IN THE SUPREME COURT OF FLORIDA

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

RESPONDENT'S CROSS REPLY BRIEF TO THE FLORIDA BAR'S REPLY/CROSS-ANSWER BRIEF

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PRELIMINARY STATEMENT

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

The Bar renumbered the issues presented in Respondent's Initial Brief on Cross-Appeal. Issues II through V in Respondent's initial brief were listed as I through IV respectively. Respondent is using that numbering in this brief.

SUMMARY OF ARGUMENT

The Florida Bar has not shown that the Referee's recommended discipline is inconsistent with the Sanctions Standards and with case law. His recommendation should, therefore, be adopted by this Court.

Under Point I, Respondent maintains that Rule of Discipline 3-4.3 cannot serve as the sole basis for discipline in the instant case. As demonstrated in the cases cited by the Bar, Rule of Discipline 3-4.3 must be coupled with a violation of a Rule of Professional Conduct to serve as a basis for discipline. In the instant case, Respondent was not charged with violating Rule 4-8.4(c) prohibiting dishonesty, fraud, deceit or misrepresentation. In fact, the Grievance Committee found no probable cause on the question of whether Respondent violated Rule 4-8.4(c).

Under Point II, Respondent argues that The Florida Bar failed to prove misconduct by clear and convincing evidence. The Bar's arguments are based upon the vague and self-serving testimony of Dr. Onusic. Respondent's arguments

are based upon the transactional documents and the unrefuted testimony of two legal experts.

In Point III, Respondent argues that if discipline is imposed the correct Standard is Section 5.13 as recommended by Judge Wallace. There is no basis for the Bar's assertion that the term "criminal conduct" as used under Sanction 5.12 "… is simply a synonym …" for "unlawful" conduct in a civil context. Further, Respondent has not been found to have committed any "unlawful" conduct in a trial on the merits.

Under Point IV, Respondent takes exception to the Bar's characterization of his rights in connection with the use of the mortgage proceeds, as well as the settlement with Dr. Onusic.

ARGUMENT

POINT I

RULE 3-4.3 BY ITSELF CANNOT SERVE AS THE BASIS FOR DISCIPLINE.

The Florida Bar argues that Rule of Discipline 3-4.3 standing alone can serve as grounds for discipline. To support this position The Florida Bar points to the very broad language in the Rule defining the term "misconduct" and cites three cases: Arnold, Cocalis and Sayler.

The Florida Bar misstates the law. The broad definition of the term "misconduct" as used in Rule of Discipline 3-4.3 is not a guideline for determining

whether an act of misconduct has occurred. Rather, it is a jurisdictional statement. Under the Bar's strained reasoning, the Rules of Professional Conduct are unnecessary in lawyer disciplinary proceedings. Their position is that any lawyer can be disciplined for any action, at any time, in any place, if somebody thinks it is unlawful, or they think it is contrary to honesty, or is contrary to justice. No lawyer reading Rule 3-4.3 is put on notice of what acts in a lawyer's life are grounds for discipline. For example, what is the definition of an act contrary to justice? Justice is a relative term; it is in the eyes of the beholder. The Rules of Professional Conduct, not Rule 3-4.3, put lawyers on notice of the conduct that can result in discipline.

In the instant case, Respondent was not charged with a violation of Rule 4-8.4(c) prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. In fact, the Grievance Committee found no probable cause on the question of whether Respondent violated Rule 4-8.4(c) Misconduct.

The broad guidelines stated in Rule of Discipline 3-4.3 for determining misconduct cannot serve as a basis for applying discipline without an alleged violation of the corresponding Rule of Professional Conduct. The Bar's reliance on Arnold, Cocalis and Sayler as support for their position is misplaced. Respondent addressed these three cases in pages 22 through 24 of his Answer Brief and Initial Brief on Cross-Appeal.

The Florida Bar dismisses the constitutional ramifications of its position by arguing that adequate notice of the prohibited conduct is provided in the Complaint. However, the constitutional standard for notice of prohibited conduct is in advance of the act rather than after the Complaint is filed. Gentile v. State Bar of Nevada, 501 U.S. 1130, 111 S.Ct 2720, 115 L.Ed.2d 888 (1991).

