IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

EILEEN M. BRAKE,

Respondent. /

The Florida Bar File
No: 94-70,760 (11F)

Supreme Court Case
No: **88,104**

BREIF OF RESPONDENT EILEEN BRAKE

EILEEN BRAKE
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In Proper Personam
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BRIEF OF RESPONDENT EILEEN BRAKE

STATEMENT OF THE CASE

This is really not a case involving the practice of law and the claims of clients. Instead, it is part of the unraveling of a close-knit family after the deaths of the two members who held it together. Until the disbarment of Eve Murphy's son, Joseph H. Murphy, Jr., there were lawyers in both factions of the family. As a result, this family feud has been fought in the courts. A **Table of Related Cases** is filed simultaneously with this brief.

On February 1, 1990, my sister-in-law, Eve Murphy, sent a letter to the Florida Bar complaining of certain actions taken by me as Personal Representative of my mother's estate. An almost identical letter was sent by my brother, Richard Murphy. The Bar closed the case on April 25, 1990.

On December 6, 1993, Eve Murphy wrote another letter seeking to reopen the case. Richard Murphy wrote a similar letter on December 15, 1993. New Bar counsel accepted the case.

More than eight years after the first letters, and on March 27, 1998, 17 months after this Referee was assigned my case, and 7 months after the close of evidence, the Florida Bar Referee filed her report (Appendix, Item 1). She recommended that I be found guilty of violating two Bar Rules in three factual situations.

- That acting as personal representative of my mother's estate was practicing law, and the "failure to finalize a sale" of the estate's fractional interest in a parcel of property, where the co-owners refused to enter into a contract that was not "as is", and the buyers refused to make an "as is" offer and refused to buy a fractional interest, constituted an act "prejudicial to the administration of justice" under Rule 4-8.4 (d).

- That joining with my husband as Plaintiff in filing a mortgage foreclosure action against the co-owners (on the last day before the Statute of Limitations would bar the claim, and after I offered to waive foreclosure, interest accruing in the future, and attorney fees, if the co-owners would waive the Statute of Limitations so that the case need not be filed, and an Administrator ad Litem had been appointed to defend the Estate in the case) was practicing law, and was an act "prejudicial to the administration of justice" under Rule 4-8.4 (d).

- That the conveyance of property purchased in my name, but which Eve and Dick had stipulated was paid for by funds earned or inherited by my husband and deposited in entireties accounts, thus creating a resulting trust, involved "dishonesty, fraud, deceit or misrepresentation" under Rule 4-8.4 (c) instead of the lawful conveyance of trust property by a trustee to the cestui.

I also object to the following actions:

- The failure of the Bar to accord me elementary due process free of gender discrimination;

- The inordinate amount of time it took for this cause to be completed at the Bar and Referee level; and

- The punishment recommended by the Referee.

STATEMENT OF THE FACTS

I was admitted to The Florida Bar in 1950. I have never practiced law. My membership was kept active by my husband as a form of insurance so that I could practice law if something happened to him. Fortunately, nothing ever did. I took inactive status in 1996.

My mother died on March 30, 1988. I was named as personal representative of her estate in her will. I was appointed in June, 1988.

At the time she died my mother owned 96 shares of Murphy Investments, Inc., a family corporation. My husband and I owned one share. My brother, Dennis L. Murphy, Jr., and his wife, Diana Murphy owned one share. Eve Murphy, the widow of my deceased brother, Joseph Murphy, Sr., owned one share. My brother Richard Murphy owned one share.

The corporation owned a commercial building and parking lot in Coral Gables.

We hired a tax attorney, Thomas Korge, Esquire, to advise us on the tax consequences of my mother's death. He advised us that if the corporation was not dissolved before the end of 1988 there would be a tax on the sale of the property when the corporation sold it, and another tax on the distribution of the proceeds of the sale to the stockholders on dissolution (T 573).

We accepted his advice to dissolve the corporation (T 583-584). He advised that to do so all debts of the corporation would have to be paid, and mortgage notes issued to any stockholders who had loaned money to the corporation. My husband and I loaned the corporation money to pay all debts to non-family members (the others were asked to contribute but did not). The property was conveyed to the five shareholders in proportion to their stock holdings and in exchange for surrender of their stock (the corporation did not distribute stock to the shareholders on dissolution, as was mistakenly stated by the Referee in her Report, page 3). The corporation was then dissolved.

Negotiations With The Deganis

The four of us living co-owners agreed that the building should be sold but that any sale contract must be "as is" (T. 473, 550 to 552).

