IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ROBERT BRAKE and
EILEEN BRAKE,

Respondents.

_____/

Supreme Court Case
Nos. 87,466
88,104

ANSWER BRIEF OF THE FLORIDA BAR TO BRIEF OF ROBERT BRAKE

ARLENE KALISH SANKEL
Bar Counsel
Florida Bar No. 272981
444 Brickell Avenue
Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN F. HARKNESS
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(850) 561-5600

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(850) 561-5600

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STATEMENT OF THE CASE AND FACTS

There is an obvious degree of difficulty in seeking to present the salient facts pertaining to ten years of litigation and appeals. At the outset, however, the origins of the consolidated disciplinary proceedings before the Referee should be placed in focus.

There were three areas of litigation between Respondent Eileen Brake (who filed a separate brief), her husband Robert (this Respondent), and two other beneficiaries of the estate of Eileen's mother (Eileen Ellis Murphy), namely Richard and Eve Murphy. The first source of litigation resulted from conflict of interest. Eileen, as personal representative of the estate, was almost constantly in conflict with the interests of Richard and Eve. Robert, her husband, acted as her attorney and had the same conflicts. A fourth beneficiary, Dennis Murphy, now deceased, was allied with Eileen and Robert in regard to most of the matters in dispute.

The conflicts, particularly regarding the sale of the estate property, and mortgages held by the Brakes, resulted in legal action. The Brakes were removed from their respective roles by two different judges due to conflict of interest. (TFB exhs. 12 and 19). The Brakes failed to sell the estate property and purchased it

themselves for $595,000 on terms considerably different from a cash offer from the Deganis for $700,000 "as is." (T. 364). That produced the second area of litigation, namely a surcharge suit. A surcharge was entered against Eileen based upon the four mortgages and, initially, the foreclosure action. On appeal, the surcharge was affirmed as to the fourth mortgage only. Brake v. Murphy, 636 So.2d 72 (Fla. 3d DCA 1994). In a later decision, the Court stated that "the imposition of the bulk of the surcharges was affirmed by this Court." Brake v. Murphy, 678 So.2d 374 (Fla. 3d DCA 1996). The surcharge was ultimately reversed and remanded for further proceedings not upon the merits, but based upon two one-fourth hour notations of communication with the Court regarding the final order on the timeslips of Eve's counsel in the surcharge action. Brake v. Murphy, 693 So.2d 663 (Fla. 2d DCA 1997).

The third area of litigation arose out of the surcharge. One day after the surcharge order was entered against Eileen Brake, she conveyed her interest in the estate property to Robert. That transfer resulted in a fraudulent conveyance action in which Eve and Richard prevailed on the merits. That case was also reversed and remanded on the basis that it had been pursued by the wrong plaintiff. (i.e. should have been pursued by the personal representative.) Brake v. Murphy, 687 So.2d 842 (Fla. 3d DCA 1996).

Again, there was no reversal on the merits of the case.

SUMMARY OF ARGUMENT

First, it is readily apparent that Respondent has not met his burden of proving error in regard to a finding of conflict of interest. As attorney for his wife the personal representative, the Respondent was constantly in conflict situations with the other beneficiaries, Eve and Richard Murphy. Respondent had to be removed by court orders because he failed to recognize the conflict.

Conflicts arose due to mortgages on the estate property which were the basis for foreclosure by the Respondent and his wife. For approximately one year, the other beneficiaries had requested an accounting and documentation of the mortgage and promissory notes. That documentation was provided only after a court order was entered.

Respondent's reliance upon an 1889 case totally lacks merit. That case does not deal with ethical issues. It decided a matter regarding forfeiture of a creditor's interest and is inapplicable to this situation.

Second, Respondent has failed to meet his burden of showing error regarding a finding of bad faith negotiation. Both beneficiaries had strongly urged a sale to the Deganis on terms that had been offered, namely $700,000 cash and "as is." The

Respondent and his wife were inaccessible and negative, constantly adding "crazy" requirements. They denied a meaningful inspection. The Respondents were, at times, totally unresponsive.

The Deganis remained very interested in the building from the time of their offers in 1989 until January 1990. They tried to establish meaningful communication and negotiations with the Brakes through Richard and his nephew, Joe Murphy, Jr. The beneficiaries repeatedly requested that the Respondents negotiate with the Deganis. Their efforts failed and the Deganis "gave up." Their attorney, among others, testified that the Brakes and Dennis did not want to sell the property and dealt with the offers in bad faith. The preferred offer of $700,000 in cash was not accepted. Eileen and her brother, Dennis, bought the property for $595,000, and not for cash.

Third, Eileen was surcharged on June 21, 1993. On the following day she conveyed her interest in the building to Robert. She claimed that she did so because of an assassination threat.

The applicable facts, including the fact that all of the Brakes' assets were jointly owned, lead conclusively to the finding of a fraudulent conveyance. The resulting trust theory advanced by Respondent is incorrect as a matter of law. Applicable case law holds that a transfer to a wife in this factual context is viewed

as a gift; unequivocal evidence of a resulting trust must be established, and a trust cannot arise in favor of a party participating in a fraud.

The fourth argument pertains to Robert's representation of Eileen's brother, Dennis Murphy, as successor personal representative, after Eileen and Robert were removed by court orders. Respondent Robert has stated on the record that Dennis was on Eileen's side on most issues. Evidence that their interests were virtually identical is abundant. Dennis and Eileen both resisted the sale of the property to others and purchased it themselves. There is no error in finding a conflict of interest in Robert's representation of Dennis.

Respondent's fifth "Argument" is an inappropriate utilization of the appellate forum. He proclaims the existence of many mistakes and errors on the part of the Referee. He does not relate those alleged mistakes to specific legal issues or rulings which were raised in his brief. Rather, he seeks to undermine the Referee's authority by listing numerous alleged errors in the appendix. This non-argument is totally lacking in legal authority or precedent of any kind. It is a presumptuous declaration that Respondent is the final arbiter of what is right and wrong. The Bar is confident that this Court will disregard this totally

inappropriate attempt to undermine the Referee's order.

Sixth, Respondent has demonstrated no error regarding a finding of frivolous pleadings. Respondent's entire argument is predicated upon those situations in which the trial court ruling was to any extent reversed by the appellate court. It is not surprising, however, that a party prevailed in regard to some appellate issues during ten years of litigation.

The evidence of frivolous pleadings survives the fragmentary success of the Respondents in several appeals. There is clear evidence to the effect that Respondent, and his wife and brother in law, threatened lengthy litigation, including RICO and civil theft claims, and carried out the threats. Numerous additional examples of frivolous pleadings exist, including the multitude of motions made after the Administrator Ad Litem was appointed, resisting that appointment, and in the proceedings before the Referee.