The Florida Bar suggests that Respondent overreaches in noting that "any act of misconduct would be prohibited by Rule 3-4.3" under the Bar's interpretation. The Bar argues in response that only "conduct which is unlawful or contrary to honesty and justice" would qualify. The problem with the Bar's argument is that the determination of "conduct which is unlawful or contrary to honesty and justice" under Rule of Discipline 3-4.3 is left to the subjective discretion of the Bar without due process or advance notice. This reality is the precise reason for requiring such allegations to proceed under the standards set forth under the Rules of Professional Conduct.

The Grievance Committee in this instant case found no probable cause that Respondent violated Rule of Professional Conduct 4-8.4(c) Misconduct. Further, The Florida Bar did not charge Respondent with any violation of Rule 4-8.4(c). The Referee cannot now rule on the question under the guise of Rule of Discipline 3-4.3 without violating due process standards.

POINT II

THE BAR FAILED TO PROVE MISCONDUCT BY CLEAR AND CONVINCING EVIDENCE.

The Florida Bar failed to prove misconduct by clear and convincing evidence and the Referee's findings are not supported by "competent substantial evidence" as required under Florida Bar v. Vining, 721 So.2d 1164, 1167 (Fla. 1998). Further, the record evidence clearly contradicts the conclusions of the Referee.

The record does not support the conclusion that Respondent had the requisite intent to harm Dr. Onusic. Respondent testified that he did not intend to harm Dr. Onusic and his testimony, as well as the testimony of two expert witnesses supporting this position, was unrefuted. Further, the contract documents evidencing the transaction support this position.

The Florida Bar argues that the recording of the Deed by NLMC in 1997, four years before Respondent stopped making payments on the note, evidences Respondent's intent to harm Dr. Onusic. In support, the Bar cites the testimony of Dr. Onusic that Respondent "… was not supposed to record the Deed until she was paid in full".

This self-serving testimony of Dr. Onusic runs contrary to the express terms of the Letter of Intent as validated by the unrefuted testimony of expert Michael Knoll. The Letter of Intent granted NLMC the contract right to record the

Deed in 1997 and that right was further validated in 1997 by the advice of attorney Richard Greene who actually recorded the Deed on behalf of the Corporation.

As further evidence that the recording of the Deed in 1997 did not evidence any intent to harm Dr. Onusic, Respondent also testified that he offered Dr. Onusic a lien on the property securing her note. The offer was declined by Dr. Onusic. Again, this testimony is unrefuted.

To further show that the recording of the Deed in 1997 did not evidence any intent to harm Dr. Onusic, the record shows that not only was the First Note serviced by NLMC but also the Second Note and the Third Note continued to be serviced until late 2001, almost twelve months after Pursley stopped making payments under his Lease in 2000. The record shows that all of the payments after 2000 were made from the personal resources of Respondent, who was eventually driven into bankruptcy 2006.

The Florida Bar also argues that the transfer and mortgaging of the property in 2001 shows intent to harm Dr. Onusic. As supporting evidence, the Bar highlights testimony from Dr. Onusic that she was not informed of the transfer beforehand or paid any of the proceeds of the loan.

Legal experts Knoll and Davis both testified that the conveyance and mortgaging of the Property in 2001 did not breach the Letter of Intent and did not evidence any wrongful intent of Respondent to harm Dr. Onusic. Legal expert

Michael Knoll testified that the transaction precluded a finding of either intentional or constructive fraud under the law prohibiting fraudulent transfers in Pennsylvania and most every other state. Legal expert Jeffery Davis testified that Respondent left adequate assets in the corporation after the transfer to address the amounts owed to Dr. Onusic. Legal expert Michael Knoll testified that there was no legal obligation to pay any of the loan proceeds to Dr. Onusic or to notify Dr. Onusic in advance of Respondent's actions. The testimony of these experts on this question was unchallenged.

The Florida Bar also attempts to argue that Respondent's cash-flow management of the transaction showed intent to harm Dr. Onusic. As evidence, the Bar points to the testimony of Anna Brosche and Respondent's testimony in the bankruptcy proceeding.