On **September 8, 1989,** Yaron Degani and his wife met with my husband and myself at the office building. The Deganis spent more than two hours inspecting the building. They were told that they could make any

inspections they wanted in advance of signing a contract, but the contract would have to be "as is" (My testimony, T. 551; Mrs. Degani's testimony, Exhibit 37, pp 143-144).

On **September 26, 1989,** Yaron Degani sent a letter to my husband, (Appendix, Item 2) stating only that he wished to purchase the office building for $700,000; setting forth the legal description of the building; and stating his "offer" would remain open 30 days There was no deposit accompanying this offer. He sent a similar letter to Joseph H. Murphy, Jr., offering to buy my mother's homestead for $250,000 (Appendix, Item 3). Joe received the $1,000 deposit on that offer.

I talked to the other co-owners. Dick said these people like to bargain; he thought they would go up to $750,000; and that I should bargain with them. Dick insisted that the sale be "as is". Dennis didn't want to sell but said if they came up to $750,000 "as is" he would sell. Eve said she would accept $700,000 if it was "as is" (T. 551-552)

I then called the Deganis and told Mrs. Degani that the co-owners all wanted an "as is" contract in a regular contract form, but again said they could have any pre-contract inspections they wanted. Mrs. Degani asked me to have the form of contract drawn up. I had my husband do so and send it to her attorney (T. 552-553; Exhibit 294; Appendix, Item 4). This was done on **October 2, 1989** approximately 6 days after we received the initial letter from the Deganis.

On **October 6, 1989** the attorney for the Deganis, Jeffrey Trinz, sent a letter to my husband rejecting the counteroffer and stating that under no circumstances would his clients accept an "as is" contract (T. 554, Exhibit 17H; Appendix Item 5).

My husband sent a letter to the other co-owners explaining what had happened (T.556; Exhibit 171; Appendix Item 6). We continued to negotiate through Mr. Trinz.

On **October 18, 1989**, in response to our negotiations, Mr. and Mrs. Degani submitted a formal, detailed contract (Exhibit 17L; Appendix, Item 7). It was not "as is"; was for the office only, and was for only $700,000. Again there was no deposit. I discussed this with Dick and Dennis and said I would try to negotiate a higher price and "as is" (T. 560).

On the next day, **October 19, 1989,** Edward I. Golden signed, filed and served a Petition **under penalties of perjury** stating that:

i. Eve Murphy was Personal Representative of the Estate

ii. The Degani reply offer met with her approval.

iii. He asked the Court to enter an Order authorizing Eve Murphy to execute, as Personal Representative, the Degani contract to sell the estate's interest in the property (Exhibit 11; Appendix Item 8).

(Eve Murphy testified under oath at the Bar hearing that she never saw the Petition or Contract until after the surcharge action was filed [which was eight months after these proceedings were instituted] and that she, like me, would have objected to the terms of the Degani contract if she had seen it because it was not an "as is" contract but required the sellers to make extensive repairs. (T. 372-376).

(Edward Golden testified at the Bar hearing that he had no recollection and no notes concerning any conversation with Eve Murphy about the Degani contract before filing the Petition under penalties of perjury (T.108-111)

(The petition is "perjured" because it claims that Eve Murphy wanted this particular contract accepted, not because it misrepresented her status, as the Referee stated in her Report on pages 5-6).

(Richard Murphy testified he did not remember seeing the Degani formal proposal 17L [page 471]. He testified that at all times he maintained the contract should be "as is". He testified his attorney, Edward I Golden, had not given him copies of anything. On the day he testified, three months after the surcharge judgment had been thrown out by the Third District Court of Appeal because of *ex parteing* by Mr. Golden and Judge Newman, he had not been told of the reversal

> "Q. And at all time you maintain(ed), along with all the others, that the contract should be an as-is contract?
>
> "A. Definitely. Same with mom's house, as is." (T, page 473).
>
> "Q. You are aware that the Third District Court of Appeals has thrown out the surcharge judgment against Eileen for failing to sell to the Deganis, are you not?
>
> "A. No, I am not aware... I haven't received anything from Ed Golden at all about this." [T, page 476-477).

(The Referee has ignored this testimony)

Dennis and I filed objections to the Petition (Exhibit 312, Appendix, Item 9) because of the terms of the offer.

. After a hearing the Honorable Harold Featherstone upheld our objections (Exhibit 316, Appendix Item 10).

