IN THE SUPREME COURT OF FLORIDA

Case Number 87,466
Case Number 88,104

THE FLORIDA BAR,

Complainant,

vs.

ROBERT M. BRAKE,

Respondent.
_____/

# REPLY BRIEF OF RESPONDENT ROBERT M. BRAKE

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Florida Rules of Professional Conduct:

## STATEMENT OF THE CASE AND OF THE FACTS

Respondent incorporates by reference the Statement Of The Case And Facts contained in his initial brief (Appendix 1). With regard to Bar Counsel's Statement of the Case and Facts, there is obvious difficulty in responding to Bar Counsel's Statement of the Case and Facts as Counsel sets forth the Bar's argument in this section, rather than presenting the salient facts. For this reason, Respondent's arguments regarding the conflict of interest are replied to below in the Summary of the Argument.

## SUMMARY OF THE ARGUMENT

**Respondent has clearly met the burden of proof in demonstrating error in the Referee's finding regarding conflict of interest.**

Existing case law holds that a conflict of interest does not exist where a creditor also serves as personal representative to an estate. Deans v. Wilcoxon, 7 So. 163 (Fla. 1889).(Appendix 2). Deans can also apply to the attorney of the personal representative, repudiating the Bar's argument that Respondent's interest in the subject property resulted in a conflict.

Second, there is no evidence that Respondent negotiated in bad faith regarding the proposed sale of the building as Respondent was acting pursuant to the beneficiaries demands for an "as is" contract and it was their refusal to accept the Degani's offer which resulted in termination of negotiations, not any alleged bad faith on Respondent's part.

Third, the Third District Court of Appeal affirmed the resulting trust case in Respondent's favor. (See Brake v. Murphy, 687 So. 2d 842 (Fla. 3d DCA 1996) (Appendix 3). In addition, the Brake's rebutted the gift presumption, thereby rebutting Counsel's contention that Respondent participated in a fraudulent conveyance.

Fourth, there is no evidence that a conflict existed at the time Respondent was appointed to represent Dennis Murphy since the subject property that was allegedly the basis for the conflict of interest claim had been sold at that point.

Fifth, the Referee's fact findings were contradictory and clearly erroneous. (Appendix 4).

Sixth, Respondent has demonstrated that no frivolous pleadings were filed as Respondent only filed the foreclosure action with regard to the Estate. The threatened civil theft violations and counterclaim in the surcharge action concerned actions by Eve Murphy on property that was not part of the estate.

Seventh, although Respondent steadfastly contends that the Bar's allegations are unfounded, he asserts, in the alternative, that the one year suspension is grossly disproportionate with sanctions imposed in other cases, in which the conduct at issue was considerably egregious, circumstances and mitigating factors herein should have mandated a minimal sanction ranging from public reprimand to minimal suspension period.

## ARGUMENT

**I. Respondent has met his burden of proof by showing that the Referee's findings were clearly erroneous based on this**

**record, and he has also overcome the presumption of correctness afforded to the factual findings of such report.**

The Florida Bar has the burden of proving its accusations by clear and convincing evidence. The Florida Bar v. Niles, 644 So. 2d 504 (Fla. 1994) (Appendix 5). In his initial brief and Appendix, Respondent delineated forty-six (46) statements by the Referee which are contrary to the overwhelming evidence before her (see Appendix 4). These errors went to the essential elements of the Referee's findings, causing the Referee to misinterpret the evidence presented, and resulted in findings by the Referee which are not supported by "clear and convincing" evidence.

In addition, Bar Counsel's brief contained at least 31 factual errors, including 10 repetitions of the unsupported statement that the Deganis agreed to an "as is" purchase (Appendix 6), lending support to Respondent's claim that the Bar failed to prove its accusations by clear and convincing evidence. It is entirely plausible that these errors may be related to the fact that the current counsel did not try the case against Respondent, and in attempting to peruse voluminous transcripts in excess of 1000 pages dealing with the complex issues presented in this case and an excess of 200 exhibits presented, Counsel apparently overlooked a number of items.

**II. Respondent did not violate Rule 4-1.7(b) by holding the mortgages, and filing the foreclosure action.**

Rule 4-1.7(b) states that a lawyer has a duty to avoid limitation on his independent professional judgment. (Appendix 7).

Under this rule, The Bar alleges that Respondent's actions amounted to a "conflict of interest" situation.