There is no evidence on the record that any of the Pursley Lease payments were not used to support NLMC. These payments were allocated to cover all NLMC costs (not just payments to Dr. Onusic) as required under the Letter of Intent. The issuance of the Third Note served the interests of Dr. Onusic and ALL of the payments thereunder came from the personal resources of Respondent. The Pursley Notes and Lease were not listed in the bankruptcy filing of Respondent precisely because they were assets of NLMC rather than Respondent. (NLMC was not a party in the bankruptcy filing). The testimony of

Respondent in the Bankruptcy proceeding that the Pursley Lease payments were the source of the payments to Dr. Onusic is not inconsistent with these facts, nor is the testimony of Anna Brosche inconsistent therewith.

The Florida Bar also misconstrues the record on Respondent's testimony concerning the rights of Dr. Onusic to pursue her claim against Pursley. Respondent testified that as a judgment creditor of NLMC, Dr. Onusic had the right to proceed against Pursley for the full value of the Pursley Notes and default under the Pursley Lease. Respondent also testified that Pursley had guaranteed the Third Note and provided evidence and argument supporting his position. Respondent's position regarding the Third Note as a restatement of the Second Note is not inconsistent with the argument that the Second Note liquidated the First Note. The letter of intent contained a contract clause expressly to that effect, i.e., that a second note would extinguish the first note. That clause only applied to the second note and not to subsequent notes.

The Florida Bar argues that conveyance of the property in 2001 left the corporation without assets, thereby evidencing Respondent's intent to harm Dr. Onusic. This argument is invalid. The property was conveyed subject to the Pursley Lease and for adequate consideration as recited on the Deed itself, with the Pursley notes also assigned to NLMC as an asset. Legal expert Professor Jeffery Davis testified that the assets remaining in the corporation after the transfer were

not de minimis and that Pursley was not judgment proof. Again, this testimony was not refuted.

The Florida Bar argues that Respondent "never had a reasonable hypothesis of innocence to disprove intent" and that the testimony of Respondent and his experts was "aggressive and self-serving". However, it is The Florida Bar that has the burden of proof to show intent and the testimony of Respondent and his legal experts (as well as the documents supporting the transaction) was not rebutted.

The evidence on the record is that Respondent had the contract right to record the Deed in 1997 and to mortgage the property in 2001. The record shows that the transfer left assets in the Corporation adequate to support Dr. Onusic's claim. The record shows that Respondent serviced the First Note, Second Note and Third Note well into 2001. He made over $205,000 in mortgage payments (exclusive of interest), paid the taxes, insurance and maintenance on the property, and retired all the mortgages and liens on the property that existed when he bought the property. There simply is no evidence to support the conclusion that Respondent intended to harm Dr. Onusic other than the Bar's speculation.

POINT III

STANDARD 5.13 OF THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS IS THE APPLICABLE STANDARD IN THIS CASE.

The Florida Bar has acknowledged that Respondent has not engaged in any criminal conduct. Nevertheless, the Bar argues that the applicable standard for discipline is Section 5.12 of the Standards. This argument is based upon the proposition that the term "criminal conduct" as used under Section 5.12 "is simply a synonym" for "unlawful conduct" in a civil context. Respondent thoroughly discussed this issue in pages 5 through 8 and page 15 of his Initial Brief on Cross-Appeal.

The Referee specifically rejected the Bar's arguments by applying Section 5.13 of the Standards instead of Section 5.12. Inherent in his recommendation is the fact that Respondent has not been found guilty of any unlawful conduct in a trial on the merits. As expressly acknowledged by the Referee, "… the bankruptcy judge's opinion was actually on exceptions to discharge, strictly speaking, as opposed to ruling on the fraudulent transfer, because he wasn't there ruling on the fraudulent transfer". [Trial Transcript – p 236 (lines 4-8)].