My husband again contacted the attorney for the Deganis. As a result, on **November 1, 1989**, less than one week after the Order sustaining our objections was entered, Jeffrey Trinz, Esquire, attorney for Yaron Degani,

wrote a letter to my husband stating that his clients would never sign an "as is" contract; would never raise the price they had offered; and would only negotiate further if all four co-owners first signed a contract at the Degani's price and not "as is" (Exhibit 319, Appendix Item 11). How can one negotiate after a contract is signed?

The co-owners refused to accept the contract because it was not "as is", and the Deganis refused to accept an "as is" contract even with permission to make all the inspections they wanted to in advance. They also refused to purchase only a fractional share (Testimony of Mrs. Degani, Exhibit 37, pages 143-144). Herbert Stettin was orally appointed on November 13, 1989 to take charge of the property and try to sell it. The Order was signed on December 14 (Bar Exhibit 12, Appendix, Item 12). I had no more authority to negotiate for any interest except that owned by my husband and myself.

From September 26 to November 13 a total of only 48 days had elapsed.

On these facts Third District Court of Appeal Judge Alan Schwartz found in his dissent in 636 So 2d 72 that there was no breach of fiduciary duty in my being unable to negotiate a contract with the Deganis. He cited **First Trust & Sun Bank v Henderson**, 1931, 101 Fla 1437, 136 So 370; **In re Estate of Wilson**, 116 So 2d 440, Fla 2d DCA 1959. In 693 So 2d 663 the remainder of the Court joined him in reversing the *ex parte* Order surcharging me for being unable to negotiate a contract.

The Foreclosure

Beginning in June, 1989 I advised the other co-owners that the Statute of Limitations would bar one of my 1985 mortgages on March 1, 1990. I offered to forego filing a foreclosure action and interest accruing after the

offer, and wait until the property was sold to receive payment of the debts due me, if the others would waive the Statute of Limitations. Although I repeated the offer and kept it open until the foreclosure action was filed on February 28, 1990, the last day before the Statute would bar collection, only my brother Dennis Murphy, Jr., accepted. The others refused (T, p 539-540; 663) .

Herbert Stettin was appointed by Order dated December 14, 1989, more than two months before the foreclosure proceeding was filed, to be Administrator Ad Litem under **Probate Rule 5.150** to defend the estate in the foreclosure action and to take complete control of the property (Appendix, Item 12) I asked him to waive the Statute of Limitations for the estate and he refused because he said Joe, Jr. did not want him to accept it (T. 539-540; 672-673).

We filed the foreclosure action on February 28, 1990, the last day before the Statute of Limitations would have barred the mortgage. At the end of the trial Judge Philip Bloom stated:

> "The Brakes advanced the money to save the building. Everyone recognized same and knew of same. No argument. They knew the Brakes were to be repaid.
>
> "Then look at the rest of this. Family meetings decided everything. Family overjoyed for Brakes to lend money to Murphy Investments, Co., Inc. or Murphy Investments.
>
> "Mr. Murphy: I think that was regarding the third mortgage.

"The Court: I'm giving you the general theme of which all of this is taking place. **These people should be praised, not condemned, for what they did. I don't even know why we are in court.**" (Exhibit 434, Pages 22-23; Emphasis added).

"The Court: I am not a magician, and I can't cure every problem that exists in every family... If these people want to fight for the rest of their lives with family situations and attorneys, which I think is foolish to do, let them be my guest...

"Here is the decision: 733.610 controls... So, therefore, there being no contest on the taxes, I have to...enforce only that portion of the $10,000 mortgage that goes to the contested portion...

"Now, where does that leave you? It means you can sue your brethren again for the money, or they can come up and see maybe you're right and maybe you were there at the right time to have money available to save the building, or they can act in good faith, as I hope you have been acting in good faith, where they can see you were there acting in good faith when no one else was there at the appropriate time.

"If you want to litigate for the rest of your life, that's up to you. I hope you act with maturity and reconciliation as a family" (Pages 46-47, Exhibit 434, Appendix, Item 13).