Seventh, the Respondents engaged in conduct that had tremendous impact upon the economic well being of the beneficiaries and upon family harmony. Ten years of costly litigation resulted, and the issues are not finally resolved. The Respondents engaged in fraudulent conduct. Respondent Robert was responsible for multiple violations. There is a substantial body of case law which establishes that a one year suspension is an appropriate

disciplinary recommendation. While there may be some cases wherein individual judgments suggest that discipline was too lenient for the offense, that does not negate the need for substantial discipline for substantial violations in this case.

ARGUMENT

I

THE RESPONDENT HAS FAILED TO ESTABLISH THAT THE EVIDENCE WAS INSUFFICIENT TO PROVE A CONFLICT OF INTEREST (REPHRASING RESPONDENT'S ARGUMENT I)

Respondent asserts that being a creditor of an estate does not disqualify an individual from being attorney to the personal representative. The Bar would submit that the rule asserted by the Respondent cannot by substantiated, (2) that the 1889 case cited by the Respondent does not even vaguely pertain to these facts and (3) there is sufficient evidence of a conflict under Bar rules which were not considered in the case cited by Respondent.

As stated in The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994) that the Referee's findings will not be overturned unless clearly erroneous or lacking in evidentiary. Also, those findings will enjoy a presumption of correctness.

An examination of the applicable rule and the evidence presented at the final hearing clearly reveals that Respondent has not met his burden. Rule of Professional Conduct 4-1.7(b)

provides:

> **(b) Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after the consultation.

Although the beneficiaries were not the clients of Mr. Brake, he had a fiduciary duty toward them. As stated In Re Gory, 570 1381, 1383 (Fla. 4th DCA 1990); "counsel for the personal representative of an estate owes fiduciary duties not only to the personal representative, but also to the beneficiaries of the estate..."

Florida Statute 733.602 (1987) provided (and continues to state) that the personal representative must follow the standard of care set forth in Florida Statute 737.302:

> **737.302 Trustee's standard of care and performance.** -Except as otherwise provided by the trust instrument, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent trustee dealing with the property of another.

The prudent man test stated in Florida Statute 518.11 (1987) is

"the judgment and care under the circumstances then prevailing which men of prudence discretion and intelligence exercise in the management of their own affairs ..."

The Brakes held four mortgages on the estate property, and promissory notes. That fact was one aspect of a bitter family feud which has lasted for approximately ten years and still continues in the form of litigation and non-communication. That the attorney for the personal representative, who was also her husband, could not perceive to this day the existence of a conflict is beyond belief. As the Referee stated after listening to many days of testimony and reading hundreds of pages of transcripts:

> However, the Referee is greatly disheartened by Mr. Brake's refusal to admit that he may have made even one error in judgment throughout the past ten year Murphy - Brake Saga. (ROR, p. 17-18)

Eve Murphy, though her son and former attorney, Joseph Murphy, Jr., wrote in February, April, May, June, July and August asking for documentary support for the notes and mortgages. (TFB exh. 45, p.110). A court order was ultimately entered requiring that the requested documents be furnished. (TFB exh. 8).

When an Administrator Ad Litem was appointed to participate in a foreclosure of the mortgages on behalf of the estate, the Respondents, as discussed infra, filed a number of motions. The

Administrator, Herb Stettin, testified that the Respondent "made a concerted effort to prevent me from assuming the responsibility and carrying out the responsibilities of administrator ad litem." (T. 656).

If conflict was not apparent previously, it was blatant when in a September 11, 1989 letter (TFB exh.14) Eileen said that she was suing Eve for civil theft, for RICO, for specific performance, for unpaid rents and Joe Murphy, Jr. for rents. (TFB exh.45, p.110) Conflict was readily apparent when Eve and Richard filed a Petition for Removal of the personal representative and Eileen was removed when she and Robert sought to foreclose their mortgages on the estate property. (TFB exh. 45, T. 152).

Eileen and Robert resisted the appointment of an administrator ad litem even though Eileen was ostensibly suing herself in the foreclosure action. (TFB exh. 45, T. 130, 149-150). She did not consider that to be a conflict, (TFB exh. 45, T. 149-150) nor apparently did Robert. The Brakes moved for rehearing after Stettin's appointment. (T. 130).

Eileen and Robert, faced with subsequent surcharge litigation against Eileen filed the threatened civil theft and Rico counterclaims, among others. (TFB exh. 15) The Brakes ultimately dismissed the counterclaims voluntarily. (TFB exh. 48).

Judges Newman and Featherstone found that a conflict existed (TFB exhs. 12 and 19). Ed Golden testified that a conflict existed (T. 988) as did Herb Stettin (T. 674).

In the face of all of the foregoing conflicts, friction and animosity between the Brakes and the Murphys, Respondent cites one 1889 case for the proposition that a creditor is not automatically disqualified as a personal representative. First, that is not what Dean v. Wilcoxon, 7 So.2d 163, 176 (Fla. 1889) holds. The argument presented in that case was that a debt was extinguished when the personal representative was also a creditor (i.e. had a duty to pay as well as to receive funds). The Court rejected that argument. That does not mean that all creditors subsequent to the case were permitted to serve as personal representatives without regard to ethical rules prohibiting conflict. In other words, Dean has absolutely nothing to do with this case. Dean did not involve ethical rules concerning conflict of interest, nor facts similar to those which pertain to this case.

ARGUMENT
II

RESPONDENT FAILED TO PROVE THAT EVIDENCE OF BAD FAITH NEGOTIATION IS LACKING (REPHRASING RESPONDENT'S ARGUMENT II)

Both Eve and Richard Murphy testified as to their dissatisfaction with the manner in which the Brakes responded to the Degani offer. Eve was anxious to see the property sold because she needed the money, and she told Eileen of her wishes in that regard.(T.346,357).

Initially, Eve advocated a price of $700,000.00(T.352,353), but as time went on she was willing to accept less.(T.357). In addition to the fact that she needed the cash, the building was deteriorating(T.347) and was not generating income(T.362). Richard also wanted to sell the property.(T.348).