Contrary to the Bar's argument, Respondent did not violate any fraudulent transfer act. Legal expert Michael Knoll testified that the structure of the transaction precluded a finding of either intentional or constructive fraud. Further,

unlike the respondent in Florida Bar v. Behm, 41 So.2d 136 (Fla. 2010), the Grievance Committee found no probable cause for the allegations of fraud under Rule of Professional Conduct 4.8.4(c) in the instant case.

Finally, there is simply no legal support for the Bar's interpretation of the term "criminal conduct" as including unlawful civil conduct. The Bar does not cite a single case in support of this argument.

The Bar's argument is at odds with the express language of Standard 5.12 and the Commentary supporting application of Standard 5.13 in this case. Section 5.12 expressly requires "criminal conduct", while Standard 5.13 requires only "conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on the lawyers fitness to practice law." The Commentary for Standard 5.13 expressly acknowledges the distinction between "criminal" and "civil" conduct, noting that "there can be situations, however, in which the lawyer's conduct is not even criminal, but, because it is directly related to his or her professional role, discipline is required."

Respondent has not engaged in any criminal conduct, nor has any been alleged. The Bar's analysis of "criminal conduct" as a synonym for "unlawful conduct" in a civil context is without support, and is inconsistent with the Commentary for Standard 5.13. If discipline is imposed, the correct standard is Section 5.13 in support of Public Reprimand.

POINT IV

THE REFEREE APPLIED AGGRAVATING FACTORS THAT SHOULD BE DISREGARDED AND IGNORED SUBSTANTIAL MITIGATION.

The Florida Bar argues that because the Referee found some of the testimony of Respondent's legal experts "strained and aggressive" the finding that Respondent acted from dishonest or selfish motive was appropriate. The Bar attempts to substantiate this position by arguing that Respondent used the loan proceeds from mortgaging the property to pay personal tax liabilities and installment debt.

The fact that the Referee observed that some of the testimony offered by Respondent's legal expert was "strained and aggressive" does not mean that the testimony was invalid, especially where that testimony was unrebutted (regarding the contract right of Respondent in recording the Deed in 1997 and in mortgaging the Property in 2001). The use of the mortgage proceeds by Respondent to pay taxes and installment debt does not evidence selfish motive when the taxes and debt arose from transactions involving the property.

The Florida Bar also attempts to characterize Respondent's legal defense as evidence that Respondent is not remorseful or has failed to acknowledge the wrongful nature of his conduct. A lawyer's defending himself cannot be a basis

for a finding of lack of remorse or failure to acknowledge wrongdoing. Florida Bar v. Lipman, 497 So.2d 1165, 1168 (Fla. 1986)

Respondent's positions are unrefuted and supported by the record. It is unrefuted that Pursley breached the Lease in December, 2000 with all payments to Dr. Onusic thereafter rendered from the personal resources of Respondent. It is unrefuted (and corroborated on the record) that Dick Greene served as Counsel to the Corporation as evidenced by the Deeds prepared in connection with the property. It is unrefuted that Anna Brosche (by her own testimony and admission) was responsible for the financial management of Respondent's business, including income and expense allocations and tax returns. Pointing out these unrefuted and substantiated facts does not constitute "shifting blame" or suggest that the Respondent is not remorseful.

The Florida Bar also makes light of Respondent's efforts at restitution and mischaracterizes the settlement arrangement between Dr. Onusic and MortgageFlex. This issue was thoroughly discussed in pages 67 through 69 of Respondent's Initial Brief on Cross-Appeal. The settlement was negotiated between MortgageFlex and Dr. Onusic separately, without influence from Respondent. In connection with the arrangement, Respondent gave up all he had – his entire claim ($230,000 plus interest over a nine year period).

CONCLUSION

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

Should this Court deny Respondent's request to dismiss these proceedings, Respondent requests that the recommendations of the Referee for Public Reprimand be confirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Brief were hand-delivered to the Honorable Thomas D. Hall, Clerk, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that copies were sent by U.S. Mail to Frances Brown-Lewis, Bar Counsel, The Florida Bar, The Gateway Center, 1000 Legion Place, Suite 1625, Orlando, Florida 32801-5200, and to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this 21st day of September, 2011.

_____

John A. Weiss

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

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

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John A. Weiss
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