Florida Statutes Section 733.610 provides that any sale or encumbrance by the Personal Representative to the Personal Representative or her spouse is "voidable" by any interested person except one who as consented after fair disclosure. It was, and still is my position that the

mortgage was executed by me as corporate president under authority unanimously granted by the Board of Directors and under the advice of Thomas Korge, the independent tax counsel (**Gibson v. Foltz**, DCA 2, 1983, 431 So 2d 647; see also **First Trust and Savings Bank v. Henderson,** et al, Fla, 1931, 136 So 370). While I believe Judge Bloom was in error in voiding the mortgage, it was not worth appealing, because he clearly stated that the sum was still due and could be collected in a separate proceeding (see above). Herbert Stettin testified at the Bar hearing that my interpretation is correct and that portion of the mortgage not foreclosed as part of one of the other mortgages (about $6,000 out of the $10,000.00 original sum) remained as a claim (T. 671)

Conveyance by Eileen Brake to Robert Brake

On **August 12, 1991** and **October 8, 1991** Judge Robert Newman entered orders authorizing the sale of the estate's share of the office building to me and my brother, Dennis L. Murphy, Jr. Because of delays not relevant to this appeal, closing was not held until **May 7, 1992.**

The Murphys stipulated at the trial of the deed/resulting trust case that the money used to purchase my share of the property from the estate at closing came from money earned or inherited by my husband and put in our entireties accounts. The transcript of this trial, including the stipulations, was entered into evidence by the Bar as Exhibits 38 and 39. Richard Murphy testified at the Grievance Committee hearing on September 22, 1994 that he knew my husband was the purchaser (page 158).

My husband made the purchase in my name because I was a beneficiary and entitled to request distribution in kind under Florida Statutes Section 733.810 (1). At my husband's request, Judge Newman had entered an order giving Dennis and me the right of first refusal to purchase the property

because of this Statute. I testified at both the surcharge trial and the deed case that I did not want the property and my husband and brother, rather than myself, were buying it. Under these facts a resulting trust was created **(Foster v. Thornton**, Fla, 1937, 179 So 882).

On **November 10, 1992,** seven months before the *ex parte* surcharge order was entered, I executed a deed (Appendix, Item 14) in front of a notary and two witnesses, one of whom was my niece, Denise Bacallao, daughter of Dennis L. Murphy, Jr., who was by then the personal representative of the estate of my mother. Denise was also the daughter of Diana Epting Murphy, sister of Eve Epting Murphy, complainant in this cause. The purpose of the deed was to fulfill the resulting trust by creating a tenancy by the entireties. The deed was given to Denise, my husband's secretary, to record, and my husband and I left on our 40th wedding anniversary extended vacation. The deed was mislaid and misfiled amid the confusion of remodeling after the purchase and after Hurricane Andrew. It was not found and recorded until a search of papers to answer discovery requests was made in November, 1995 (T, pp 776, 920-921, Testimony in Exhibits 38 and 39). The Referee ignored this evidence.

Thereafter, on **June 20, 1993,** 30 months after trial began in the surcharge case; 15 months after Judge Newman stated, before we started our defense, that he had heard enough and was ready to rule, thus lulling us into presenting only a nominal defense; 15 months after the last day of testimony; 14 months after the conveyance of the property by the Estate; and 7 months after execution of the deed from me to myself and my husband creating the estate by the entireties, Judge Newman changed his mind after being *ex partied* by Edward I Golden and entered the **Order Surcharging Eileen Brake** (Exhibit 24). The Order assessed $147,000 damages. Joseph Murphy,

Jr., sought $395,395 attorney fees, and Edward I Golden sought $156,300 attorney fees. (The filing of Mr. Golden's time sheets in connection with this request betrayed the *ex parte* conferences of Edward I Golden and Judge Newman.)

Family members had reported to me and my husband that Eve's son, Joseph H. Murphy, Jr., (a drug and alcohol abuser who had, by that time, been disbarred), had stated that his time in jail had given him contacts to have a "hit man take care of" my husband, thus leaving title to the entireties property solely in my name and subject to a writ of execution. Because of this, I insisted that the tenancy by the entireties be terminated and Joe told, so as to remove his incentive for assassination. I executed a quit claim deed of my interest in the entireties property to my husband. This deed was witnessed by Dennis L. Murphy, Jr., personal representative of the estate of my mother. It was recorded on **June 22, 1993** in the Public Records of Dade County, Florida (Exhibit 25, Appendix, Item 15).

SUMMARY OF THE ARGUMENT

1. I have not violated Rule 4-8.4 (d) because acting as a personal representative is not engaging in the practice of law; and failure to negotiate a contract successfully is not "prejudicial to the administration of justice" while practicing law.

2. I did not violate Rule 4-8.4(d) by filing the mortgage foreclosure action jointly with my husband. I was not practicing law. Becoming a Plaintiff in a mortgage foreclosure action does not in any way constitute the practice of law. Likewise, becoming a plaintiff in a mortgage foreclosure action is not in itself prejudicial to the administration of justice.