However, the Third District Court of Appeal held in Brake v. Murphy, 636 So. 2d 72 (Fla. 3d DCA 1994) (Appendix 8), that Eileen Brake acted in her individual capacity and not as a personal representative by holding the mortgages and filing the foreclosure proceeding. If Eileen Brake's decision was a personal one and thus proper, then Respondent's decision as her attorney was also proper. Respondent has overcome the presumption of correctness as the Referee's finding that Respondent violated Rule 4-1.7(b) is clearly erroneous and lacks evidentiary support.

**III. Respondent's negotiations with the Deganis were not "prejudicial to the administration of justice" as prohibited by Rule 4-8.4(d).**

Bar Counsel asserts numerous times that the Degani's offers were "as is". (See Appendix 9). However, Mrs. Degani's testimony is contrary to this assertion (see Appendix 4, Item 6).

Mrs. Degani's testimony corroborates that of Eileen Brake, Robert M. Brake and Dennis L. Murphy, Jr., and the letters of Jeffrey Trinz that the Deganis never made an "as is" offer and never would. (Appendix 10).

Bar Counsel inaccurately quotes Mrs. Degani as asserting that the Brakes refused to allow inspections (Appendix 11). However, Mrs. Degani's uncontroverted testimony with regard to pre-contract inspections was that the Brake's told her to "go ahead and do what you want". (Appendix 12).

Further, a timetable of the Degani negotiations shows that Respondent expended a clearly reasonable amount of time for a $700,000 purchase. (See Appendix 6, Item 17).

The decision to accept or reject the Degani's offers was the prerogative of the Personal Representative and the five co-owners. Rule 4-1.2(a) states, in pertinent part, that "a lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter". (Appendix 13). While Respondent could, and did, advise the co-owners (Appendix 14) he could not make the decision. The five co-owners insisted upon an "as is" contract.

The evidence does not show any "conduct prejudicial to the administration of justice" by Respondent under Rule 4-8.4(d) (Appendix 15), nor any limitation on Respondent's independent professional judgment. Instead, it shows that Respondent acted in conformity with Rule 4-1.2(a), abiding by his client's decision..

**IV. Respondent's representation of Dennis Murphy, Jr. in his capacity as second successor personal representative did not violate Rule 4-1.7(b)**

Judge Robert Newman signed the Order removing Eileen Brake as personal representative and Robert M. Brake as attorney for the personal representative, on October 10, 1990 (Appendix 16).

On April 17, 1992, the same Judge signed an Order (Appendix 17) substituting Robert M. Brake for Carey Ewing, Esq., as attorney for Dennis L. Murphy, Jr., the successor personal representative. By that time, the surcharge trial was completed, the property sold, and the only issues remaining were determination of attorney's fees

and the amount of a partial distribution.

Nine months later, following a Motion by Edward I. Golden, Eve and Richard Murphy's attorney, Judge Newman removed Respondent as attorney for Dennis L. Murphy, Jr. (Appendix 18).

Bar Counsel does not address the alleged conflict caused by Respondent's representation of Dennis L. Murphy, Jr. (Appendix 19). Instead, Counsel limits argument to the one sentence statement that in Brake v. Murphy, 626 So. 2d 325 (Fla. 3d DCA 1993)(Appendix 20), the Third District opined that Dennis L. Murphy, Jr., may have had a conflict of interest with the Estate. Counsel does not explain how this conflict is imputed to Respondent.

Regarding the above, the Bar fails to mention that when the aforementioned case was decided, Respondent had not represented Dennis L. Murphy, Jr., for almost a year, that Dennis L. Murphy, Jr., was represented at that time by other counsel, and that Dennis L. Murphy, Jr., is listed as an Appellant in that action only because that is the same case as the 1991 Brake v. Murphy case, in which he was an Appellant. The 1993 opinion deals only with enforcing the 1991 opinion. (In the 1991 Opinion, Carey L. Ewing represented Dennis L. Murphy, Jr.; Respondent represented Eileen M. Brake in both matters.)

There is nothing in the Third District's opinion nor Bar Counsel's argument, nor any other evidence, that in any way indicates that Respondent had any conflict arising out of any attorney-client relationship at that time. The evidence does not

show any violation of Rule 4-1.7(b).

**V. The conveyance of property from Eileen Brake to Respondent did not involve "failure to disclose a material fact to a third person where disclosure is necessary to avoid assisting a criminal or fraudulent act" as prohibited by Rule 4-4.1(b), nor "conduct involving dishonesty, fraud, deceit or misrepresentation" as prohibited by Rule 4-8.4(c).**

Bar Counsel states with regard to the resulting trust case that "... there was no reversal on the merits of the case". (Appendix 21). However, the Third District found to the contrary. Brake v. Murphy, 687 So. 2d 842 (Fla. 3d DCA 1996) (reversing and remanding for a new trial on all issues, including the resulting trust affirmative defense Appendix 3).

