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 EILEEN BRAKE

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STATEMENT OF THE CASE AND FACTS

The facts which are pertinent to these appeals are presented in detail in the Argument portion of the Bar's Answer Brief directed to Robert Brake's Initial Brief. The Bar will adopt by reference those portions of that brief insofar as Eileen Brake raises some of the same issues. Additional facts will be incorporated into the Argument portion of this brief.

Some aspects of the history of this matter require clarification. There are basically three aspects to this case: (1) conflicts,[1] (2) surcharge of the personal representative and (3) a fraudulent conveyance made one day after the surcharge. Decisions adverse to the Respondents have been rendered in the trial Courts in regard to all of the three substantive areas.

Two orders regarding conflict of interest were entered. (TFB exhs. 12 and 19). A surcharge order was entered in a separate proceeding. There was also a separate suit in which there was a finding that a conveyance was fraudulent. Appellate rulings altered, reduced or remanded the latter two rulings, but no decision has totally vindicated the Brakes as they frequently contend.

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[1]The conflicts led to violations by Eileen of Rules 4-8.4(c), (conduct prejudicial to the administration of justice) and 4-8.4(d), (conduct involving dishonesty, fraud, deceit or misrepresentation).

The surcharge order was limited to one of four mortgages which were the original basis for the ruling. Brake v. Murphy, 636 So.2d 72 (Fla. 3d DCA 1994). The fraudulent conveyance ruling was set aside on the basis that the proper party had not brought the action. Brake v. Murphy, 687 So.2d 842 (Fla. 3d DCA 1996). The surcharge order was the subsequent subject of a writ of prohibition directed to Judge Newman. Brake v. Murphy, 693 So.2d 663 (Fla. 3d DCA 1997). The writ of prohibition was granted based upon two one-fourth hour time sheets of Ed Golden, counsel for Eve Murphy, identifying communications with the Judge's office regarding the final order.

The case was remanded. However, it does not justify Eileen's assertion that Judge Newman was:

> "lulling us into presenting only a nominal defense...and that Judge Newman changed his mind after being ex partied by Edward I. Golden and entered the order surcharging Eileen Brake." (Brief, p. 11).

The Bar would also indicate some factual areas of disagreement at the outset. Those factual areas are the following:

(a) The role of Thomas Korge. The Respondents appear to suggest that their conduct was merely ministerial, carrying out the recommendations of a tax attorney. Attorney Korge, however, was totally uninvolved as the conflicts of interest became readily

apparent. His testimony was that all of his information regarding the estate came from Robert Brake (T. 613-14) and he would not have advised the beneficiaries to transfer stock to the corporation if he knew the stock was equally owned by the four children. (T. 615). He didn't advise the Respondents regarding the fourth mortgage. (T. 613).

2. Negotiations with the Deganis and the "as is" factor. The testimony is ample that the Deganis were willing to purchase "as is" as the beneficiaries desired for quite some time. (See Argument II, Bar's "Robert Brief"). The testimony is ample that the Respondents were uncooperative and would not permit the desired inspections. Mrs. Degani stated under oath that:

> 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).

3. The "perjured petition." Respondents keep beating this dead horse without mercy. Ed Golden testified in open court that he mistakenly designated Eve Murphy as the personal representative. (T. 991). He obviously could not have attempted to fool the court in a case where the Respondents were noticed and were parties. No court has found that Mr. Golden has committed perjury, for which recanting is a defense. Brannen v. State, 114 So.2d 429 (Fla.

1927). For the first time, Respondent Eileen, in this brief, asserts a different basis for the "perjury" accusation. (P.5, Respondent's Brief).

4. The fraudulent conveyance. Eileen has advanced several different versions of the consideration provided for the quit claim deed conveying from Eileen to Robert one day after entry of the surcharge order. That timing, she suggests, is mere coincidence. The different versions are presented in Argument V of the Bar's Answer Brief directed to Robert's Initial Brief. No court has accepted her explanation that her now deceased brother Dennis reported a threat by her nephew to arrange assassination of Robert, thereby enabling him to attack Eileen's assets as Robert's survivor.

Additional factual distinctions will be presented in the Argument portion of this brief.

SUMMARY OF ARGUMENT

Respondent seeks to reargue the issue of whether there was proof of bad faith negotiation by Respondent. The Bar has addressed that question of the sufficiency of the evidence in the Answer Brief (Argument II) to Robert's brief. An examination of that evidence reveals that the Respondent has not overcome the presumption of correctness. Eve Murphy, Richard Murphy and Deborah Degani all testified as to the bad faith negotiations.

Case law establishes that Respondent cannot escape discipline by arguing that she was not acting as an attorney. That same legal principle applies to Respondent's second argument.