3. The conveyance to my husband of property bought in my name but paid for by him with entireties funds, where I testified under oath before

the sale was made that I was not the one buying the property, does not constitute conduct involving fraud under Rule 4-8.4 (c) because my title was as a resulting trustee and there is no fraud in the conveyance of property by a trustee to a cestui.

4. The actions of The Florida Bar toward me constitute deprivation of due process and gross acts of gender bias.

5. The Florida Bar and the Referee grossly exceeded the applicable time limits. The failure of the Referee to remember simple facts, the gross inconsistencies in her Report, and the erroneous conclusions of law and fact show that the Report is in error and its recommendations should be overruled.

6. The discipline recommended by the referee is unconscionable under the circumstances.

FIRST POINT

> I have not violated Rule 4-8.4 (d) because acting as a personal representative is not engaging in the practice of law; and failure to negotiate a contract successfully is not "prejudicial to the administration of justice" while practicing law.

Argument

On page 2 of her report the Referee stated that I had never practiced law. On page 29 of her report, the Referee recommended that I be found guilty of violating Rule 4-8.4 (d) for conduct while engaged in the practice of law. She quoted as the parts of the rule that I was supposed to have violated the following:

> "A lawyer shall not ...(d) engage in conduct in connection with the **practice of law** that is **prejudicial to the administration of justice**", including to knowingly, or through callous

> indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis..." (Emphasis added)

This finding is in conflict with her correct finding of fact on page 2 that I have never practiced law.

On the preceding page of her report (page 28) the Referee recognized that acting as a personal representative does not constitute "the practice of law" and the rules regarding attorney/client relationships do not apply.

This Court has held that a lawyer who is a personal representative is not in a lawyer/client relationship with the estate's beneficiaries (**In Re: Amendment to Rule**, 1977, Fla, 346 So 2d 1536). Indeed, a personal representative need not be a lawyer (**Florida Statutes Section 731.201 (25)** and **Section 733.302**). Therefore Rule 4-8.4 (d) dealing with the "practice of law" does not apply to me in my capacity as Personal Representative.

Even if the rule did apply, the facts do not show a violation by me. The Referee ignores my uncontradicted testimony, and the documents which show the extensive negotiations between myself, both individually and through my husband as my lawyer, and the Deganis (see pages 3-6 above).

Finally, the Referee cites as evidence of my lack of "good faith" in negotiating with the Deganis, the fact that she thinks "inspections could have been done before any contract was finalized", thus trying to weaken or negate the defense that the contracts were not acceptable to the co-owners because they were not "as is" (Report, page 22). In the eight months between my testimony on July 30, 1997 and the execution of her report on March 27, 1998 the Referee apparently forgot my testimony that

> "I took them (the Deganis) all around the building, upstairs and everything else, and I said that it would have to be an "as is" transaction, because

> everybody, all the beneficiaries, had insisted that it had to be an "as is". We knew it was an old building and it needed a lot of repairs, so **I told them they could make any of the inspections they wanted to make but, once the contract was signed, it was going to be an as-is contract.**" (T. pages 550-551) (Emphasis added)

This testimony was never contradicted, either by the testimony of any witness or any document. On the contrary, the testimony of Mrs. Degani in the first surcharge action, which was entered into evidence as Exhibit 37, admits that she was told this by me (Exhibit 37, pages 143-144).

A Personal Representative is not a guarantor of the success of business negotiations (**First Trust & Sun Bank v Henderson**, 1931, 101 Fla 1437, 136 So 370; **In re Estate of Wilson**, 116 So 2d 440, Fla 2d DCA 1959), particularly where, as here, the co-owners controlled the impasse in the sale of their ownership interests.

The Referee misinterpreted the rule and forgot the evidence and therefore misconstrued the facts. She forgot that the Rule did not apply to me as a non-practicing member of the Bar who was acting as a Personal Representative, not a lawyer.

The recommendation as to this rule and fact situation should be rejected.

SECOND POINT

> I did not violate Rule 4-8.4(d) by filing the mortgage foreclosure action jointly with my husband.

Argument

This is the same rule cited in the first point. It does not apply for the same reasons. I was not practicing law. My husband was my lawyer.

Becoming a plaintiff in a mortgage foreclosure action is not in itself prejudicial to the administration of justice, particularly where the final result is a final judgment partially, if not wholly, vindicating the issues raised in the complaint, and where the trial judge praises my generosity at the end of the trial, as set forth on pages 8-9 above (Appendix, Item 13).

