IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC11-836

TBF File No. 2008-31,207(07B)

v.

HENRY T. SWANN, III

Respondent.

_____/

ANSWER BRIEF AND BRIEF ON CROSS PETITION FOR REVIEW OF RESPONDENT

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SYMBOLS AND REFERENCES

In this brief, the Respondent shall be referred to as “The Respondent”.

The Complainant is referred to as the “Bar” or “Complainant”.

The transcript of the final hearing before the Referee on November 14–18, 2011, shall be referred to as “T” followed by the page number.

The Report of the Referee dated February 9, 2012, will be referred to

as “ROR”, followed by A1 of the Bar Appendix and the page or paragraph number of the item, (ROR A1 page /par. ___).

The Florida Bar Proposed Report of Referee shall be referred to as “BPROR” followed by A2 of the Respondent’s Appendix and the page or paragraph number of the item, (BPROR A2, page/ par. _____).

The Respondent’s Proposed Report of Referee dated January 27, 2012, shall be referred to as “RPROR” followed by A3 of the Respondent’s Appendix and the page or paragraph number, (RPROR A3 page /par.__).

Respondent’s exhibits will be referred to as R-Ex_____, followed by the exhibit number. Bar exhibits will be referred to as B-Ex_____, followed by the exhibit number.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as included in the Complainant's Initial Brief with the following additions:

The Referee accepted verbatim for inclusion in his ROR, Respondent's Statement of the Case (RPROR A3, pages 1-3) as the Referee's Summary of Proceedings (ROR A1 pages 1- 3). This chronicled the history of the Bar complaint herein, beginning with the complaint initially filed by Harold Lippes, in 2005,who was adverse to Respondent: the Bar dismissed that complaint in May, 2006, finding the evidence insufficient to support any of Mr. Lippes allegations, but stated it would revisit the matter if a court of competent jurisdiction made a

determination that Mr. Swann violated the law, the Rules of Attorney Conduct, or in any way perpetuated a fraud. (ROR A1, page 2).

There was no such court determination, except for two references to Respondent in a Final Judgment rendered by the Duval County Probate Court in the case of the Estate of Shelton v. Rhoualmi, in which Respondent was not a party. Nevertheless, on April 28, 2011, the Bar filed the complaint herein.

The Referee directed both parties to submit a Proposed Report of the Referee, making Findings of Fact, Conclusions and Recommendations based on the evidence as they interpreted it. Both the Bar and Respondent complied, and presented separate

Proposed Reports of Referee (Appendix 2 & 3).

The Bar's Proposed Report of Referee made extensive findings of fact covering 197 paragraphs (BPROR A2, pages 6 - 56). The Referee adopted

verbatim all 197 paragraphs of the findings in the Bar's Proposed Report of Referee in his Report of Referee dated February 4th, 2012 (ROR A1, pages 7 – 57).

The Bar made recommendations as to guilt and discipline in its Proposed Report of Referee (BPROR A2, Pages 56 – 71) which the Referee adopted verbatim. (ROR A1 pages 57 – 72).

Specifically, the 91 day Suspension recommended by the Bar was adopted by the Referee. (BPROR, A2 page 71 and ROR, A1 page 72).

On April 9, 2012, the Bar filed its Petition for Review of the Referee's recommendation for a 91-day suspension, asking this Court to impose disbarment instead.

SUMMARY OF FACTS

Complainant has reiterated the findings of fact from its Proposed Report of Referee (BPROR, A2 pages 6-56 & para. 1- 197) as its Summary of Facts herein. Respondent interprets those facts differently than the Bar, as set forth in his Proposed Report of Referee (RPROR, A3, pages 3- 31). Respondent's Proposed Report of Referee answered, explained or mitigated most allegations in the Bar's complaint, referencing documentary evidence, testimony of third parties, or Respondent's testimony. Much of the Bar's evidence was hearsay by the Bar's sole live witness, Harold S. Lippes, based on his opinions and conclusions.

Most of the facts giving rise to the Bar's charges of misconduct arose over an eight month period, during which Respondent was undergoing treatment for Parkinson's Disease, and was involved in a contentious divorce (ROR A1, par. 116). The misconduct alleged was inconsistent with Respondent's 35 years of service to the legal profession with no history of disciplinary action (ROR A1,

page 72 - 73). References to Counts and Paragraphs below are to the Referee's findings in his Report of Referee (ROR A1).

Count I dealt with Respondent's investment of his mother's money. The money came to her after his father's death, from joint accounts or his father's life insurance, which she loaned directly to Respondent, or deposited in the bank account of his father's estate for her convenience. (ROR A1, par. 1). Respondent's mother approved and ratified all of Respondent's investments made on her behalf in a Durable Power of Attorney, dated May 6, 2006 (R-Ex 57 & 78). Respondent's father's estate was closed by the Wilkes County Georgia Probate Court in January, 2009, without objection by any person.

Count II concerned Mr. Shelton, and a judgment for his Estate entered by the Duval County Probate Court against Khadija Rhoualmi, finding that Respondent "had acted in concert" with her in defrauding Shelton.(ROR par.

101 & 105). Respondent had been joined in an action based on the same facts in St. John's County, which did not go to trial, but Respondent was dismissed from that action by the Shelton attorney, Harold Lippes, who was the primary witness against Respondent herein, and who did not join Respondent in the Duval County action, which went to trial.(B-Ex 11).

Count III alleges Respondent secreted assets in his wife's divorce action. (ROR A1, pages 37-46). Respondent made various transfers of his property, none of which violated any court order or lis pendens , in an effort to prevent the divorce proceeding from disrupting purchase and sale contracts he had on several properties. (T917-918). Nevertheless, the Bar and the Referee determined that Respondent violated Florida Bar Rule 4-3.4(a) & 4-8.4(d),(ROR A1, par. 116).

Count IV involves the same property transfers, but couches the violation in relation to LLC's controlled by Respondent, which transferred or received property titles. The Bar claims a separate violation because some of the officers of LLC's controlled by him were prior clients and friends of Respondent. There is no evidence that, Respondent involved his former clients and friends in any illegal conduct or dissipated any of their funds. (ROR A1, par. 162-163).

Count V concerns the Taylor estate and trust in St. John's County, which Respondent handled to conclusion and received his fees, with no objection by any person, or any issues raised in the Probate Court (B-Ex 1, Tab 56). The Probate Court approved all of the issues raised in Mr. Lippes letters, and the Bar Complaint, with no objection by any person, awarding him attorney's fees for his services to the estate and the trust (ROR A1, par. 194)(T970-971; 974-975). Although Harold Lippes, on behalf of the specific beneficiaries of the trust, wrote

a letter to Respondent demanding that he resign as trustee and personal representative of the Taylor trust and estate, no such issue was raised with the Probate Court. (R Ex-28; T390-391; 970). (ROR A1, par. 192).

The Bar was well aware of all the alleged misconduct, and the degree of any misconduct, alleged in Counts I-V of the Bar Complaint, when it recommended to the Referee that the penalty be a 91 day suspension, and supported that recommendation with relevant case law.