The Deganis had originally offered $700,000.00 as is(T.357). That fact was confirmed by Richard(T.467) who received many calls from the Deganis because the Brakes were not responding. As Richard testified:

> Q. "And what were the Deganis telling you ?
>
> A. They were telling me they were very interested in both properties and they would like to move ahead but they are not getting satisfaction from talking to the Brakes about it. They even made a trip up there to North Carolina and stopped by where I lived and

> wanted to know why they couldn't get something going. I said, because you have to go through the people down there.
>
> Q.Were you anxious to sell it for $700,000.00?
>
> A. I have been anxious to sell it for way before all this happened.
>
> Q. Why was that?
>
> A. Well, at first of all, I wasn't getting an office up in the building. I was strictly the outsider in the group, and I even tried to get Mr. Brake to trade me my interest for a house he had in South Dade way back when. That shows how interested I was in getting out of the building. It was not making money, and there was no prospects of renting it and what have you. Nobody would do anything on that.(T.438).

The $700,000.00 "as is" offer was also confirmed by Deborah Deganis(TFB exh.36, p.147) who also testified that the Brakes did not respond to their offers. (TFB exh.36, p.140).

The Deganis made several offers in accordance with the requests of the Brakes. The first offer was $750,000.00 for the office building and former residence of the parents of Eileen, Richard, Dennis and Joe Murphy. (TFB exh.36, p.139). They received no response (TFB exh.36, p.140) and arranged for a meeting with the Brakes only after many telephone calls. (TFB exh.36, p.140).

Two subsequent offers were submitted, namely $900,000 for the

two properties and, later, $950,000. These were cash offers and "as is", merely subject to inspection. (TFB exh.36, p.141,142,144). Again, the Brakes were not responding.(TFB exh.36, p.145). When they finally arranged a meeting, they were told that the house was not for sale (TFB exh.36, p.146).

The Deganis then offered $700,000 for the building "as is" (and $250,000. for the house).(TFB exh.36, p.147). The Brakes did not accept the offer. (TFB exh.36, p.147).

Subsequently, a contract was submitted by the Deganis to the Brakes, containing a $700,000 offer for the building. (TFB exh.36, p.149). Since they did not obtain <u>any</u> response from the Brakes, the Deganis called Joe Murphy Jr. and Richard Murphy regarding their pending offer. (TFB exh.36, p.149).

Jeff Trinz, attorney for the potential buyers, wrote to Robert Brake in October of 1989. He wrote, in part that "<u>it is apparent to me that your client is not negotiating in good faith</u>." (TFB exh.36, p.151). Mrs. Degani explained that her "husband was very interested in the building ... for his own personal business..." (TFB exh.36, p.151).

Eventually the Deganis "gave up". They were not getting answers or they were receiving demands for inclusion of "crazy terms" from the Brakes (TFB exh. 36, p. 153) which included paying

all the taxes for the year, without proration.(TFB exh. 17h).

Eve and Richard had urged the Brakes to negotiate with the Deganis.(T.359). After a considerable amount of time had elapsed and nothing had been worked out with the Deganis, Eve wrote to the Brakes on October 13, 1989. Her letter reflected her frustration and that of Richard regarding the failure to accept the Degani offer. As she stated:

> " I do not agree that we should list the property in question. We have a perfectly good offer pending, and I would like to see it negotiated as soon as possible. Dick and I have expressed our desire to accept the Deganis' offer over and over again, and I am, again, reiterating my desire to accept their offer. It is all cash, it is as is, and should have been negotiated long ago. The Building is deteriorating by the day and the taxes keep adding up. It should have been sold a year ago." (Bar's exh. # 35).

In view of the lack of responsiveness to the Deganis' offer, Eve wrote again on November 2, 1989 as follows:

> Dear Bob and Eileen: I do not understand why you two are being so pigheaded about disposing of the office building. I have always responded to your communications and your suggestions with the same response, which is, we agreed back some months ago to sell the building for a net of $700,000. We have had an offer of purchase at this price, and I have at all times requested and authorized the estate to negotiate this offer. You will notice that I say negotiate. This means to discuss the prospective buyer's representative

> the terms that you have been authorized by the heirs to accept and, hopefully, to come to a conclusion that we have been looking for all along to sell the building for $700,000. cash, and soon. The buyers have every right to make inspections. We just advised them that we will not pay for any repairs which are deemed necessary. To say my son, Joe, Junior has been negotiating with the Deganis is ridiculous. They only speak to him when they are unable to speak to either/or both of you."(R. Exh. 321).

Richard concluded that the Brakes had a plan to obtain the property for themselves from "day one".(T.447-448). Eve arrived at the same conclusion.(T.364). Ronald Buchsbaum, who also dealt with the Brakes, testified that they were not interested in selling the property. (TFB exh. 46, P.105). The Brakes did purchase the building for $595,000.00 and not for cash.(T.364). That conclusion that the Brakes sought to buy the building was based, in part, upon the fact that <u>all</u> of the beneficiaries had initially agreed to accept the $700,000.00 for the building and $250,000.00 for the home(T.437), but, on the day following the date of the agreement Eileen, Dennis and Robert said that they did not wish to accept that offer.(T. 437).

Richard continued to urge Eileen to sell the property. Her response was hostile. As Richard testified:

> "Definitely, Definitely. I went to my sister

> and - hey, these people want to buy. And I -- Let's sell. And I believe everybody wanted to sell up to that point, because everybody had expressed this in any meetings, anything else, if they could get the right price, they would sell. I said, let's do it. All I got - I was put off on it and put off on it to the point where my sister eventually told me that I should get a good attorney. I said, well, you are a good attorney. You are the personal representative. She said, well, you better get yourself a good attorney. So that brought it to my head what was happening, that, really, we weren't going anywhere on selling the house or the office building without some more help from the court." (T. 439).

The respondent's argument, in the face of the foregoing evidence, should be viewed as irrelevant, in addition to being factually incorrect. It is irrelevant since it assumes that sufficient proof of bad faith negotiations is dependent upon willingness to contract on an "as is " basis. However, as pointed out above, there is a plethora of evidence of unresponsiveness on the part of the Brakes, i.e., a failure to reply or to negotiate a contract. There is no evidence that the negotiations broke down because of the "as is" matter. Furthermore, "as is" was the original position of both the Deganis and the beneficiaries . However, negotiation of that issue clearly became a necessity because the Brakes had been constantly unresponsive to the original offers, of which there were several, and because the Brakes asked

the Deganis to disclaim all warranties and to forego inspection. (TFB exh. 17h; T. 1016).

The referee merely mentioned the "as is" clause as an "example" of the respondents transparent defense. Respondent's factual basis regarding this issue is false. The respondent claims that there was "uncontradicted testimony" that Eileen said they could make any inspections they desired. Respondent also states that Mrs. Degani corroborated this. Respondent offers no references to the record in support of the arguments.(p. 16, Respondent's brief).