Counsel then refers to testimony of Eileen Brake which purportedly demonstrates an absence of consideration for the transfer of property. (Appendix 22). However, this testimony refers only to the $18,750.00 that Eileen Brake received along with the three remaining co-owners/beneficiaries as a partial distribution from the estate and not consideration for the conveyance itself. (See, Appendix 22 Cash Disbursements: Murphy Estate closing). This sum was thereafter given to Robert M. Brake as payment toward substantial attorney's fees accrued in this case (see Appendix 22 letter from Herbert Stettin).

Counsel relies heavily on "presumptions" of a gift. (Appendix 23). However, these presumptions were rebutted by Eileen Brake's testimony that she did not want the property and that Respondent was going to buy it (Appendix 24) and Richard Murphy's testimony at

the Bar Hearing on September 22, 1994 that Respondent purchased the property (Appendix 25).

In order to constitute a fraudulent transaction, the transferred property must be subject to payment of a debt. Sponholtz v. Sponholtz, 190 So. 2d 572 (Fla. 1966) (Appendix 26). The resulting trust property does not fit this description, as such property was owned by the Brake's as tenants by the entireties and was not subject to payment of a debt by Eileen Brake individually.

A lawyer does not violate Rule 4-8.4(c) by accepting a deed to property for which he has paid consideration. (Appendix 27) A lawyer does not violate Rule 4-4.1(b) by recording a deed in the Public Records of the county where the land is located. (Appendix 28) The Referee's finding of a violation is totally lacking in evidentiary support.

**VI. All pleadings filed by Respondent were proper and conformed to the rules of civil procedure and the rules relating to bar proceedings and were not "prejudicial to the administration of justice" as prohibited by Rule 4-8.4(d).**

The Bar alleges that the Brakes threatened to keep the Murphys in litigation for a long time (Appendix 29). Counsel is referring to a letter from Eileen Brake to Joseph H. Murphy, Jr. (Appendix 30).[1] Eileen Brake was not acting in her capacity as personal representative with regard to that transaction, as said transaction

[1]The letter was erroneously dictated or transcribed since an examination of the Answer and Counterclaim filed by the Brake's in response to Eve Murphy's Complaint filed against Eileen Brake, Dennis Murphy and Richard Murphy did not assert any RICO claims or other unnecessary litigation positions. (See Appendix 33)

concerned an action for partition of property unconnected to the Estate. This letter was not a threat, but an unfortunate prediction of future events.

The Brakes filed only one civil action against Eve and Richard Murphy or the Estate. This was the foreclosure action, necessitated by the Murphy's refusal to waive the Statute of Limitations in return for a waiver of foreclosure, future interest and attorney's fees. The Murphy's filed all of the remaining actions.

Regarding the civil theft and RICO claims, the Bar fails to mention that the Brakes let Eve Murphy use their publicly traded stocks to secure a loan to pay off a judgment (Appendix 31). Bar Counsel failed to mention that Eve Murphy's son, Joseph Murphy, Jr., increased the loan without the Brake's consent, and then refused to make payment. (Appendix 32). Payment was made in full only after the partition action where Judge Leonard Rivkind ordered a sale of the homestead and distributed Eve Murphy's share of the proceeds to the bank to satisfy the loan. (Appendix 32).

The statement that the counterclaim in the surcharge action dealt with buying Eve Murphy's share of the Estate for $51,500.00 is unsupported by the record. This counterclaim was filed in the partition action, which was unconnected with the Estate, and was based on Eve Murphy's agreement to sell her interest in the homestead to Eileen M. Brake and Dennis L. Murphy, Jr., for the same $51,500.00 price offered by a third person. (Appendix 33).

Counsel claims that Robert Brake filed multifarious pleadings

but does not try to analyze them. The issue is not numbers, but frivolousness. (See, Shotkin v. Cohen, 163 So. 2d 330 [Fla. 3d DCA 1964]; Kreager v. Glickman, 519 So. 2d 666 [Fla. 4th DCA 1988]; (Appendix 34). Respondent maintains that the pleadings were reasonable, as shown by the circumstances and results (Appendix 35). Respondent should not be condemned for successfully defending a client absent evidence of the number and content of the improper pleadings.

The Referee's conclusion that Respondent violated Rule 4-8.4(d) is clearly erroneous and therefore Respondent has overcome the presumption of correctness.