SUMMARY OF ARGUMENT

First, Respondent argues that the 91-day suspension, recommended by the Bar and adopted by the Referee, not disbarment, is the appropriate discipline. The Bar, as the moving party, has failed to demonstrate that the

recommended penalty is erroneous, unlawful or unjustified as required by Florida Bar Rule 3-7.7 (c)(5). Also, as this Court has repeatedly held (The Florida Bar v Adorno, 60 So.3d 852 (Fla. 2011) that it will not change a referee's recommended penalty that is reasonably supported by case law (ROR A1, pages 68 to 72) and The Florida Standards for Imposing Lawyer Sanctions.

In The Florida Bar v Poplack, 599 So.2d 116 (Fla. 1992) this Court held:

> "...A Referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is erroneous or not supported by the evidence." (Poplack, supra, at 119)

In the instant case, suspension is supported by the case law the Bar cited in its Proposed Report of the Referee (BPROR, A2, pages 67-71). The Bar now seeks disbarment as a penalty based on cases they did not previously cite to the Referee, in which this Court confirmed Referee's recommendations for disbarment, in accord with Poplack, supra. The cases cited by the Bar in its

Proposed Report of Referee (BPROR,A2, pages 67-71) reasonably support a 91-day suspension.

The issue is not whether other cases support confirmation of a Referee's recommendation for disbarment, but whether the cases cited by the Bar in its Proposed Report of Referee support a 91-day suspension. If so, this court has said it will not disturb the recommendation of the Referee. The Florida Bar v. Klausner, 721 So.2d 720, 722 (Fla. 1998) which held that where disbarment could also be an appropriate penalty, the Referee's recommendation of suspension will be confirmed if it is supported by case law.

Second, the ROR findings in paragraphs 1 to 197 do not support disbarment. Those findings are internally inconsistent, and many of the conclusions expressed are not supported by the evidence. Also, with the possible exception of Count III, there is no "corrupt motive" or "fraudulent

intent" demonstrated as required for disbarment (In re Dekle, 308 So.2d 5, 10 (Fla. 1975).

For example, Count I addresses Respondent's investment of his mother's money. The Record contains a duly recorded Durable Power of Attorney, that gives Respondent full authority to invest his mother's money, and ratifies all such investments previously made (R Ex- 57 & 78). The Referee's Report infers the Respondent should have titled the investment properties in his mother's name, or placed liens favoring his mother or his father's estate against those properties. No law or Bar Rule requires Respondent to do so, and his mother's Power of Attorney resolves that question. The Referee's Report acknowledged that the money was repaid (ROR A1, par. 45). Respondent, as a son, invested money for, and on behalf of, his mother, and did so in good faith, with her consent, approval and ratification.

Count II concerns the Duval County Probate Court finding that Respondent acted in concert with Ms. Rhoualmi to exploit Mr. Shelton, an elderly man Respondent had advised on a zoning matter. (R Ex-3; T936-938). The gravaman of the Referee's finding on this issue is a Judgment by the Probate Court of Duval County, which included two adverse comments concerning Respondent on that issue. (ROR A1, par. 101 & 105). Respondent was not a party to that Duval County case, having been previously dismissed by Mr. Shelton's attorney, Harold Lippes, in a St. John's County case based on the same facts (B-Ex 11), and had no opportunity to defend himself or to take any appeal in the Duval County case. That judgment, by law, should have no adverse affect on Respondent. The evidence with regard to the preparation of two deeds for Mr. Shelton by Ms. Rhoualmi (B-Ex 14 &15) was not in conflict. Ms. Rhoualmi testified that she had the deeds prepared by her friend,

Respondent's secretary, Isabel Garcia, and wrote Respondent's name on one of the deeds as the preparer (T780-782). There is no evidence, or any finding by the Referee, that Respondent counseled Mr. Shelton about the deeds, or was present at the time of their execution. The deeds were notarized by Mr. Shelton's banker, presumably in the bank's office (B-Ex 14 & 15). The findings state that Respondent "lied" because he did not tell Mr. Shelton that he had performed legal work for Ms. Rhoualmi thirteen months previously (ROR A1, par. 68). Respondent was under no duty to tell Mr. Shelton, while advising him on a zoning matter in April 2005, that he had advised Ms. Rhoualmi on immigration matters in May of 2004. Respondent's efforts to persuade Ms. Rhoualmi to restore Mr. Shelton's property to him as soon as he learned what had happened is inconsistent with any "corrupt motive" or "fraudulent intent", or

any finding that Respondent orchestrated any concert of action with Ms. Rhoualmi to defraud Shelton. (ROR A1, par. 90, 96).

Count III finds that Respondent attempted to hide assets during the initial weeks of his divorce (ROR A1, pages 37-46). Respondent admits that he did make title transfers to protect purchase and sale contracts he had on various properties. A few weeks later he voluntarily reacquired all titles jointly with his wife prior to the Marital Property Settlement Agreement. (ROR A1, par. 116).

Count IV is duplicative of Count III and does not allege any separate acts of misconduct. Ms. Rhoualmi and Ms. Martinot were friends and former clients of Respondent's at the time of the alleged real estate transactions; and were at all times aware of what Respondent was doing, and voluntarily supported him by serving as officers of the LLC's controlled by him . (ROR A1, par.152, 154, 162-163).

Count V finds that Respondent rented a house owned in the Taylor Estate for less than fair market value to a friend for two months, that he was late in filing a trust accounting, and that he was late in notifying trust beneficiaries of their interest in a testamentary trust (ROR A1, par. 182-183, 185, 187). The Referee found that Respondent had an obligation to rent the house and to prevent vandalism (ROR A1, par.184), but that inadequate notice was given to the beneficiaries (ROR A1, par. 185). Respondent's February 23, 2006 letter clearly states that he was renting the property to avoid vandalism and qualify for insurance. (R-Ex 97). The Referee's findings as to that issue does not constitute misconduct, but was an act of business discretion by Respondent as co-personal representative of the estate acting in the best interests of the estate beneficiaries. Ms. Taylor died in November 2005 and Respondent wrote to the trust beneficiaries advising them of the trust, and corresponded with them on

several occasions between February 16, and May 12, 2006, when Mr. Lippes appeared on their behalf.

Third, disbarment is not appropriate in this case as there is no prior disciplinary history. Respondent served the legal profession for 35 years with no history of misconduct prior to this incident. (ROR A1, pages 72-73). In 2002, The Florida Bar recognized Respondent for his leadership and character by awarding him the Clayton B. Burton award. (R Ex-109: T993-994) (Respondent's Proposed Report A3, page 32).(R Ex-104; T993-994).

Respondent accepts the recommendation of a 91-day suspension as recommended by the Bar (BPROR A2, page 71) and by the Referee (ROR A1, page 72).

ARGUMENT

ISSUE I

THE FLORIDA BAR HAS NOT DEMONSTRATED THAT THE REPORT OF REFEREE IS ERRONEOUS, UNLAWFUL, OR UNJUSTIFIED AND NOT SUPPORTED BY THE CASE LAW.

Pursuant to Rule 3-7.7 (c)(5) the party seeking a review of a Referee's Report has the burden of demonstrating that the report sought to be reviewed is either erroneous, unlawful or unjustified. (Rule 3-7.7, Rules Regulating The Florida Bar). In its Initial Brief, The Bar has not argued that the recommended penalty of a 91- day suspension with proof of rehabilitation required before reinstatement and payment of assessed costs as contained in Referee's ROR (ROR A1, pages 57-72) is erroneous, unlawful, or unjustified. In fact, The Bar previously recommended that exact penalty in its Proposed Report of Referee (BPROR,A2, pages 56-71).

