Court held that the fact that Mr. Behm was not charged or prosecuted for his conduct is not inconsistent with the referee's finding that his conduct was unlawful and his recommendations that Mr. Behm be found guilty of violating rules 3-4.3 and 4-8.4(c).

Standard 5.12 states that "[s]uspension 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." (Emphasis added.) The standard does not require a conviction of or even an arrest for criminal conduct, rather only that the conduct be criminal conduct.

The referee repeatedly found that respondent's conduct was "unlawful", which is simply a synonym for "criminal".

> 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). (Emphasis added.) (ROR-19)
>
> 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 was unlawful or contrary to honesty and justice in violation of Rule 3-4.3 of the Rules of Discipline. (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 also contrary to honesty and justice. (Emphasis added.) (ROR-25)

Clearly, based upon the referee's repeated findings of unlawful conduct, the correct standard is Standard 5.12 and a suspension is the appropriate starting point in determining the appropriate discipline in the instant case.

Furthermore, this Court stated in The Florida Bar v. Herman, 8 So. 3d 1100, 1108 (Fla. 2009), quoting The Florida Bar v. Rotstein, 835 So. 2d 241, 246 (Fla. 2003), "this Court 'has moved towards stronger sanctions for attorney misconduct' in recent years."

POINT IV

THE REFEREE APPLIED THE APPROPRIATE AGGRAVATION AND MITIGATION IN THIS CASE.

Respondent argues that various aggravating factors found by the referee should be disregarded and that the referee disregarded substantial mitigation. A referee's findings of aggravation and mitigation carry a presumption of correctness which should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Shankman, 41 So. 3d 166, 173 (Fla. 2010), citing The Florida Bar v. Herman, 8 So. 3d 1100, 1106 (Fla. 2009).

Respondent suggests that the referee should not have found the aggravator of dishonest or selfish motive as he and his experts testified that his recording of the deed and subsequent transfer and mortgaging of the property was subject to contract rights and pursuant to the advice of counsel. The referee did not find respondent and his experts very credible and found their interpretation of the documents and facts to be "strained and aggressive". Further, the referee correctly found that respondent is unable to abdicate his ethical responsibilities as a lawyer to another. The referee did, however, consider respondent's communication with the Pennsylvania counsel as a mitigating factor. Respondent ignores the fact that the referee found that respondent used the loan proceeds from mortgaging the property, not to pay Ms. Onusic, but rather to pay his personal tax liabilities and reduce his personal installment debt. (ROR-10).

Clearly, this was a selfish motive.

In arguing that the referee should not have found his refusal to acknowledge the wrongful nature of his conduct as aggravation, respondent relies on The Florida Bar v. Lipman, 497 So. 2d 1165, 1168 (Fla. 1986). In Lipman, the Court agreed that it was improper for a referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct. Lipman was decided in 1986. However, in Shankman at 173, which was decided in 2010, the Court noted that the referee's own findings of fact supported the application of, among other things, the refusal to acknowledge the wrongful nature of the conduct. Mr. Shankman not only insisted he did nothing wrong but blamed the conduct on others. Likewise, respondent herein has attempted to shift the focus of his wrongdoing onto Mr. Pursley and his reliance upon the Pennsylvania attorney. Further, in his brief, respondent also attempts to shift the blame to Ms. Brosche and his tax accounting firm. (AB-40).

Respondent contends that the evidence shows his remorse, "particularly regarding the impact on Dr. Onusic." The evidence supports that Ms. Onusic was dependent upon respondent as to when and if he would forward payments to her under the notes. Indeed, respondent attempted to discharge the debt owed to Ms. Onusic. The evidence shows that until January 2011, respondent repeatedly made little effort (respondent paid $6,000 of a more than $100,000 judgment against NLMC) to make

Ms. Onusic whole. In January 2011, respondent caused a third party to purchase the bankruptcy judgment from Ms. Onusic and she received a payment of $50,000.00. She released all legal claims against respondent. The referee found that while respondent had given up valuable consideration to arrange the purchase, it was made very late and Ms. Onusic was not made whole. "Accordingly, in light of the entire record, Respondent's efforts at restitution are not substantial mitigating factors in determining the recommendation for discipline." (ROR–30). Respondent has failed to show that the referee's recommendation on this matter was clearly erroneous or without support in the record.

Respondent also argues that his experts' testimony should be afforded full weight as mitigating factors. However, as noted above, the referee, who was in the best position to judge, found their testimony was less credible than the bar's expert and based upon a "strained and aggressive" interpretation of the documents and facts. Nevertheless, the referee did, in fact, consider that they were able to advocate a defense as mitigation.

CONCLUSION

Respondent's intentional fraud was unlawful and contrary to honesty and justice. The referee's recommended sanction of a public reprimand is disproportionate to the level of respondent's egregious misconduct and the aggravators found herein. 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 Reply/Cross-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