**VII. Alternatively, if the Court should rule that violations existed, the punishment suggested by the Referee and the Bar is clearly inappropriate and inconsistent with precedent.**

All of the sanction cases relied on by Bar Counsel to try and justify a one year sanction are clearly distinguishable or inapplicable to a consideration of sanctions in this case. Further, sanctions imposed in many of Bar Counsel's cases are those which are far less severe than the sanction imposed in the instant case.[2]

[2] See, *e.g.* The Florida Bar v. Birdsong, 661 So. 2d 1199 (Fla. 1995) (Thirty day suspension upheld where attorney continued representing the same client despite a conflict of interest)(Appendix 36), The Florida Bar v. Moore, 194 So. 2d 264 (Fla. 1966) (Three month suspension upheld for attorney who represented lifetime income beneficiary and trustees, and received a contingency fee of a percentage of the amounts recovered)(Appendix 37), The Florida Bar v. Pahules, 334 So. 2d 23 (Fla. 1976) (Ninety day suspension upheld where attorney formed a corporation with a client and participated in fraudulent activities involving the corporation; (Appendix 38) The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991) (Attorney received a

Counsel attempts to distinguish Pahules by claiming that there was no fraudulent or dishonest conduct in that case (Appendix 40). However, in Pahules, the Court held that the attorney released funds to his client with full knowledge that his client misappropriated these funds. In addition, the client gave a portion of these misappropriated funds to the attorney, who then used the funds for his own purposes!! Other cases cited by Counsel involving more severe sanctions are also factually distinguishable.[3] Other cases cited by Bar Counsel involving a one

60 day suspension for entering into a partnership agreement with a client and billing the client for his services without prior disclosure and using the client's funds to purchase property without obtaining the client's consent) (Appendix 39).

[3] For instance, in The Florida Bar v. Papy, 358 So. 2d 4 (Fla. 1978)(Appendix 41), the Court upheld a one year suspension where the attorney, while acting as Estate Administrator, sold assets to a corporation of which he was an officer and which he and his wife subsequently became owners. On the day of appraisal, the attorney concealed assets, deliberately reducing their appraised value and made false representations to the court regarding their value. In addition, the attorney never distributed the sale proceeds to the estate and did not open a separate account for the estate's assets. In The Florida Bar v. Feige, 596 So. 2d 433 (Fla. 1992) (Appendix 42), the Court upheld a two year suspension for an attorney who actively and continuously perpetrated a fraud upon the Court. Not only did the attorney fail to advise the opposing party that his client had remarried, which terminated the alimony obligation, the attorney permitted his client to collect more than $4,000 from the opposing party and to use this money to pay the attorney's fee. In The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989), (Appendix 43), the attorney committed several violations considerably more egregious than Bar counsel's characterization of "working under a conflict of interest" (Appendix 44). In this case, the attorney prepared estate planning documents which included several trusts and foundations. The attorney and his partner acted as legal counsel for the estate while the attorney acted as trustee for one of the trusts and later became the personal representative upon the client's death. The Referee

year suspension are also easily distinguishable from the instant case.[4]

Another case cited by Bar counsel concerns lesser sanctions for arguably more serious conduct. In The Florida Bar v. Bloom, 632 So. 2d 1016 (Fla. 1994) (Appendix 48), the attorney disobeyed court orders to answer interrogatories, attend hearings, and failed to pay costs imposed as a result of a violation of these court orders,

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concluded that the attorney: " act[ed] in complete derogation of his ethical and fiduciary responsibilities to enrich, unjustly and financially, himself and the attorney's working on his behalf". (Id. at 309). In addition, the attorney "misus[ed] positions of trust for personal and financial gain" and charged fees "clearly excessive...both in amount and... the unethical manner in which Della-Donna extracted that money". Id. The Referee concluded that the Bar proved by clear and convincing evidence that Della-Donna committed extortion.

[4] In The Florida Bar v. Rood, 622 So. 2d 974 (Fla. 1993)(Appendix 45) which Bar counsel mistakenly characterizes as "identical", an attorney not only counselled his client to sign false documents, but informed the client that he must do so or be faced with a possible jail sentence. In The Florida Bar v. Beaver, 248 So. 2d 477 (Fla. 1971)(Appendix 46), the attorney counselled his client to secrete assets in furtherance of a plan to misrepresent the client's financial condition at the client's deposition in a pending divorce action and knowingly permitted his client to deposit funds in the attorney's trust account for purposes of carrying out this plan. This case differs from the instant case where there is absolutely no evidence of fraudulent misrepresentations made to the court.