This court stated in The Florida Bar v. Adorno, 60 So.3d 1016, 1031 (Fla. 2011);

> "This Court usually will not second guess a Referee's recommended discipline as long as it has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions." See The Florida Bar v Temmer, 753 So.2d 555, 558 (Fla. 1999).

With one exception, The Bar has cited different cases in its Initial Brief herein from those it cited in its Proposed Report of Referee (BPROR, A2, pages 67-70) to support its new request for disbarment as the appropriate penalty. To the extent the case law supports suspension and also disbarment, this court should approve the recommended penalty of suspension in accord with the Adorno, *supra*, The Florida Bar v. Temmer , 753 So.2d 555 (Fla. 1999), and Klausner, *supra*. The cases cited by the Bar and accepted by the Referee as support for a suspension (BPROR, A2, page 67 to 70) deal with: (1) an

attorney signing his estranged wife's name to a loan document, The Florida Bar v Baker, 810 So.2d 876 (Fla. 2002), similar to conduct Respondent is charged with; (2) a conflict of interest which the attorney exploited to the client's pecuniary detriment, The Florida Bar v. Laing, 695 So.2d 299 (Fla. 1997), similar to conduct Respondent is charged with; (3) an attorney making false representations to third persons and involving them in a scheme to repatriate funds without their knowledge, The Florida Bar v Crabtree, 595 So.2d 935 (Fla.1992), similar to conduct Respondent is charged with; and (4) an attorney taking financial advantage of a family member who was not competent, The Florida Bar v Collier, 506 So.2d 389 (Fla. 1987), also similar to conduct Respondent is charged with.

Those cases are relevant and germane to the Referee's findings in our case herein. The Referee's reliance on these cases to support his

recommended 91-day suspension has a reasonable basis under existing case law.

Similarly, the Standards for Imposing Lawyer Sanctions, cited by the Referee (ROR A1, pages 66-68) overwhelmingly support suspension and not disbarment. Those Standards were cited by the Bar in its Proposed Report of Referee (BPROR, A2, 65-67). In its Initial Brief, the Bar raises for the first time Standards 9.0, aggravation, and 9.22 multiple offenses. (Bar's Initial Brief, pages 42-43). Those alleged aggravating factors and multiple offenses were known to the Bar when it recommended a 91-day suspension to the Referee. (BPROR, A2, pages 71-72) Standard 9.0 states "aggravating factors may be considered", but does not mandate they be considered. It is apparent that the Referee considered aggravating factors in support of his recommendation for suspension.

The fact that the Bar now finds it expedient to cite other case law to support its new request for disbarment, does not mean that the Report of Referee, which was based on the Bar's recommendation, should not be sustained. If the Referee's recommended penalty is reasonably supported by case law, and the Florida Standards to be Considered in Imposing Sanctions, it must be sustained, even if disbarment was a penalty the Referee could have considered.

The Bar's Initial Brief ignores the rulings of this court that it will sustain disciplinary recommendations by a Referee which are reasonably supported by case law and accord a presumption of correctness to that recommendation unless it is erroneous, lawful and unjustified. This court should deny the Bar's petition for disbarment and confirm the recommended penalty of suspension.

ISSUE II

THE CUMULATIVE EFFECT OF THE REFEREE'S FINDINGS OF MISCONDUCT DO NOT MERIT DISBARMENT

On page 7 of the Referee's report, starting at paragraph 1, and continuing through paragraph 197,on page 56 the Referee makes specific findings and conclusions. Many of those findings and some of the conclusions do not involve misconduct by Respondent but merely recite background information. Other findings and conclusions may appear to be supported, but upon closer examination, are not supportive of a finding of misconduct by Respondent. Some of the findings in regard to Count III, may support a lapse of ethical judgment by Respondent.

FACTUAL ANALYSIS OF REFEREE'S REPORT

COUNT I

Paragraphs 1 through 6 and 8 through 13 detail family business involving investments made by Respondent for his mother. Respondent's mother asked him to make the investments in the manner he did and approved and ratified those investments in her Durable Power of Attorney on May 6, 2006. ® Ex-57&78). There was no evidence or finding that Respondent's mother was not competent to give Respondent authority to make those investments from her funds, to which she was exclusively entitled, as the sole beneficiary of Respondent's father's estate (R-Ex 75)(ROR A1, par. 2). The fact that Respondent invested his mother's money in Florida real estate his own name and not in the name of his mother or his father's estate, does not violate of any law or Florida Bar Rule.

All of the funds Respondent invested on his mother's behalf came from her directly, or from funds she deposited into his father's estate, of which she was

the sole beneficiary and which she had received outside of the estate from joint accounts or life insurance . (T819-820, 835, 839-840, 863). Respondent began investing his mother's money in 2003, after his father died in December 2002,in accordance with her instructions (R Ex-68; T820, 835), and on May 6, 2006 his mother signed and recorded a Durable Power Attorney ratifying all of the investments he had made for her to date (R-Ex 57 & 78). When a son invests his mother's money without creating any formal legal documentation, there is no violation of law or Florida Bar Rule. Neither his mother nor his sister, who was his mother's only other heir, ever objected to this arrangement. (B Ex-40 pp. 27-28; R Ex-208, 209). Respondent fully accounted for his mother's funds in the interim accounting he filed in the Georgia Probate Court on December 20, 2006. (B Ex-37, 38, 40). There was no evidence that interim accounting was not timely filed under Georgia Probate Rules. (ROR A1, par.

61)(B-Ex 1 Tab 37-39). The court approved his sister's final accounting and Petition for Discharge, dated December 24, 2008 and closed the estate January 18, 2009. (B-Ex 1 Tab 40).

In paragraphs 14 to 45, the Referee traces Respondent's initial investment of his mothers funds from 2003 (ROR A1, par.14) to August 12,2005,when Respondent repaid $400,000 directly to his mother's Georgia bank account. (ROR A1, par. 45). Respondent accounted for the other $63,000.00 he borrowed from his mother in his interim accounting of December 20, 2006 in the Georgia Probate Court, showing that he had spent that amount from the estate for his mother's care and support.(B-Ex 1 Tab 37-39). Buying and selling properties was Respondent's principal business during 2003-2006, and was the method used by Respondent to invest his mother's money.

In paragraphs 17, 18 and 33,the Referee concludes that Respondent's sworn testimony in the divorce proceeding, that the money he invested came from his father's estate "was directly contrary to his sworn testimony at the disciplinary hearing that the money came from his mother". However, all of the money invested belonged to his mother, some of which came directly from her and some of which came from the bank account of his father's estate into which she had deposited some of her money. (T819, 820, 835, 839-840, 849, 863). Respondent always recognized his obligation to protect his mother's money in a fiduciary capacity and his testimony in the divorce proceedings is not contrary to his testimony at the disciplinary hearing, because all of the money belonged to his mother.

In paragraph 21, the Referee concludes Respondent misrepresented the use of the sale of Surf Club proceeds because he stated that he "credited" a

part of the sale proceeds to his mother, but did not use those funds to repay her. Respondent did state that he credited a part of the sale proceeds to his mother, he did not say or imply that he repaid her at that time and there is no inference that he made any misrepresentation to the Court in the divorce proceeding on that issue.