Furthermore, the opinion of the Referee ignores the fundamental facts of the foreclosure as set forth on pages 6-7 above. Herbert Stettin had been appointed Administrator Ad Litem to defend the estate two and a half months before the foreclosure action was filed. All of the co-owners, including the Administrator Ad Litem, had been asked to waive the Statute of Limitations in return for a waiver of the filing of the foreclosure action and the waiver of future interest and attorney fees. All except Dennis L. Murphy, Jr. refused (T. 539-540). My choice was to file foreclosure or to lose the money my husband had loaned the corporation. Herbert Stettin testified that it would have been much better for the Estate to have agreed to waive the Statute of Limitations (T, pages 685-687).

Finally, the Report attempts to reverse the opinion of the 3rd District Court of Appeal which considered the same facts and upheld my actions. That Court recognized the fact that the trial of the foreclosure action took place when I was acting in my individual capacity, not as personal representative, and that the foreclosure action was defended on behalf of the estate by Herbert Stettin as Administrator Ad Litem.

As to the fourth mortgage, the Referee ignored the advice given to me by Thomas Korge, Esquire in Exhibit 191 (Appendix, Item 16) that loans made by stockholders to the corporation should be memorialized by mortgage notes (Pages 590-593), my uncontradicted testimony that the fourth mortgage was issued by me as corporate president in response to such instructions (T, p

539), and that the directors, shareholders and co-owners all signed the minutes of the corporation meeting in June, 1988, granting that authority (Exhibit 191, Appendix, Item 16). Under those circumstances Herbert Stettin testified, as an expert, that they would be estopped from denying such authority (T, pages 692-693).

There was no breach of the rule by the filing of the foreclosure action. The recommendation of the Referee should be overruled.

THIRD POINT

> The conveyance to my husband of property bought in my name but paid for by him with entireties funds earned or inherited by him, where I testified under oath before the sale was made that I was not the one buying the property, does not constitute conduct involving fraud under Rule 4-8.4 (c) because my title was as a trustee and there is no fraud in the conveyance of property by a trustee to a cestui.

Argument

The eight months it took the Referee to decide this matter apparently also caused her to forget or overlook pertinent facts concerning the resulting trust case:

On the above issue the Referee stated

> "The Referee finds that Mrs. Brake's interest (in the property) was conveyed **without consideration** to Mr. Brake resulting in a fraudulent conveyance" (Report, page 24) (emphasis added).

The Referee overlooked the stipulation of Eve Murphy and Richard Murphy during the trial of the deed case that the money used at the closing to purchase the Brake share of the property from the Estate and the other co-

owners came from money earned or inherited during the marriage by Robert M. Brake and deposited in entireties accounts (Exhibit 39).

The Referee overlooked the testimony of Herbert Stettin as an expert witness that a resulting trust is a valid defense to the Statute of Fraudulent Conveyances because there is adequate consideration for the conveyance (T, pages 714-715).

The Referee overlooked the testimony of Richard Murphy at the Grievance Committee hearing on September 22, 1994 that the property was being bought by Robert Brake from Herbert Stettin ( ). Eve Murphy was present in the room and did not testify to the contrary.

The Referee overlooked the leading Florida case on this issue (even though it was cited to her), to wit: **Foster v. Thornton**, Fla, 1937, 179 So 882, in which the Florida Supreme Court held that the fraudulent conveyance rule

> **"...does not apply to cases where a tortfeasor holds title to land in trust for another and makes a conveyance to the *cestui que trust*"** (179 So at 887, column 1, headnote paragraph [1], emphasis added).

Such a conveyance was simply what "equity would have required h(er) to do" (179 So at 887, Column 2, headnote paragraph [2]).

Entireties funds used to purchase property, where title is taken only in the name of one spouse, are treated the same way. In such a case the untitled spouse

> "...could thereafter demand a conveyance jointly to (both spouses) and have the deed reformed, the effect of which would be to create an estate by the entireties" (179 So at 888, column 1, fourth paragraph).

This is what the November, 1992 deed did.

The Referee did not hear the evidence in the resulting trust/deed case. Although the Bar introduced the transcript of testimony in the resulting trust/deed case into evidence as exhibits 38 and 39, it is obvious that the Referee either did not read the transcripts or overlooked or forgot their contents and the facts during the eight months it took her to write her report.

The resulting trust/deed case was reversed on December 26, 1996 (687 So 2d 842). A resulting trust was held to be a valid defense. Judge Cardonne promptly recused herself. The case has not been set for trial because it has not been necessary. When the case is concluded with a judgment in favor of myself and my husband, what recompense will the Florida Bar (and this Court) make to us if we are erroneously disciplined? Isn't it bad enough that for four years I suffered the humiliation of an illegal judgment crafted *ex parte* by Eve and Richard Murphy's lawyer, Edward Golden.