In The Florida Bar v. Bennett, 276 So. 2d 481 (Fla. 1973)(Appendix 47), the attorney entered into a joint venture with seven others and acted as trustee. The Court concluded that the attorney was guilty not only of "fraudulent misrepresentation" and "breach of fiduciary duties", but also for misrepresenting the purchase price and failing to pay taxes after receiving the tax money from his "partners". In addition, this case involved an attorney who acted as trustee for out of state partners who were unaware of the conditions of the purchased property and were relying entirely upon the attorney, whereas in the instant case, all participants were family members who were aware of Mr. Brake's activities at all times.

and failed to respond to the trial court's Order to show cause, at which point the court entered judgment against him. Finally, the attorney failed to answer interrogatories or attend depositions set in aid of judgment. The Court imposed a 91 day suspension for the attorney's repeated refusal to comply with court orders.

In a recent case, this Court held that a 91 day suspension was appropriate for an attorney found guilty of engaging in fraudulent activity. The Florida Bar v. Sweeney, 23 FLW S428 (August 27, 1998) (Appendix 49). In Sweeney, the attorney was found guilty of signing his client's and several medical providers' signatures to settlement checks without authority, and unilaterally altering the insurer's settlement distribution. The Court declined to follow the Referee's recommendation, stating that, "Although a referee's recommended discipline is persuasive, we do not pay the same deference to this recommendation as we do to the guilt recommendation because this Court has the ultimate responsibility to determine the appropriate sanction. Id. at S429. A one year suspension is clearly inconsistent with established case law given the conduct at issue in this case. Further, this Court, quoting Florida's Standards for Imposing Lawyer Sanctions (Fla. Bar Bd. Governors 1997), stated that "suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client". Such injury did not occur in the instant case. Therefore, the Referee's recommendation for a one year suspension is clearly

erroneous and should be rejected by this Court.

THIS COURT MUST ALSO CONSIDER THE APPROPRIATE MITIGATING CIRCUMSTANCES WHICH SUPPORT RESPONDENT'S CONTENTION THAT THE PUNISHMENT IMPOSED IS EXCESSIVE.

In her Report, the Referee specifically mentions that Respondent expressed no remorse. The Referee's findings were also influenced by her perception that Respondent filed numerous "frivolous" pleadings, notwithstanding that Respondent's pleadings resulted in the successful reversal of many Orders. It is important to note that Respondent did not engage in fraud, misrepresentation, or self-dealing in contrast to most of the cases cited by Bar Counsel. In addition, the parties in the instant action are all family members who were aware at all times of the events that transpired with regard to the estate. Clearly, the Referee gave inappropriate weight to the misperceived aggravating circumstances and neglected to adequately consider the mitigating circumstances present in this case. Rather than considering the case one of conflict of interest, the Referee would have been better served had she viewed it as a family matter in which some of the co-owners of property challenged Robert Brake's actions as an attorney when he was justifiably defending himself and continuing to aggressively litigate on behalf of his client. Respondent submits that, after careful consideration of the below mitigating factors, it would be unconscionable for this Honorable Court to impose a sanction greater than that within the range of reprimand to minimal

suspension.

This Court generally considers a number of mitigating factors when imposing sanctions, including: the number of years of practice, previous record of violations and evidence of the attorney's character and good reputation in the community. See The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991), The Florida Bar v. Rood, 622 So. 2d at 974.

In the instant case, Respondent has no record of prior discipline in over 45 years of practicing law. In addition, his character and good reputation in the community has been exceptional. Specifically, the Respondent has a long and distinguished career in public service (Appendix 50), which includes serving numerous elective positions, such as Dade County Commissioner and State Representative, in addition to serving in the armed forces and retiring as a Retired Colonel in the Air Force. Respondent also served twice as co-chairman of the Archbishop's Charities Drive of the Archdiocese of Miami, was a member and Vice Chairperson of the United States Catholic Bishops' Advisory Council and was made a member of the Knights of Malta in 1982. Respondent is presently a member of the Florida Advisory Committee to the United States Commission on Civil Rights.

**CONCLUSION**

The evidence to substantiate the Bar's accusations is not "clear and convincing", thus overcoming the presumption of correctness. On the contrary, the Bar's "evidence" is patently

incorrect when the record is examined.

The punishment suggested is legally inappropriate under the case law and evaluation of the mitigating circumstances therein.

This Court should overrule the fact findings and recommendations of the Referee. Alternatively, the punishment is inappropriate in light of the mitigating circumstances set forth herein.

Respectfully submitted

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By_____
Jerome H. Shevin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and mailed to Cynthia Lynn Bloom, Esq., The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, this ____ day of September, 1998.

By_____
Jerome H. Shevin