In paragraphs 26 & 27, the Referee finds that Respondent did not pay off a mortgage for 14 months after a closing and had a duty as closing agent to pay it off sooner. In paragraph 29, the Referee states that the delay was only 2 months. ®-Ex 2) (B-Ex 86, 79). The Referee did not recognize the fact that the sale of the property involved a "wrap mortgage", which included the amount of the bank's mortgage. (B-Ex 82, 89). Respondent testified and the Referee found, that the 2 month delay arose from his concern that the title company's check for $545,000 clear before he satisfied the Washington Mutual mortgage.

That delay was not in violation of the terms of the mortgage, or any law or Florida Bar Rule. (T898-899).

The Referee's conclusion in paragraph 30 that the Respondent misused the proceeds of the Surf Club transaction is not supported by any evidence or specific finding of the Referee.

In paragraph 39, the Referee disparages Respondent for not encumbering his investments with liens favoring his mother, or his father's estate. Respondent's mother's security was her son's word. The trust between a mother and her son for investment of her money by her son on her behalf without documentation is not a violation of any law or Florida Bar Rule. Respondent's decision not to encumber the property or to title it in his mother's name was a family business judgmental decision, and did not violate any law or Florida Bar Rule.

In paragraphs 42 and 43, the Referee concludes the Respondent had an obligation to pay off the mortgage loan on the Ocean Hammock property when he transferred title from one entity wholly owned by him to another entity wholly owned by him and that his failure to do so was misconduct. Respondent was always personally obligated on that mortgage loan, and all of the title transfers were between him and entities wholly owned or controlled by him. (R Ex-81; B Ex-94; T846, 934). The mortgage loan was paid in full when the property was sold to a third party on August 12, 2005. (ROR A1, par. 46). Respondent's transfer of that property between entities wholly owned by him did not violate the terms of the mortgage, or any law, or Florida Bar Rule.

Paragraphs 50 to 59 deal with Respondent's purchase of a house in San Mateo and a condominium in Cinnamon Beach, Florida. Respondent testified that a portion of the purchase price for San Mateo came from his mother's

funds and that he did not record a lien against the property in favor of his mother or his father's estate, as found by the Referee, but those findings did not constitute any violation of law or any Florida Bar Rules. Respondent testified he lived in the San Mateo house without paying rent to his mother as the Referee found in paragraph 55. ® PROR A3, par 14) . None of these findings constitute any violation of law or Florida Bar Rule. All of Respondent's investment decisions on his mother's behalf were approved and ratified by his mother in her Durable Power of Attorney dated May 6, 2006. (R57 & 78).

The Referee infers in paragraph 58 & 59 that Respondent had an obligation to his mother, or his father's estate, not to include the San Mateo house in his Marital Property Settlement, but there is no evidence to support that finding. The Referee found that Respondent repaid his mother $400,000 on August 12, 2005. (ROR A1 par. 45). The Marital Property Settlement Agreement

was not executed until February 2006, ® Ex-52) (B Ex-36) long after he had repaid his mother.

The Referee in paragraph 62 concluded that Respondent had comingled his mother's money with his own, obscured the true ownership of his mother's investments and created a capital gains issue for his father's estate or his mother. The evidence and the Referee's findings of fact do not support those findings. Respondent used his mother's money to try to improve her financial security. He repaid the money after his former wife filed for divorce (ROR A1, par. 45) and resigned as Personal Representative of his father's estate in 2005 (R-Ex 76) allowing his sister to become the alternate Personal Representative. His sister subsequently closed the estate in 2009, with no objection having been made by any party to Respondent's interim accounting filed in December 2006, or to his sisters final accounting filed in December, 2008. (ROR A1, par. 61). (

B Ex-40). No objection was ever made or filed by any heir, financial institution, or third party as to Respondent's handling of his father's estate or his mother's money. Respondent's use of his mother's investments on her behalf was always with her knowledge, and consent, was ratified by her in her Power of Attorney signed and recorded May 6, 2006. ®-Ex 57&78). There was no evidence that any capital gains tax issue arose.

COUNT II

The Referee criticizes, in footnote 1 to paragraph 63, Respondent taking the 5th Amendment against self incrimination in his answers to an interrogatory in the Shelton action in St. John's County, which never went to trial. Respondent 's lawyer advised him to give that answer in light of Florida's statute prohibiting adultery, because if he answered any question regarding adultery, even in the negative, he might waive that privilege. Respondent's assertion of the 5th

Amendment was on advice of counsel and does not constitute any admission or inference that he lied when he previously denied having sexual relations with Ms. Rhoualmi. (R Ex-603(a); B Ex-24). Whether or not Respondent had a sexual relationship with Ms. Rhoualmi, with whom he was a good friend, is irrelevant and immaterial to any issue in this proceeding. The fact that Respondent took the 5th Amendment on the advice of counsel on that issue did not violate any law or Florida Bar Rule. (R Ex-603(a); B Ex-24).

In the Shelton civil litigation, Respondent was joined and then dismissed as a party to the Shelton suit in St. John's County which never went to trial. (B Ex-1 Tab 1(a)). Respondent was never a party to the Shelton Estate action in Duval County which resulted in a judgment against Ms. Rhoulami. Respondent had no opportunity to influence the references to him in that judgment, and no

standing to appeal it.(B Ex-11). In A Norville Phd vs Bellsouth, 664 So.2d 16, 17 (Fla. 3d DCA 1995) the Court held:

> "As stated by the Florida Supreme Court, 'It is so fundamental to our concept of justice that a citation of supporting authorities is unnecessary to hold that the rights of an individual cannot be adjudicated in a judicial proceeding to which he has not been made a party and from which he has literally been excluded by the failure of the moving party to bring him into court,'..."

(See, also, Moretto vs. Staub, 370 So.2d 1220 (Fla. 3rd DCA 1979)).

In paragraph 65 the Referee states the Respondent had advised Ms. Rhoualmi on immigration matters in March of 2004, and had an adult relationship with Ms. Rhoualmi and took trips with her. Respondent admits those findings, but none support any of violation of law or Florida Bar Rule.

In paragraph 68, the Referee found that Respondent did not advise Mr. Shelton in April, 2005, that he had provided legal service to Ms. Rhoualmi in March 2004 and "lied" to Shelton about his relationship with Rhoualmi. There is

no finding that Respondent lied to Mr. Shelton, only that he did not tell him that he had advised Ms. Rhoualmi on immigration matters thirteen months before his conference about a zoning matter with Mr. Shelton. That finding does not constitute any violation of law or Florida Bar Rule.