The report is in error on this point and should be reversed.

FOURTH POINT

The actions of The Florida Bar toward me constitute deprivation of due process and gross acts of gender bias.

Argument

1. Protest over committee makeup. I protested that the committee membership included the law partner of Edward I. Golden (who was himself a member of another Grievance Committee at that time); an officer of Sun Trust Bank (which loaned money to Eve Murphy secured by stocks owned by my husband and myself, and then refused to request substitute security from Eve Murphy to free up our stocks when we requested it); the Bar reviewing member was attorney for my nephew, Joseph H.

Murphy, Jr., son of Eve Murphy, in the criminal cases in Monroe County for which Joe was ultimately disbarred. The Bar rejected my request for disqualification.

2. Sex discrimination in Bar proceedings. I was never interviewed by Bar counsel. I was never interviewed by the investigators. I requested separate hearings to prevent confusion of the facts in my case with the facts in my husband's case. I objected to joining the proceedings against my husband, which were already in progress, because I had been cut out of the prior proceedings. My requests were denied. Just as I feared, confusion has resulted.

3. Limiting my participation in Committee hearings. The first Grievance Committee hearing for me was held on September 22, 1994. My right to cross-examine the witnesses against me was severely curtailed, to put it politely.

At that time I requested bar counsel to contact my brother, Dennis, and interview him, because he was dying of cancer and would corroborate the facts we had given her. He died that December, but neither Bar counsel nor the investigating committee members talked to him. Eve Murphy and Richard Murphy ignored his death, including failing to attend his funeral.

A second hearing was scheduled for December 7, 1994. When I appeared at the Bar offices no one was present. Bar counsel later appeared and announced that the hearing had been canceled, but that she forgot to notify me. My husband and I asked Bar counsel to interview the both of us separately so that we could explain the facts and the documents to her. Although she agreed she interviewed only my husband. She did not interview me. I also asked her to interview my brother Dennis L. Murphy, Jr. who

could corroborate our testimony. I told her he was dying of cancer. She agreed to interview him but never did. He died December 21, 1994.

A third hearing was noticed only for my husband for July 19, 1995. When my husband appeared he was informed on the record that, although the notice named only him (Appendix, Item 17), the notice was intended for me also, and that since I had not appeared the committee would not give me a hearing (see transcript of said hearing). Later on, the committee said I would get a hearing (Appendix, Item 18). I never did. True to its first word, the committee refused to hear me then or later.

The Committee held a closed door hearing on my case on October 11, 1995. No transcript was ever furnished to me. The committee included several members who had replaced members present at the first committee meeting whose terms had expired. My husband requested that the new members be disqualified or the matter reheard by all members *de novo*. I have been advised that the new members were allowed to participate in the hearing and deliberations, although they abstained from actually voting.

4. The pleadings. On May 22, 1996, the Florida Bar filed its Complaint against me. The Complaint set forth more than 20 fact situations as possible causes of action. The 20 situations were spread out and intermingled over only five counts.

I moved to have the Complaint dismissed because it did not conform to the "one count, one cause of action" rule of the Florida Rules of Civil Procedure. The Referee denied the motion.

5. The trial. The cases against my husband and myself were consolidated by this Court on Petition of the Florida Bar over my objection. Even though many motion hearings had already been held, I was forced to join a case already in progress. The presentation of the matters by the Bar

was done in a way to confuse the allegations against me with the allegations against my husband.

If I were a man, this cavalier disregard of my due process rights would not have been allowed. I would have been interviewed by Bar counsel and the investigative committee members, as was my husband. I would not have been forced to join a case already in progress.

I believe that after 48 years of paying Bar dues I should be treated as an individual and not as a chattel of my husband. The Bar talks a good line about fairness and gender equality. The reality is quite different.

FIFTH POINT

> The Florida Bar and the Referee grossly exceeded the applicable time limits. The failure of the Referee to remember simple facts, the gross inconsistencies in her Report, and the erroneous conclusions of law and fact show that the Report is in error and its recommendations should be overruled.

Argument

Florida Rule of Judicial Administration 2.085 (3) requires a Florida Bar Referee to file her report within 180 days of being assigned to hear the case. Rule 2.050 (f) suggests that in a non-jury case a judge should rule within 60 days after trial ends. The reason is that, over time, the memory of human beings fades, and a judge will lose the recollection of the demeanor of the witnesses, the testimony, the other evidence, and even the basic facts of a case (see **Polizzi v Polizzi**, 1992, DCA 5, 600 So 2d 490).