The record is quite clear. The transcript of the surcharge trial reveals the following question addressed to Deborah Degani and her answer:

> Q. Did Mr. and Mrs. Brake allow you to come in and make inspections ?
>
> A. Well, they said no. They said as is means as is.(TFB exh. 36, p. 143)

There is no evidence that the two hour visit to the premises by the Deganis, to which Respondent refers, can be regarded as an "inspection" as Mrs. Degani's testimony makes clear.

Respondent also claims in his brief that Eve and Richard had not seen the contract and would not have signed it because it did

not have an "as is' clause.(Respondent's brief, p.16) The claim is unfounded.

Richard testified that "up front they (the Deganis) were willing to buy the building as is."(T.467). He added that they changed later, but early on they would have bought the building "as is".

Eve also pointed out that the contract was submitted a year after the original "as is" offer, stating:

> But I would just like to point out that this was over a year after they made their initial offer of all cash, as is, and wanted inspections only to know what they were going to have to pay.(T.374)

Deborah Degani confirmed that the original purpose of inspections was limited to knowledge of exposure and not elimination of the "as is" understanding.

> The Court: If you buy it as is, can you back out if you find something wrong ?
>
> A. The majority of the properties I own are the Gables and they are older properties. I have renovated everything I own. So, all I was asking was -- basically, I know what I'm getting into, because I've renovated six properties in the Gables now. I just want to know what I'm buying. Let me run my inspection, let me see what I'm buying.(TFB exh. 36, p.142).

Therefore, it is apparent that the argument of respondent that the inspections could have served as a basis for rescission is incorrect. Furthermore, with proper negotiation some agreement might have been worked out with the buyers. Mrs. Degani testified that she remained interested in the property until January of 1990. (TFB exh. 36, p. 151).

The Respondent, instead of negotiating in good faith, searched for reasons for not going forward with negotiations. As Richard testified, they did not bring offers to the Court (T.441) and continually obstructed the sale of building and of the house which was sold on the courthouse steps. (T.449).

Respondent has failed to meet his burden of proving a lack of evidence or findings that are clearly erroneous.

ARGUMENT
III

THE RESPONDENT HAS FAILED TO DEMONSTRATE ERROR IN REGARD TO THE FINDING OF A FRAUDULENT CONVEYANCE (REPHRASING RESPONDENT'S ARGUMENT III)

On June 21, 1993, an Order Surcharging Eileen M. Brake was entered in the adversary proceeding in the amount of $142,675.00. Respondent's conduct at the time of the surcharge order is the issue presented by The Bar. The current status of the

surcharge order after the Third District's ruling in Brake v. Murphy, 693 So.2d 663 (3d DCA 1997) is immaterial.

At the time the Surcharge Order was entered, Eileen was the owner in fee simple of a one-half (½) undivided interest in the office building that was the subject of the litigation. One day after the entry of the original Surcharge Order, Eileen Brake transferred the property to her husband, Robert, by means of a Quit Claim Deed dated June 22, 1993. The Quit Claim Deed clearly shows that minimum documentary stamps of $0.60 and additional documentary stamps for the minimum amount of Dade County surtax for commercial property of $0.45 were paid at the time that the Quit Claim Deed was recorded.(TFB exh. 25).

On November 10, 1993, the fraudulent conveyance action was brought pursuant to Chapter 726 of the Florida Statutes to set aside the conveyance of Eileen's one-half interest in the property to Robert. There was a determination that there was a fraudulent conveyance. (Case No. 93-21194 CA08, Eve E. Murphy a/k/a Eve Murphy and Richard Murphy, Plaintiffs, v. Robert M. Brake and Eileen M. Brake a/k/a Eileen Brake, his wife, Defendants). The referee has also found that Robert and Eileen engaged in a fraudulent conveyance.

During the course of the civil proceedings, Respondents also produced a copy of a Quit Claim Deed dated November 10, 1992, conveying Eileen's one-half interest to both Eileen and Robert. The November deed was not recorded until November, 1995.

Eileen Brake's testimony regarding the transfer was contradictory and equivocal. She testified under oath several times and provided several versions of what constituted the consideration for transfer.

At the hearing before the grievance committee on September 22, 1994, Eileen was asked about the transfer. The following exchange took place:

> MR. MALAND: Maybe you didn't understand my question. What was it that your husband gave you in consideration for the warranty deed or quit claim deed that you gave to your husband for the building?
>
> MRS. BRAKE: He gave me five years of legal service and over $15,000 worth of costs.
>
> MR. MALAND: Is that it?
>
> MRS. BRAKE: That is it, for my $21,000 interest, and that's all I had in it.
>
> MR. STONE: What is the value of the five years of legal services?
>
> MRS. BRAKE: I would imagine four or five hundred thousand dollars.
>
> (Griev. Trans. p. 208, TFB exh.43)

In the final hearing before the Referee in this case, and in the hearing before the Court in the fraudulent conveyance action, Mrs. Brake has testified that she was acting to save Robert's life by transferring the property to him because Joe Murphy, Jr. threatened to get a hit man. By transferring the property to Robert alone, Eileen contended that the hit man would be thwarted. Property in Robert's name alone would go to their children in trust and not to her. Therefore, there would be no purpose in eliminating Robert. (TFB exh. 44, p.6). She has alleged that motive, although the Court in the fraudulent conveyance case pointed out that the theory was fallacious.

> THE COURT: Let me ask you a question. We are both lawyers, okay? And if you transfer property in the State of Florida to your husband and he dies, don't you have an absolute statutory right to get one-third even if he has willed it all away? So that doesn't make sense to me for a lawyer to make that statement.
>
> THE WITNESS: I don't have to take that right.
>
> THE COURT: But you have it. (TFB exh. 45, 23-24).

Eileen Brake provided a third response, again under oath, as to the alleged consideration. When she was deposed in the Florida Bar proceeding, Eileen Brake indicated the equivocal nature of her position by repeating the death threat story and adding a new

response to a question.

> Q.: And when I asked you earlier, you said love and affection was the consideration.
>
> A.: Maybe his support for 45 years. I don't know. (TFB exh.44, p. 9).

Eileen's answers raise credibility questions regarding the transfer by the Brakes. With that in mind the applicable statutes should be considered. Florida Statute §726.105(1)(a) provides that a transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made if (a) the debtor made the transfer with actual intent to hinder, delay or defraud any creditor of the debtor or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: 2. Intended to incur debts beyond his ability to pay as they became due.