Paragraphs 71 to 79 discuss whether Respondent prepared two deeds conveying title from Mr. Shelton to Mr. Shelton and Ms. Rhoualmi as joint tenants with right of survivorship in May and June 2005. (B-Ex(s) 14&15). Respondent testified he did not learn of the deeds until July 2005, (T946), weeks after they were executed by Mr. Shelton and recorded. The Referee concludes that Respondent prepared one or both of the deeds and recorded and paid to record at least one of them. (ROR A1 par. (s) 71-74). There is no evidence or finding that Respondent was present when the deeds were executed, or had any discussions with Shelton about those deeds. The sole

evidence of the preparation of those deeds was in the deposition of Ms. Rhoualmi in the Shelton litigation, in which she testified that the deeds were prepared by Respondent's secretary, a friend of hers, without Respondent's knowledge and that when the clerk asked her who prepared the May 6, 2005 deed, she wrote on it that it was prepared by Respondent . (T780-781). It is the procurement of the deed that could become misconduct, not the ministerial act of deed preparation and recording. Respondent testified that the May 9, 2005 check bore his signature, but he did not recall what it was for, and assumes he did not know, and never knew, that it may have been a recording fee for one of Ms. Rhoualmi's deeds. (T941-945). There is no evidence regarding preparation of the deeds or payment of the recording fee which constitutes any violation of law or Florida Bar Rule by Respondent.

Paragraph 84 states that Respondent "bragged to Shelton he had his girl

and his land" revealing his complicity in obtaining Shelton's property. (ROR A1, par. 84). The sole support for that finding by the Referee is contained in Bar exhibit 127 (B-Ex 127, page 4), a Proposed Final Order drafted by Ms. Rhoualmi's attorney for the judge in the Shelton Estate action in Duval County, which was never signed by the Court or filed. In other words, it is a hearsay document drafted by Ms. Rhoulami's attorney and has no probative value to support the Referee's finding in paragraph 84.

In paragraph 96 the Referee references Mr. Harold Lippes opinion testimony at the Final Hearing herein that, "Respondent was orchestrating things from behind the scenes", in the Shelton matter citing the hearing transcript, pages 487 and 488, which do not contain such a statement by Mr. Lippes. There is no evidence to support the Referee's conclusion based on Mr. Lippes opinion and even if Mr. Lippes had stated such an opinion, it alone would not

constitute any violation of any law or Florida Bar Rule.

The Referee's findings in paragraphs 101, 105 and 106, in regard to the judgment entered by the Duval County Court against Ms. Rhoulami is addressed herein above, under Referee's report paragraph 63, in as much as Respondent was not a party to that action, and:

> "the rights of an individual cannot be adjudicated in a judicial proceeding to which he has not been made a party". (A Norville Phd v Bellsouth, supra; Moretto v Staub, supra.).

The Bar's dismissal of Mr. Lippes accusations in May 3, 2007, (B-Ex 15) concluded that there was no evidence upon which to proceed against Respondent, but that the Bar would revisit the matter if a court of competent jurisdiction determined that Mr. Swann violated the law, the Rules of Attorney Conduct, or any way perpetrated a fraud. There was no determination against Mr. Swann by any Court subsequent to May 3, 2007, except that in the Duval

County court judgment against Ms. Rhoualmi, the judge expressed two opinions adverse Respondent(who was not a party to that action), none of which constituted any determination that Mr. Swann committed any fraud or violated any law or Florida Bar Rule. In A Norville Phd v Bellsouth, supra; Moretto v Staub, supra ,the Florida Third DCA cited with approval the Florida Supreme Court case of Alger v Peters, 88 So.2d 903, 906 (Fla. 1956), that:

> "...a citation of supporting authorities is unnecessary to hold the rights of an individual cannot be adjudicated in a judicial proceeding to which he has not been made a party...".

In this case it would be doubly egregious to predicate Respondent's penalty on a judgment where not only was he not a party, but had been previously dismissed in a similar action in St. John's County.

COUNT III

In paragraph 107 and 149, the Referee finds that Respondent took actions to obscure ownership of marital assets and to defraud a lender.

Respondent testified that he transferred title to marital assets from himself to various entities wholly owned or controlled by him whose officers were friends and prior clients and to his sister, for the purpose of attempting to protect various purchase and sale contracts on those properties from being disrupted by his wife's divorce proceedings. Those transactions commenced shortly before his wife filed for divorce in July 2005 and continued to August 24, 2005, when Respondent, upon advice of his divorce counsel, reacquired all titles jointly with his wife, after which they were sold and the proceeds divided in accordance with their Marital Property Settlement Agreement. (ROR A1, par. 116).

Prior to August 24, 2005, on August 12, 2005, Respondent sold Ocean Hammock to a third party purchaser under a previous purchase sale agreement

and used the proceeds to pay off the mortgage loan to the Bank of St. Augustine, to repay $400,000.00 to his mother and to pay for the divorce proceedings. There was no objection to those transactions by his wife. ®-Ex 36, 52, 73&74) (B-Ex 36).

Paragraph 107and 149 do not specify in which transaction the Referee found Respondent defrauded a lender. Respondent's explanation of his handling of the Washington Mutual mortgage on Coquina Key property appears herein above addressing the Referee's report, paragraphs 26, 27, and 29.

Respondent's explanation of the handling of the other two mortgages in question are addressed in his response to paragraphs 125-129, 132-137, and 142 of the Referee's Report herein below.

In paragraphs 109 - 118, the Referee references the affidavit of Steve Brust, regarding his efforts to locate Respondent's property during the divorce

proceedings. Mr. Brust filed third party actions in August 2005against Respondent's shell companies, Respondent's sister, Ms. Rhoualmi and Ms. Martinot .(ROR A1, par.110). In September 2005, on the advice of his divorce counsel, Respondent reacquired title to those properties jointly with his wife and Mr. Brust terminated that litigation. (ROR A1, par 116-117). Respondent paid his wife's attorney fees in the divorce action, including the cost of Mr. Brust's litigation, (ROR A1, par. 124) and settled the divorce case with his wife with no further court hearings after the Special Needs Hearing on August 24, 2005 (R Ex-85).

Paragraph 119 finds that Respondent failed to file a required Financial Affidavit before the Special Needs Hearing. Pursuant to the Rule 12.285, Florida Family Rules, the Financial Affidavit referenced was due 45 days after the complaint was served, which time had not elapsed on August 24, 2005.

(T1039). There is no evidence and no finding by the divorce court, or the Referee, that Respondent attempted to evade court rules, only that his financial affidavit, which was not yet due, had not been filed before the August 24, 2005 hearing. (ROR A1, par. 121).

Paragraph's 125 to 129 find that Respondent signed his wife's name to a home equity line of credit application before she filed her divorce action. Respondent testified that he understood his wife had consented to his signing her name to the application, and expected to have her sign the line of credit mortgage when it was received. After his wife filed for divorce she objected to opening the line of credit and refused to sign the mortgage, whereupon Respondent repaid the home equity line of credit (T954), so that the property could be transferred to her free of any home equity lien. (T953-954). There is no specific finding (B Ex 29 at pp. 86-93 & 91, 94) that Respondent signed his

wife's name without her consent. ® Ex-52; T1028; see ROR A2, par. 126).

Paragraphs 132 to 136 find that Respondent failed to disclose a lis pendens filed by his wife on his San Mateo property to the Bank when applying for a loan. The Referee found in paragraph 133, that lis pendens was filed against the wrong record titleholder and did not create any lien on the San Mateo title. Respondent and the bank relied on the bank's title company to determine whether there was a valid lien against the property, and they found none.(T916-918; R Ex-91; B Ex-101). Respondent testified that he made the title transfers to avoid any liens against the San Mateo property, but denies he ever defrauded any financial institution and there is no evidence or finding to support such a conclusion.

Paragraph 136 finds that the lender made a loan on the San Mateo property which it thought was free of encumbrances. The evidence is that the

property was free of encumbrances and that Respondent and the bank relied on the bank's title company, which determined that there were no encumbrances. (T916-918; R Ex-91; B Ex-101).