Judge Stein grossly exceeded these limits. She was assigned my husband's case on March 5, 1996, and my case on July 31, 1996. She filed her report March 27, 1998, 752 days after assignment of my husband's case,

or 4 times more than the Rule allows, and 605 days after assignment of my case, or three and a half times more than the Rule allows. She heard the last day of trial on August 5, 1997, but did not file her report for 234 days afterwards, or almost four times more than the Rule allows.

Judge Stein made more than 30 errors of fact on her report. A listing of the errors, and an explanation of the true facts, is set forth in the Appendix as Item 19.

Between the end of the trial and the filing of her report Judge Stein had her normal court business to take care of. She was also appointed associate administrative judge. But even more time-consuming and attention demanding was the fact that she adopted a newborn child. As the adoptive mother of four children (now all grown) I realize well the extra time spent and emotional turmoil she went through during this period. Her report reflects these distractions.

The fact that this Court approved extensions of time is no excuse for the errors in the Report. This Court did not approve forgetfulness leading to error.

SIXTH POINT

> The discipline recommended by the Referee is ridiculous under the circumstances.

Argument

A general discussion of case law on this subject is set forth in my husband's Brief, and I adopt it by reference.

This Court has ruled that the test of disciplinary punishment is:

> "First, the judgment must be fair to society...; 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; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations" (**The Florida Bar v Poplack**, 599 So 2d 116, Fla, 1992).

As a general rule, this Court has found that suspension is appropriate when an attorney is found guilty of misconduct that causes injury or potential injury to the legal system or the profession, and that such misconduct is similar to that for which an attorney has been disciplined in the past (**The Florida Bar v Grigsby,** 641 So 2d 1341).

None of those rules apply to me.

1. I have not been involved in a disciplinary proceeding because I have never practiced law.

2. "Reformation and rehabilitation" of my negotiations with the Deganis, or my filing the mortgage foreclosure, is absurd. The property has been sold. The foreclosure action has been won, and the judgment paid out of the sale proceeds. I do not own property with Eve and Dick. I admit that lending the corporation money without getting ironclad business guarantees, as a bank would, appears to have been a mistake, but helping family, and trusting them, is taught to me by my religion and by the example of the many families, particularly in the immigrant community, who do "stick together" and help one another. Herbert Stettin often reminded me that "No good deed goes unpunished", and the Referee certainly wants to prove the truth of that maxim.

3. There is no potential injury to the legal system or profession in what I did.

I did not practice law, as Judge Stein admitted on page 2 of her Report.

I negotiated for the sale of property owned by five persons (including the estate) and was unable to get the others, and the potential buyers, to agree. A Personal Representative is not a guarantor of success in business negotiations (**First Trust & Savings Bank v Henderson, et al,** Fla 1931, 136 So 370).

I joined my husband in foreclosing mortgages only because the mortgagees refused to waive the Statute of Limitations. Judge Philip Bloom praised my husband and me for what we did.

I ended a resulting trust by conveying property to the cestui.

4. Is a 90 day suspension really appropriate for this? This Court has given private reprimands, public reprimands and lesser suspensions to attorneys who have committed far more serious violations than what the Referee has claimed I did. Trust account violations are among the most serious of violations. Even in these cases, public reprimands, or shorter suspension periods have been applied. (See **The Florida Bar v. Pipkins, 1998 708 So 2d 953**), where the attorney committed a second violation while on suspension for an earlier violation. A divided court upheld a 90 day suspension, with the dissenter willing to forego suspension.

Since I have never practiced law, perhaps a more appropriate punishment would be to sentence me to the practice of law for 90 days.

CONCLUSION

By the terms of the rules, and by cases decided by this Court, Rule 4-8.4 (d) does not apply to me. The facts show that Rule 4-8.4 (c) does not apply to me.

The Report of the Referee is full of inconsistencies and mistakes, due, in all probability, to the delay of the Referee in processing this case. She obviously did not read the documents introduced into evidence, especially the transcripts of the prior cases.

This Court should overrule the recommendations of the report and enter a final judgment in my favor.

CERTIFICATE OF MAILING

I hereby certify mailing a copy of the above and foregoing to Jerome Shevin, Attorney for Robert M. Brake, 100 North Biscayne Blvd. 30th Floor, Miami, Florida 33132, Cynthia Lindbloom, Assistant Staff Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 this 24th day of June, 1998.

Eileen M. Brake

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