It is clear that Eileen was a "debtor" as F.S. §726.102(6) defines a "debtor" as a person who is liable on a claim. The evidence establishes both actual intent under F.S. §726.105(1)(a) and lack of consideration under section (1)(b)(2). In regard to intent, F.S. §726.105(2) sets forth various factors, most of which are present in this transaction:

1. The transfer was to an insider, Robert M. Brake, Eileen's husband. F.S. 726.102(7).

2. The transfer was concealed [726.105(2)(c)]. The June 1993 deed was concealed from the parties as it was only discovered upon title search done in connection with the enforcement of the Surcharge Order/Judgment (contradicting the testimony that they wanted Joe to know of the transfer in order to save Bob's life.) The November deed was also concealed.

3. Before the transfer was made, the debtor had been sued or threatened with suit [726.105(d)]. The Petition to Surcharge was filed on October 12, 1990. The June 1993 deed was given one day after the Surcharge Order was actually entered, and the November deed during the pendency of the actions.

4. The transfer was of substantially all the debtor's assets [726.105(e)]. Affidavits and deposition testimony in the fraudulent conveyance action and testimony in the final hearing establish that Eileen and Robert have maintained that all of Eileen's assets, except her interest in the Estate and in her deceased mother's house, were jointly owned, as recognized in Respondent's brief (p. 19). Under F.S. §726.102(2)(c) "assets" do not include an interest in property held in tenancy by the entireties to

the extent it is not subject to process by a creditor holding a claim against only one tenant. All of the assets, whether held jointly in a bank account or in real property, were and are immune from process by Eve and Richard in enforcing the Surcharge Order. By transferring substantially all of her assets through conveying the office building to her husband Robert Brake, Eileen transferred substantially all of her assets that were in her name.

5. The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred [726.105(h)]. The nature of the consideration cannot be determined from Eileen's multiple explanations. There is no evidence of consideration. There is no evidence based upon a closing statement or more than nominal documentary stamps.[1]

6. The debtor was insolvent or became insolvent shortly after the transfer was made [726.105(i)]. F.S. §726.103

[1] "While a deed furnished on nominal consideration is not absolutely fraud per se, it does afford prima facie evidence of fraud. Moreover, when a transferee is a relative of the transferor, it tends to establish a prima facie case." Gyorok vs. Davis, 183 So.2d 701 (Fla. 3rd DCA 1966).

provides that a debtor is insolvent if the sum of the debtor's debts is greater than assets at a fair valuation. It is clear from the evidence that after the transfer of the office building, the amount remaining as Eileen's share in the Estate was not enough to pay for the initial amount awarded in the Surcharge Order as well as amounts to be determined by the probate court at further proceedings. Since Eileen's jointly owned assets with her husband are not part of the "assets" as treated by Chapter 726, Eileen became insolvent as a result of the transfer of the office building.

7. The transfer occurred shortly before or shortly after a substantial debt was incurred [726.105(j)]. The June 22, 1993 deed was given and recorded after the Surcharge Order was entered on June 21, 1993.

The transfer is also fraudulent pursuant to F.S. 726.106(1). F.S.§726.106(1) provides that a transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made, if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or became insolvent as a result of the transfer.

The transfer is also fraudulent pursuant to F.S. 726.106(2). F.S. §726.106(2) provides that a transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

The Respondents have the burden of proving that the transfer was not fraudulent under these circumstances. In Gyorok vs. Davis, supra, the Third District Court of Appeal held that once a prima facie case has been made by the Plaintiff in establishing a fraudulent conveyance, the burden shifts to the Defendant (Respondents) to prove otherwise. Gyorok at page 703. The Brakes have clearly failed in that regard.

In Tornwall v. Carter, 106 So.2d 96,99 (Fla. 2nd DCA 1958), the court held that "where the parties involved in the alleged fraudulent transaction are relatives or close associates of the transferor, such close relationship tends to establish a prima facie case which must be met by evidence on the part of the Defendant, and such transactions are regarded with suspicion." Tornwall at page 99.

It is clear from the evidence that the Respondents have not sustained their burden of showing that the transfer of the office

building was not fraudulent. The transfer of the office building is imbued with the badges of fraud outlined in F.S. §726.105 as discussed above.

F.S. §726.107(1)(a) provides that with respect to an asset that is real property, the transfer is made when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee. This would mean that the transfer that was purportedly made on November 10, 1992, would be perfected only insofar as it was recorded in the Public Records of Dade County, Florida. However, the November 1992 deed was not recorded until November, 1995.

Under F.S. §726.107(2), if the transfer was not perfected before the commencement of an action such as this fraudulent conveyance action, the transfer is deemed made <u>immediately before</u> the commencement of the action. This means that if the November deed is considered to be valid, it was not effective until immediately prior to the commencement of this action since it was not actually recorded until after this action was commenced. The November deed must be considered as a transfer that took place <u>after</u> the June deed. Consequently, the November deed has even less

validity than the June deed under both statutory authority and case law. Since the June deed is subject to avoidance, then the November deed must be avoided as well.

Respondents advance the theory that the conveyance from Eileen to Robert and Eileen is a resulting trust citing Foster v. Thornton, 179 So.2d 882 (Fla. 1938). Respondents reliance upon that case is misplaced for numerous reasons.

Case law has repeatedly held that a presumption of a resulting trust can exist when separate funds for purchase of property can be traced by a transferee. However, two years after Thornton, the Court stated in Smith v. Smith, 196 So.2d 409 (Fla. 1940):

> "This presumption of a resulting trust is not available, however, where the property is conveyed to the wife, the transfer being regarded prima facie as an advancement, but, of course subject to rebuttal."

In subsequent cases the Supreme Court and the Appellate Courts following the Smith decision reiterated the rule set forth in Foster to the effect that:

> "Evidence to establish a resulting trust must be so clear, strong and unequivocal as to remove . . . every reasonable doubt as to the existence of the trust."
>
> . . . . . .
>
> When a resulting trust is sought to be established by parol evidence the burden rests upon the person asserting the existence of the trust to remove every reasonable doubt as to

> its existence by clear, strong and unequivocal evidence." (at 891; emphasis supplied).

In Frank v. Eeles, 13 So.2d 216 (Fla. 1943), this Court held that when purchase money for land is paid by one person and title is taken by another for whom the purchaser is under a legal or moral obligation to provide, a contrary presumption arises and a gift is presumed. Such a legal and moral obligation arises when the parties are married and where the husband's monies have been used to purchase property in the name of the wife. That is, no trust was intended and the wife is presumed to take the beneficial as well as legal title to the property. The same doctrine was set forth in Abreu v. Amaro, 534 So.2d 771 (Fla. 3d DCA 1988) and Maliski v. Maliski, 664 So.2d 341 (Fla. 5th DCA 1995).