Paragraph 137, finds that Respondent stated at the special needs hearing on August 24, 2005,that he had not transferred the title between two of his shell companies. Respondent testified that he had executed and filed a deed from First Coast Land and Title, LLC, to KRH Investments, LLC, in July 2005, but he later discovered the clerk had not recorded that deed, and the bank and its title company recorded the new mortgage on the San Mateo property against the record title holder, First Coast Land and Title, LLC. Accordingly, Respondent testified truthfully at the August 24, 2005 Special Needs Hearing, that he believed the title had not been transferred out of First Coast Land and Title, LLC. (T917-918). A few days after the August 24, 2005, Respondent

transferred title to all of his properties, including San Mateo, joining to himself and his wife, and all of his properties were ultimately sold, and the proceeds divided in accordance with the Marital Property Settlement Agreement. (ROR A1 par. 116).

In paragraph 142, the Referee finds that Respondent attempted to conceal the transfer he made to his sister and that his sister was named as a party defendant in the divorce because of the transfer. There is no evidence that Respondent 's sister was unaware of the transfer and the Referee's findings constitute any violation of law or Florida Bar Rules.

Paragraphs 144-146 discuss the Fairwinds Condominium property, which was purchased in December 2005, after the divorce was filed and after Respondent had repaid his mother $400,000 on August 12, 2005. (R Ex-74, T-888)(ROR A1 par. 45). After December 2005, Respondent transferred title to

Fairwinds Condominium jointly to himself and his wife and when it was sold, the net sale proceeds were split with her in accordance with the Marital Property Settlement Agreement. (R Ex-85)(T960-961).

COUNT IV

In paragraphs 150 - 166, the Referee finds that Respondent involved his client Christine Martinot in business transactions for the purpose of hiding assets from his wife and created KRH Investments, LLC, in the name of Khadija Rhoualmi, as registered agent, managing member and occupying all officer positions ,and that Ms. Rhoualmi was Respondent's client at the time. None of those findings constitute any violation of law or Florida Bar Rules.

Paragraphs 163 to 166 merely chronicle Respondent's business transactions, in which there are no findings of misconduct.

In paragraphs 167 to 174, the Referee finds that Respondent did not involve any

of Ms. Martinot 's funds in his dealings with Green Ville, LLC, but used Green Ville, LLC to transfer title to protect his properties from becoming involved in the divorce proceeding. None of those findings constitute any violation of law or Florida Bar Rules. (ROR A1, par.170). There was no improper involvement of a former client's money in a transaction, because none of the former client's money was used.

COUNT V

In paragraph 175, the Referee makes conclusions which are not consistent with the evidence. The findings in paragraphs 176-195 are discussed below.

In paragraphs 176 to 181 the Referee chronicles Respondent's activities in drafting and administering the Taylor Estate and Trust.

In paragraphs 182 to 185 the Referee finds that Respondent leased the Taylor Estate house for less than fair market value, with no finding of what a fair market value rent was, or how much rent was paid. In paragraph 184, the Referee finds that Respondent was obliged to protect the house from

vandalism and to keep it insured and to collect fair market value for the rent.(ROR A1, par. 184) (R Ex- 97). The rental agreement with Ms. Rhoualmi lasted 24 days, from March 7 to March 31, 2006 and for Ms. Monahan for two months, beginning in March 2006. (ROR A1, par182-185). As Co-Personal Representative, Respondent, had legal authority to exercise his discretion in leasing the property. The Referee found that Respondent's notice to the beneficiaries that he had rented the house was misleading. (ROR A1, par. 185). To the contrary, Respondent's letter of February 23, 2006, to the estate beneficiaries, notified them that he had rented the house and the amount of the rent ® Ex-97) (T985), to which they had no objection. None of those findings constitute a violation of law or Florida Bar Rules, and certainly do not rise to a level to justify disbarment.

Paragraphs 187 to 190 and 196 to 197 detail what Mr. Lippes did to

investigate the Taylor trust and estate, but do not reflect any ethical misconduct by Respondent.

Paragraphs 186 and 191through 195, find that Respondent gave late notice to the specific trust beneficiaries, and was late filing one of his accountings. The evidence does not support this finding. (B-Ex 46) (T969). In fact, Respondent notified the specific trust beneficiaries of the trust on February 16, 2006, a few weeks after the trust was filed and corresponded with them extensively before Mr. Lippes appeared on their behalf on May 12, 2006. (R-Ex 17,18,19, 20,22,23,24,25,26,27, 98, 99). The findings do not state why the trust accounting was late, but the documentary evidence shows that it was filed without objection or judicial intervention (B-Ex 46) and it should not be a violation of Florida Bar Disciplinary Rules for a lawyer to file late accounting in a probate proceeding.

LEGAL ARGUMENT

This legal analysis is intended to show that the Referee's recommended penalty is not erroneous, unlawful or unjustified and is supported by the evidence.(Florida Bar Rule 3-7.7 (c)(5)). The Referee's findings of fact were taken verbatim from the Florida Bar Proposed Report of Referee and may appear to infer flagrant, or intentional, violations of The Florida Bar Rules by Respondent. However, taken in context, the facts, the evidence, the law, and Bar Rules, considered as a whole, demonstrate the Referee's Report does not show that Respondent ever exhibited any "corrupt motive" or "fraudulent intent", and no one but Respondent suffered as a result of any of his conduct.

In determining attorney discipline this Court has stated there are three precepts it follows:

"First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and, at the same time, not depriving the public from the services of a qualified attorney due to undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent –sufficient to sanction a breach of ethics and, at the same time, encourage rehabilitation. Third, the judgment must be severe enough to deter others who might be prone to become involved in like violations. This Court continues to be mindful of these considerations." (The Florida Bar v Adorno, 60 So.3d 1016, at 1031(Fla. 2011).

The Florida Bar Rule 20-5.1(f) provides:

> "...Disbarment is the presumed sanction for lawyers found guilty of theft from a lawyers trust account or special trust funds received or dispersed by a lawyer as guardian, personal representative, receiver, or in similar capacity such as trustee under a specific trust document..."

There is no evidence or finding herein that Respondent was found guilty of theft from a trust account.

As to disbarment, this Court held in The Florida Bar v O'Conner, 945 So.2d 1113, at 1120 (Fla. 2006) that:

"Disbarment is an extreme form of discipline and is reserved for the most egregious misconduct. See Fla. Bar v. Summers, 728 So.2d 739, 742 (Fla. 1999); see also Fla. Bar v. Cox, 718 So.2d 788, 794 (Fla. 1998) (holding disbarment is appropriate where there is a pattern of misconduct and a history of discipline); Fla. Bar v. Kassier, 711 So.2d 515, 517 (Fla. 1998) (holding disbarment is an extreme sanction that should be imposed only in those rare cases where rehabilitation is highly improbable)."