The Brakes have failed to establish their affirmative defense and have failed to overcome the presumption of a gift. No evidence was produced of separate funds of Robert. The Courts have consistently held that once individuals are husband and wife, each spouse's income during the marriage becomes marital income. See Rosenfeld v. Rosenfeld, 597 So.2d 835 (Fla. 3rd DCA 1992).

The record, particularly the fraudulent conveyance case transcript, shows that all monies earned by Robert, either as an employee or in his own practice, constituted the sole support of

the family unit as respondent recognizes in his brief (p. 11; citing The Florida Bar's Exh. 38). Additionally, all of the earnings were deposited in joint accounts to which Eileen had total and unfettered access. As such, whatever monies that were earned became Eileen's as a matter of law. Robertson v. Robertson, 593 So.2d 491 (Fla. 1991). See also Florida Statute §61.075(5)(a)5.

Finally, a trust cannot arise in favor of a party participating in a fraudulent transaction. Sponholtz v. Sponholtz, 180 So.2d 497 (Fla. 3rd DCA 1965); affd in part, rev. in part, 190 So.2d 572 (Fla. 1966); and a resulting trust cannot arise in derogation of a statute (Chapter 726), Dewhurst v. Wright, 10 So.2d 682 (Fla. 1892). In this case, no resulting trust exists, factually and as a matter of law.

ARGUMENT
IV

RESPONDENT HAS FAILED TO DEMONSTRATE THAT THERE WAS INSUFFICIENT EVIDENCE OF A CONFLICT OF INTEREST REGARDING REPRESENTATION OF DENNIS MURPHY (REPHRASING RESPONDENT'S ISSUE ON APPEAL)

This argument of Respondent applied to only one aspect of the conflict of interest issue. The argument is based upon the claim that Robert Brake was not a beneficiary and had no direct interest in the distribution of the estate. Since Robert also argues

(Argument # III) that the transfer of the estate interest from Eileen to Robert was merely a resulting trust and Robert was the legal owner, the argument appears to be, at the least, slightly contradictory.

There is ample evidence to establish that Dennis Murphy's interests were identical to Eileen's, and that he was aligned with Eileen in the dispute with Eve and Richard. Respondent, Robert, has stated that Dennis was "on the side of Eileen on most of these issues." (T. 932). There are innumerable references in the record to that fact. Both Richard and Eve Murphy testified to the fact that Eileen, Dennis and Robert had a common interest. (T. 348, 351, 381, 434 and 443). Robert, in effect, was still representing Eileen's interests which were identical to his own, and according to Richard, identical to that of Dennis. (T. 443). Robert told witness Buchsbaum that Dennis did not want to sell the property. (TFB exh. 46, p.106). Both Eileen and Dennis opposed the petition to authorize the sale of property. (TFB exh. 45, p.2 and 130). When the property was sold, Dennis was a co-purchaser. (T. 351, and hrg. 5/19/97, p.4). Dennis' conflict was recognized by the Third District in Brake v. Murphy, 626 So.2d 325 (Fla. 3d DCA 1993).

In sum, Respondent has not met his burden of proving insufficient evidence to overcome the presumption of correctness.

ARGUMENT
V

THE RESPONDENT'S CLAIM OF INACCURACIES AND ERRORS IS INAPPROPRIATE. RESPONDENT IDENTIFIES NO ISSUE FOR REVIEW (REPHRASING RESPONDENT'S ISSUE NO. V)

The Respondent presents no issue for review by this Court in "Argument" V. Rather, Respondent inappropriately seeks to undermine the Referee's Report by asserting the existence of numerous errors. Respondent has asserted a unilateral right to determine what is correct and what is incorrect. None of these matters were identified as rulings by the Referee either on hearing or rehearing and, therefore, are not ripe for review. Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla. 1992). In essence, this issue constitutes a personal attack upon the Referee and is similar to other attacks upon the Referee, the Bar[2] and others who have sought to oppose the Respondent.

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[2]Respondent Eileen stated: "There is no due process in this Court." (5/19/97, p.35). Respondents claimed that the Bar had consolidated the two cases "to confuse" (T. 777). Respondent claims also that the Bar seeks to extort a settlement (T. 1123) and the Bar's investigation and prosecution has been in bad faith. (T. 1129, 1181). The deposition taken by the Bar on 7/2/97 was the "stupidist deposition." (p. 92).

ARGUMENT

VI

RESPONDENT HAS NOT ESTABLISHED A BASIS OF ERROR IN REGARD TO A FINDING OF FRIVOLOUS PLEADINGS

The burden is upon the Respondent, as discussed above, to overcome the presumption of correctness in favor of the Referee. The Florida Bar v. Niles, supra. The evidence of frivolous pleadings should be considered in the context of the fact that Robert Brake as an attorney has utilized his professional capacity in a punitive manner. Richard Murphy testified as follows:

> Q. Did Eileen Brake ever tell you that she would keep you in Court for a long time?
>
> A. Yes. Both Dennis Murphy and Eileen said that we would be in Court for a long, long time, and turned out...
>
> Q. Did they keep their promise?
>
> A. Yeah. They kept their word. (T. 447).

As previously discussed, when the family conflicts became acute, the Respondents threatened Eve with claims of civil theft, RICO, rents due, and rents from her son allegedly due to the estate and for specific performance.

When the surcharge action was filed by Eve, Respondents based their first counterclaim upon the assertion that Eve had agreed to sell her interest in the estate for $51,250 to Eileen and Dennis.

(TFB exh. 15). In addition to that ultimately unproven counterclaim, the Respondents alleged that Eve's failure to repay a loan constituted civil theft pursuant to Chapter 812 of the Florida Statutes. Respondents also alleged a violation by incorporating the allegations in the earlier counts and referring to Chapter 772, Florida Statutes. Respondents claimed that they were entitled to treble damages as a result of that count.

Chapter 772 is titled "Civil Remedies for Criminal Activities." The nature of the alleged criminal activities was not designated in the counterclaim which the Brakes ultimately dismissed voluntarily.

Another example of frivolous pleadings by the Respondents pertains to the Order to Appoint an Administrator Ad Litem. That Order was based upon the obvious conflict wherein Eileen sought to be both a plaintiff and a defendant as personal representative in the foreclosure proceedings, and Robert represented her in both capacities.

Despite the blatant conflict, the Respondents opposed the motion. (TFB exh. 45, p. 130). The motion was, however, granted. The Respondents subsequently filed a Motion for Rehearing (TFB exh. 45, p. 132), a Motion to Stay (TFB exh. 45, p. 133), a Motion for Extension of Time to file a brief (TFB exh. 45, p. 133), a second

Motion to Stay (TFB exh. 45, p. 133), and a second Motion for Extension of Time to file a brief (TFB exh. 45, p. 133). No appeal was filed.

The Respondents also filed a motion to recuse Judge Newman based upon the appointment of Herb Stettin, the Administrator Ad Litem. Stettin's response follows:

> Dear Bob:
>
> I acknowledge receipt by fax of a copy of your Affidavit For Disqualification of Judge For Prejudice which bears a clerk's certificate as having been filed on June 17, 1992. Since I have no memory of having contributed to the judge's election campaign, I asked my bookkeeper to check our records. I enclosed for your information, a copy of a solicitation letter dated April 20, 1988 sent to me by the late Eric B. Meyers, together with a copy of my office record reflecting a check for $100.00 payable to the re-election campaign dated April 27, 1988.
>
> The purpose of this letter to respond on a personal level to your scurrilous motion. I recognize the judge is not permitted to respond. The statements in the affidavit represent a new low in this case even for you and Mrs. Brake. Most charitably, I would like to believe that some idiot wrote that pleading without your knowledge and signed your name.

Stettin testified that he saw no basis for the Motion for Recusal. There were also numerous motions to recuse Judge Newman. (T. 1005-1006). The following are questions directed to witness Ed Golden and his answers in regard to those motions:

Q. Do you recall what the substance of the motions were?

A. Well, there were various allegations that Mr. Brake set forth in some of the motions. I mean the one that sticks out in my mind is where he basically accused the judge of engaging in criminal activity. That's the one that really sticks out in my mind, but there were just a number. I couldn't even tell you how many. I would say somewhere between three and five. Maybe more.

Q. (BY MS. LAPIN) And what were the result of those motions?

A. All but the last one were -- Well, all of them were denied by Judge Newman as being insufficient, and the appellate court upheld all of the prior ones, except for the one addressed in the May '97 letter.

Respondent filed fifteen appeals. (T. 983). Respondent also filed numerous frivolous pleadings in this cause. Those matters were properly considered by the Referee. The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981). For example, the Respondent attacked the grievance proceedings and Bar members Paul Cowan and John Thornton in the context of repeated motions. Ms. Lapin's response indicates the frivolous nature of those motions:

MS. LAPIN: I'll try to respond point by point to Mr. Brake's statements.

First of all, I believe we have gone ad nauseam reviewing the participation of Paul Cowan in the Grievance Committee, of John Thornton having anything to do with this matter as the designated reviewer.

In my last response to my prior response to Mr. Brake's motion to return the cause to the Grievance Committee, I specifically set forth every motion -- actually, I don't believe I have that in front of me, but it should be in the Court file.

I have outlined every motion Mr. Brake has filed in both his case and in Eileen's case regarding recusing members of the Grievance Committee.

In every response, I indicated Paul Cowan had no participation in the Grievance Committee. He wasn't present at any meetings. He didn't vote on any of these matters. He was not at the live hearing. He had nothing to do with this case.

The same for Mr. Thornton. It was a scrivener's error that Mr. Thornton was ever even sent anything regarding this matter.

I believe in the very beginning, something did mistakenly get sent to Mr. Thornton, which was later corrected.

Mr. Brake knows very well that Miles McGrane is and always has been the designated reviewer on this case.

Mr. Thornton brought it to the Bar's attention that he had a conflict and he has never reviewed any matter regarding this case. I think this may be the fifth or the sixth time Mr. Brake has brought it up which, Your Honor, is another example of what Mr. Brake does.

He calls it something else every time he files the motion, but we have been here I would say six times and there are six orders on those particular issues and they have been disposed of. (T. 5/19/97, pp. 28-29).

The hearing of June 3, 1997 demonstrates Respondent's

repetitive and frivolous pleading in regard to one of several pending motions and an oral motion made at the hearing. The following passages are again illustrative of Respondent's conduct.

> MR. BRAKE: In my brief, I asked Your Honor, as an alternative, to certify these questions to the Florida Supreme Court. (6/3/98, p. 7, 24-25, p.8, 1).
>
> .....
>
> MR. BRAKE: In that case, I would ask Your Honor again, would you certify those questions to the Florida Supreme Court in my brief and if Your Honor declines to do so, I will advise Your Honor that I will, before the next two weeks are over with, file a petition with the Florida Supreme Court for a writ of certiorari and a writ of prohibition.
>
> At this time, I would orally ask Your Honor to stay all further proceedings until they have decided that one way or the other. (6/3/98, p. 8, 16-25, p. 9, 1).
>
> .....
>
> MR. BRAKE: As I say, Your Honor, I would again ask that the proceedings be stayed on my oral representation to you that within two weeks from today, I will file a petition for certiorari with the Florida Supreme Court as to the jurisdiction of the Court to continue hearing any matters that have been cited by the Third District Court of Appeal. (6/3/98, p. 10, 21-25, p. 11, 1-3).
>
> .....
>
> MR. BRAKE: I am advising Your Honor that I will file a specific proceeding before the Supreme Court.
>
> I will ask Your Honor to stay these proceedings until such time as the Supreme Court hears it, because my belief is that where there is -- (6/3/98, p.12, 19-25).

Respondent's argument is that he prevailed on many appeals. However, it is readily apparent that none of those appeals would have been necessary if there had not been a conflict of interest, bad faith negotiation leading to surcharge litigation and a fraudulent conveyance. Second, some favorable rulings during ten years of litigation are to be expected and do not negate the existence of many frivolous pleadings. Third, the various appeals were not totally successful, nor did they provide favorable rulings on the merits in most cases.[3]

ARGUMENT
VII

RESPONDENT HAS FAILED TO ESTABLISH THAT A ONE YEAR SUSPENSION IS INAPPROPRIATE

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[3]If results of prior proceedings are the test to be employed, it is clear that Respondent's positions fail. Despite Respondent's claim that Eileen's conduct was vindicated, it is evident that the conflict of interest rulings unfavorable to the Respondents are unaffected, a surcharge was imposed, and upon appeal, the surcharge was reduced but not eliminated. In a subsequent appeal it was remanded because of records of ex parte communications, but not on the merits. A trial court also found that there was a fraudulent conveyance. The fraudulent conveyance was sent back to the trial court solely because the personal representative rather than the beneficiaries was deemed to be the proper plaintiff in Brake v. Murphy, 687 So.2d 842 (Fla. 3d DCA 1997). Respondent misleads this Court by asserting that also: "The Court ruled that a resulting trust was a valid defense." The 3d DCA merely held that it should have been considered. The merits of the defense were not evaluated.