This is not such a case. First, as the Referee found, Respondent was admitted to the Bar in 1975 and has no prior disciplinary history (ROR A1, pages 72-73). Second, upon close examination of the Referee's Report, only Count III could support any inference of any corrupt motive in Respondent's attempts to protect his real estate contracts from being disrupted by his wife's divorce proceedings. After the Special Needs Hearing in August, 2005 (ROR A1, par. 163), Respondent reacquired the title to all of his properties jointly with his wife, so that she sustained no loss and actually profited from the transactions he had

been able to consummate prior to their Marital Property Settlement Agreement. Third, no one suffered loss except Respondent, as a result of Respondent's alleged misconduct. Fourth, Respondent never violated any court order or lis pendens in making any title transfer.

Respondent's alleged misconduct was highly inconsistent when compared to his 35 years of service as a lawyer with no prior disciplinary history. Complete rehabilitation appears likely as the alleged events occurred in 2005, and Respondent has not incurred any disciplinary complaints since then. In 2005, Respondent was suffering from physical and mental maladies, and emotional distress arising from his wife's divorce action and for a short period of time acted irresponsibly. (ROR A1, par. 116).

Other Findings of the Referee are inconsistent with any violation of law or Florida Bar Rule and do not support disbarment.

There is no evidence that Respondent defrauded any financial institution and no concern was ever expressed by any financial institution.

There is no evidence that Respondent mishandled the Taylor estate or trust, other than Mr. Lippes letter in May 2006 demanding that he resign. The Court awarded Respondent his fees for his services in the estate and the trust and closed both the trust and the estate based on Respondent's final accountings and petitions with no objection by any person.

Mr. Shelton's attorney, Mr. Lippes, dismissed Respondent as a party to Mr. Shelton's St. John's County action and did not join him in the Shelton Estate action in Duval County on the same issues, which went to trial, inferring that Mr. Lippes did not find Respondent responsible for Ms. Rhoualmi's conduct.

There is no evidence that Respondent defrauded or acted illegally with his mother's money, and the record shows that she was repaid by a transfer to her

bank account of $400,000.00 on August 12, 2005, and by a final accounting in his father's estate showing that $63,000.00 had been paid from that account for her care and support. There was never any complaint by his mother or his sister about his handling of his father's estate, and the Georgia Probate Court closed the estate in January, 2009, based on Respondent's interim accounting in December 2006, and his sister's final accounting of December 2008, with no negative reflection on Respondent.

In The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977), this Court held:

> "Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings." (See also The Florida Bar v. Summers, 728 So.2d 739, 742 (Fla.1999)).

The cases cited by the Bar to support disbarment do not mandate disbarment of Respondent herein and are otherwise distinguishable. The Bar cited, Florida Bar v Poplack, 599 So.2d 116 (Fla. 1992), in which the Bar's petition for a 91-day suspension with probation instead of the Referee's recommended 30-day suspension with 18-month probation and counseling was denied. The evidence was that Poplack lied to a police officer, and in lieu of prosecution completed a pre-trial intervention program.

The Referee herein concluded that Respondent lacked credibility on several issues, but there was no evidence or finding that Respondent ever lied under oath, or has ever been convicted of a crime.

In Poplack, supra, this court held that:

"... in reviewing a Referee's recommendations for discipline, the scope of review is broader than afforded to findings of fact because it is our responsibility to order the appropriate punishment. The Florida Bar v Anderson

538 So.2d. 852, 854 (Fla.1989) However, a Referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. (The Florida Bar v Lipman, 497, So2d. 1165, 1168 (Fla. 1968)..." (Poplack, supra, at 119.)

Many of Respondent's real estate transactions were complicated and perhaps confusing. This fact alone may have appeared to support a finding of lack of credibility, where none actually exists. The confusing state of Respondent's affairs is exemplified on page 26 of The Bar's Initial Brief. The Bar alleges that Respondent had no credible explanation as to why funds were deposited into one of the LLC's he controlled, Green Ville, LLC., instead of another LLC owned by him, KRH Investments, LLC. Because Respondent could not recall why that happened at the final hearing, the Bar inferred that he lacked candor. "Why" that was done is not relevant to any issue herein, as Respondent controlled both entities, and maintained ownership of all of the funds

in either case.

The Bar challenges Respondent's credibility, concluding he was untruthful when he testified that the Washington Mutual mortgage must not have been recorded properly. Respondent reasoned that to be the only explanation for how his buyer got clear title without paying off Washington Mutual's mortgage.

The Washington Mutual mortgage appears to particularly trouble The Bar, as it continues to discuss it on page 28 of its Initial Brief. Respondent sold the Coquina Key property in return for a "wrap mortgage" that required the Respondent, as seller, to keep Washington Mutual's underlying mortgage current until the buyer paid off the wrap mortgage. Respondent received approximately $32,000 down at the first closing in 2004, only enough to pay the Realtor's commission, so there were no funds to repay the Washington Mutual mortgage until 12 months later when the buyer paid off the "wrap mortgage" and

Respondent received $545,000. He paid off that mortgage, after waiting to ensure that the title company's check had cleared. Until that time Washington Mutual's monthly mortgage payments were timely paid by Respondent. The Bar apparently does not understand the mechanics of a "wrap mortgage", but those facts do not infer that Respondent lacks credibility, or defrauded the lender.

The Bar again challenges Respondent's credibility on page 28 of it's Initial Brief in connection with his divorce case. Respondent testified in his deposition in the divorce case, that in his opinion the San Mateo property was a non-marital asset, based upon the fact that some of the funds used to buy San Mateo came directly from his mother and some from funds she had deposited in the bank account of his father's estate. The final Marital Property Settlement Agreement, was executed after Respondent had repaid his mother $400,000.00, on August 12, 2005, with his wife's consent. Accordingly,

Respondent allowed the San Mateo property he had previously testified was an asset of his father's estate or his mother, to be included in the final Marital Property Settlement Agreement. No credibility issue arises from Respondent's deposition testimony because any interest of his mother or his father's estate in the San Mateo property was extinguished on August 12, 2005, with the repayment of the $400,000.00, after which the San Mateo property became a marital asset.

On page 29 of its Initial Brief the Bar contends that because Respondent took the Fifth Amendment on advice of counsel, he had been untruthful, when he previously denied being intimate with Ms. Rhoualmi. Respondent testified herein that he took the 5th Amendment on advice of counsel. Respondent was advised that to even to answer in negative, could constitute a waiver of his privilege in light of the Florida Adultery Statute. Whether or not Respondent's friendship with

Ms. Rhoualmi involved a sexual relationship is not relevant as to whether he acted in concert with her to defraud Mr. Shelton and there is no evidence that he did.

On pages 31-38 of the Bar's Initial Brief, The Bar cites a string of cases (Della-Donna, infra, Maynard, infra, Klein, infra, Kaufman, infra, and Swofford, infra.) in support of its petition for this court to impose disbarment on Respondent. All of those cases were petitions by the Respondent therein to review a Referee recommendation for disbarment. All of them upheld the Referee's recommendation for disbarment because the Referee's recommendation on discipline which is afforded a presumption of correctness unless it was clearly erroneous or not supported by the evidence. (Poplack, supra.).

In the instant case the Bar seeks to substitute the Referee's

recommendation for a 91-day suspension with disbarment, which should be denied in accordance with Poplack, *supra* .

Respondent testified that he rented the Taylor house at a low rent for two months so that it would be occupied to deter vandalism, qualify for insurability, and be cleaned for the market by the tenants. There is no finding that Respondent rented the house or used the rent revenues for his personal benefit, and the estate records show that $800.00 in rent revenues was deposited into the Estate. There is no finding as to what a fair market value of rent would have been, or the value of the house being occupied and the tenants services to clean the house for the market. Respondent testified he made that decision in the best interest of the estate by having the property occupied for a short time before putting it on the market.