Respondent argues that there are cases in which more serious violations resulted in lesser discipline. In regard to that claim, the impact of Respondent's conduct upon the lives of the individuals affected must be considered.

The conflict of interest between Robert (and Eileen) and Richard Murphy and Eve Murphy has resulted in ten years of litigation. The conflict produced bad faith negotiation which led to a surcharge which resulted in a fraudulent conveyance. These activities also produced a number of appeals.

Eve Murphy testified that instead of receiving twenty five percent of a sale price of $700,000, she received payments of $18,750, $10,000, and $3,000. (T. 366, 367). The $18,750 and additional funds were used to pay attorneys and a bill of $70-80,000 for additional fees is still outstanding.

Eve elaborated upon the impact upon her life of the endless proceedings.

> A. It's been horrible. It's--I've had to live from hand to mouth at different times. I had to mortgage properties, borrow money. I moved up to North Carolina with the idea of retiring there. I did - do receive Social Security, and that's mainly what I have been living on. (T. 369).

Richard also testified that he had received a similar sum (T. 441), but was obligated to pay attorneys fees. Furthermore, funds came

out of the estate to pay Herb Stettin as Administrator Ad Litem. (T. 450). Instead of receiving his inheritance, Richard, like Eve, became indebted due to the protracted litigation.

Respondent cites a number of cases which do not resemble the facts in this disciplinary case in any respect. Whether they are qualitatively more serious and this Court was more lenient is both difficult to measure and irrelevant. The fact remains that there is ample authority which mirrors the violations in this case to support a one year suspension.

This Court has frequently restated the purposes of sanctions against attorneys who violate the ethical rules. Those principles were set forth in The Florida Bar v. Birdsong, 661 So.2d 1199 (Fla. 1995), as well as other cases, as 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 denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter other who might be prone or tempted to become involved in like violations. (At 1201; emphasis in the original)

As stated in Ramey v. Thomas, 382 So.2d 78 (Fla. 1980), in a conflict situation, an attorney is first an officer of the Court and is bound to serve the ends of justice with openness, candor and

fairness to all, even when it appears in conflict with a client's interest. The foregoing clearly applies to the Respondent.

Conflict of interest violations have resulted in a wide range of sanctions. Birdsong, supra, resulted in a thirty (30) day suspension. The Respondent in that case continued to assist a client after receiving a motion to disqualify due to conflict and an order of disqualification.

Several cases involving conflict resulted in longer suspensions. The Florida Bar v. Rogers, 583 So.2d 1379 (Fla. 1991), involved the acceptance of employment despite apparent conflict, as does this proceeding regarding Robert as attorney for Eileen as personal representative. Rogers also involved a failure to provide an accounting, a factor also established by the record in this case. Rogers received a 60 day suspension.

Longer suspensions were ordered in The Florida Bar v. Pahules, 334 So.2d 23 (Fla. 1976); The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978); and The Florida Bar v. Feige, 596 So.2d 433 (Fla. 1992); and The Florida Bar v. Della Donna, 583 So.2d 307(Fla.1989).

The Court in Pahules ordered a ninety (90) day suspension in that situation wherein Respondent had an irreconcilable conflict of interest, but was not involved in dishonesty, fraud, deceit, or misrepresentation. As the evidence in the case has established,

fraudulent and dishonest conduct are also apparent.

Papy accepted employment as an administrator of an estate despite a conflict of interest. His conduct also included misrepresentations. He also failed to account for or distribute assets. The Court also considered some mitigating factors and suspended Papy for one year.

Feige was suspended for two years. He also accepted employment despite the fact that his professional judgment was affected by his personal interest. His conduct was also fraudulent: He failed to advise the opposing party that his client had remarried and, therefore, alimony payments were not required to continue. Feige was ultimately found to be in violation of five former Bar rules.

Della Donna was disbarred for among other violations, working under conflicts of interest. The referee also found Della Donna's conduct to have been motivated by personal and financial self-gain and aggrandizement and that he engaged in protracted and unnecessary litigation for his own self-interest. The Court held that this rule is rigid because it is designed not only to prevent the dishonest practitioner from fraudulent conduct but also to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or

be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. See also The Florida Bar v. Moore, 194 So.2d 264, 269 (Fla. 1966). See also The Florida Bar v. Bennett; Rules Regulating Florida Bar, Rule 4-1.7.

Robert was found to be guilty of several counts of conduct prejudicial to the administration of justice. Florida cases encompassing sanctions for such conduct range from ninety-one (91) days to one year.

In The Florida Bar v. Bloom, 632 So.2d 1016 (Fla. 1994), the disciplined attorney was a defendant in civil litigation. He failed to timely answer interrogatories and did not do so after a court order, failed to attend hearings and failed to pay costs. Further, he failed to respond to an order to show cause. Bloom was suspended for ninety-one (91) days, based upon failure to comply with lawful discovery requests and conduct prejudicial to the administration of justice.

The Florida Bar v. Jones, 403 So.2d 1340 (Fla. 1981) resulted in a six (6) month suspension. The Court found that the Respondent had engaged in conduct prejudicial to the administration of justice, although the nature of the conduct was not specified.

Two cases resulted in one (1) year suspensions for conduct

prejudicial to the interests of justice. The Respondent in The Florida Bar v. Rood, 622 So.2d 974 (Fla. 1993) engaged in the identical conduct of assisting a client in a fraudulent conveyance to avoid creditors. Respondent submitted false documents to the probate court, and sought to conceal that fact from the Court.

The Respondent's discipline of a one (1) year suspension was based upon violating several rules in addition to conduct prejudicial to the administration of justice. The aggravating and mitigating factors considered by the court were relatively equal in Rood.

Another case involving the same violation and a one (1) year suspension is The Florida Bar v. Beaver, 248 So.2d 477 (Fla. 1971). As in this case, Beaver encouraged his client to secrete assets, and also lied under oath regarding the existence of those assets.

The Bar would submit that Beaver is very similar to this case in which the Brakes sought to transfer assets to avoid creditors and invented an after the fact justification that Eileen was merely holding title to the property in trust for Robert.

The Referee explicitly found that multiple violations have occurred. In view of the nature of those violations, and the foregoing authority, a one year suspension is appropriate.

CONCLUSION

Based upon the foregoing, the Respondent's Appeal should be denied and the Referee's Report should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Answer Brief of The Florida Bar to Brief of Robert Brake was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and that a true and correct copy was mailed to Jerome H. Shevin, Attorney for Respondent, 100 North Biscayne Blvd., 30th Floor, Miami, Florida 33132, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this 10th day of August, 1998.

Arlene K. Sankel

ARLENE KALISH SANKEL
Bar Counsel