The case of The Florida Bar v Maynard, 672 So.2d 530 (Fla.1996) is distinguishable from these proceedings. In Maynard the attorney loaned trust funds to himself and others for personal gain and was disbarred. Respondent herein used his mother's money to invest for her benefit, and repaid her $400,000.00 on August 12, 2005 and used $63,000.00 of her funds in his father's estate bank account for her care and support.

Page 33 of the Bar's Initial Brief alleges Respondent assisted Ms. Rhoualmi in exploiting Mr. Shelton. Ms. Rhoualmi testified that at the clerk's office she wrote on one of the deeds that it was prepared by Respondent. Drafting of the deeds and signing a check which may have paid a recording fee, do not constitute fraud, where Respondent was not present when Mr. Shelton executed the deeds, did not counsel Mr. Shelton on the deeds and did not participate in procurement of Mr. Shelton's signature.

On page 34 of its Initial Brief, the Bar cites The Florida Bar v Klein, 774 So.2d 685 (Fla. 2000) in support of disbarment of Respondent, because he signed his wife's name to a line of credit application and attempted to prevent his wife's divorce action from disrupting purchase and sale contracts on property he owned. Klein engaged in improper forum shopping, was in contempt of Court for failing to comply with Court orders, failed to produce records in violation of court orders, filed a frivolous and untimely motion for attorney's fees, suffered a summary judgment in the Bankruptcy Court, which found he had fraudulently transferred assets, and had prior disciplines in 1967, 1977, and 1992. Respondent's transfers herein were not in violation of any court order or lis pendens. No assets or funds of any client were dissipated.

On page 35 of its Initial Brief, The Bar alleges Respondent forged his wife's name to an application for a line of credit. There is no specific finding by

the Referee that Respondent forged his wife's name. (ROR A1, par. 126). Respondent admitted he signed her name to the document without her specific authority, although at the time he mistakenly understood her previous written agreement provided that he could do so. When his wife later objected and refused to sign the line of credit mortgage, he paid it off.

On page 36 of its Initial Brief, The Bar cites The Florida Bar v Kaufman, 684 So.2d 807 (Fla. 1996) to support disbarment because of Respondent's transfers of properties during his divorce proceedings. The Court denied Kaufman's petition to review the Referee's recommendation for disbarment, because Kaufman violated numerous discovery deadlines, lied to the Court about his assets, and dissipated assets. Respondent herein did not violate any discovery deadlines, did not lie to any court about his assets, and did not dissipate any assets.

On page 37 of the Bar's Brief, The Bar cites The Florida Bar v. Crabtree, 595 So.2d 935 (Fla. 1992) to support disbarment of Respondent. The Bar's Proposed Report of Referee (BPROR A2, page 70), cites Crabtree, supra, to support its recommendation for a 91-day suspension.

Page 38 of The Bar's Brief cites The Florida Bar v Swofford, 527 So.2d 812 (Fla. 1988) to support disbarment because Respondent allowed a bank to issue a loan based on the record titleholder in its title binder and for signing his wife's name without her authority to a line of credit application. In Swofford, the attorney advised a lender to make two loans that were usurious and therefore illegal, and made an unconscionable personal profit from the sale of his client's property, which he did not disclose to the client. Respondent herein advised the bank that title may have changed, but the bank insisted on making the loan in the name of the title holder identified in its title binder. Neither the lender bank

nor the credit line bank suffered any loss, as both loans were timely repaid in full.

The Bar references Standard 4.61 to support disbarment based upon Respondent's alleged involvement in defrauding Mr. Shelton. As the Referee found, after Respondent discovered the existence of the deeds, he tried to obtain Quit Claim deeds from Ms. Rhoualmi deeding the property back to Mr. Shelton. The Referee's finding infers that Respondent could have had knowledge of the preparation of the two deeds is not dispositive of Respondent's complicity in Ms. Rhoualmi's fraud. There is no evidence or finding that Respondent was active in the procurement of Mr. Shelton's signature, or the filing of either deed.

ISSUE III

THIS COURT SHOULD TAKE INTO CONSIDERATION ALL MITIGATING FACTORS

In mitigation of any misconduct by Respondent the Court should consider the following:

1. Respondent engaged in the practice of law in Florida for 35 years with no disciplinary history before the events upon which he was accused of misconduct herein.

2. During the time the alleged misconduct occurred, Respondent was undergoing treatment for acute Parkinson's Disease, and was under severe emotional distress resulting from his wife's attorney's vigorous pursuit of him in her divorce proceedings.

3. The Referee accepted into evidence by stipulation Respondent's award on March 23, 2002, of The Florida Bar's Clayton B. Burton Award, presented annually to the Florida attorney who best exemplifies

service to our military veterans (R Ex-104, T993-994). The award reads in part:

> "The Clayton B. Burton Award of Excellence Awarded to Henry T. Swann, III for Demonstration of Character and Leadership in Promoting the Quality of Legal Services Furnished to Military Personnel Serving in the State of Florida."

Respondent suggests this award is evidence that he is a qualified attorney whose services should not be denied to potential clients including military veterans, and that Respondent is a good candidate for rehabilitation, pursuant to Adorno, supra, at 1031.

CONCLUSION

The recommendation of the Bar in its Proposed Report of Referee, and the Report of Referee, that Respondent be disciplined by a 91-day suspension, should be sustained, based on the evidence herein. There has been no showing

by the Bar that the Referee's recommended penalty is erroneous, unlawful or unjustified, or unsupported by the evidence, or case law, which this Court must find to overcome the presumption of correctness accorded to the Referee's disciplinary recommendation.

The Referee's recommended discipline is supported by reasonable case law, Respondent's lack of disciplinary history over 35 years, his health and emotional state during the time of the events alleged herein, and the Florida Bar's award to Respondent for leadership and character mitigate against the extreme discipline of disbarment, and for the 91-day suspension recommended by the Bar in its Proposed Report of Referee, and the Referee herein.

WHEREFORE, Respondent prays this Honorable Court will confirm the Bar's and the Referee's recommended discipline of a 91- day suspension, with proof of rehabilitation required before reinstatement, and payment of assessed

costs as a prerequisite to reinstatement.

Respectfully submitted,

By:_____

James C. Rinaman, Jr.

Attorney for Respondent

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Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of Respondent's Brief and Appendix have been sent by Federal Express and email to the Clerk of Court, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927; and a copy of the foregoing has been furnished by regular U.S. Mail to Complaint's Counsel, Frances R. Brown-Lewis, Esquire, Bar Counsel, The Florida Bar, 1000 Legion Place, Suite 1625, Orlando, Florida 32801-1050 and Kenneth Lawrence Marvin, Esquire, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this 31st day of May, 2012.

Respectfully submitted,

By:_____

James C. Rinaman, Jr.

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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 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: _____

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC11-836

TBF File No. 2008-31,207(07B)

v.

HENRY T. SWANN, III

Respondent.

_____/

APPENDIX INDEX TO ANSWER BRIEF AND BRIEF ON CROSS PETITION FOR REVIEW OF RESPONDENT

Page

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