Respondent has also failed to overcome the presumption of correctness of the Referee's findings in regard to the second argument. The evidence is ample that the Respondent violated statutory requirements governing personal representatives. Furthermore, Respondent cannot hide behind the advice of a tax attorney who had no knowledge of the conflicts and lacked other vital information.

In regard to the third argument, Respondent has provided a variety of explanations as to the consideration for a transfer from Eileen to Robert. Her explanation that it was done to avoid an assassination effort is not credible and is illogical. Further, a

resulting trust will not be presumed to exist in derogation of a statute. The record and the law clearly establish the existence of a fraudulent conveyance. The discussion of this issue in our response to Robert's brief is adopted by reference.

The Respondent failed to plead defenses alleged in regard to subjects IV, A, B and C. Those "defenses" are, therefore, waived. Respondent provided no proof of any conflict of interest among Grievance Committee members or sex discrimination. (A and B).

She has set forth no Bar rule which was violated regarding the disciplinary meetings (C), nor presented facts, nor the appropriate rule to support a claim of a pleading deficiency (D). Furthermore, she establishes no factual basis for the claim that consolidation was designed to conclude, nor the claim that consolidation resulted in confusion (E).

Bar cases have held that the time utilized by this Referee to complete the Report is not excessive. This is particularly applicable when the Referee asked this Court for an extension of time and it was granted.

Finally, there are a number of cases which prove that a ninety day suspension is more than reasonable under the circumstances.

ARGUMENT

I

THE RESPONDENT HAS ESTABLISHED NO BASIS OF ERROR REGARDING THE FINDING OF BAD FAITH NEGOTIATIONS

Respondent first contends that as personal representative she was not acting as an attorney and therefore, is not subject to discipline. This Court in The Florida Bar v. Della-Donna, 583 So.2d 307, 310 (Fla. 1989) rejected that contention:

> [1-3] Like the referee, we cannot agree with Della-Donna's contention that our rules and professional ethics do not apply to an attorney who acts, at some time or another, as a client rather than as an attorney. Conduct while not acting as an attorney can subject one to disciplinary proceedings. *The Florida Bar v. Hefty*, 213 So.2d 422 (Fla. 1968). As this Court has stated before, "'an attorney is an attorney is an attorney.'" *The Florida Bar v. Bennett*, 276 So.2d 481 (Fla. 1973). Even in personal transactions and when not acting as an attorney, attorneys must "avoid tarnishing the professional image or damaging the public." *Id.; The Florida Bar v. Hooper*, 507 So.2d 1078 (Fla. 1987); *State ex rel. The Florida Bar v. Clements*, 131 So.2d 198 (Fla. 1961). We agree with the referee that this claim is simply untenable. The practice of law is a privilege which carries with it responsibilities as well as rights. That an attorney might, as it were, wear different hats at different times does not mean that professional ethics can be "checked at the door" or that unethical or unprofessional conduct by a member of the legal profession can be tolerated.

Respondent also advances the broad assertion that the facts do not support the Referee's findings. That nebulous claim ignores the applicable law.

As this Court stated in The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994):

> ---this court's review of a referee's findings of fact is not in the nature of a trial de novo. The responsibility for finding facts and resolving conflicts in the evidence is placed with the referee. *The Florida Bar v. Hoffer*, 383 So.2d 639 (Fla. 1980). The referee's findings "should not be overturned unless clearly erroneous or lacking in evidentiary support." *The Florida Bar v. Wagner*, 212 So.2d 770, 772 (Fla. 1968); *The Florida Bar v. Neely*, 502 So.2d 1237 (Fla. 1987). Further, Rule 3-7.6(k)(1)(A) of the Rules Regulating The Florida Bar provides that the referee's findings of fact as to items of misconduct charged "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." *See The Florida Bar v. Hooper*, 509 So.2d 289 (Fla. 1987).

Respondent sets forth no basis for overcoming the presumption of correctness which is afforded to the Referee's findings. There is ample evidence in the record to support those findings. The Bar adopts by reference the facts set forth in Argument II of The Florida Bar's Answer Brief directed to Robert Brake's Initial Brief.

Note particularly that Eileen claims that her testimony regarding the availability of inspection was uncontradicted. That claim is false. As pointed out in response to Robert's brief, the testimony of Deborah Degani explicitly disputes Eileen's claim. Note the following question and 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).

ARGUMENT
II

RESPONDENT HAS NOT DEMONSTRATED ANY ERROR IN REGARD TO THE FINDING THAT RESPONDENT'S FILING OF A FORECLOSURE ACTION CONSTITUTED AN ETHICAL VIOLATION

The Referee found that as the Bar alleged, Respondent's role as plaintiff in the foreclosure of the fourth mortgage which encumbered the major asset of the estate was a breach of her fiduciary duty to the estate. As the Referee properly found, Respondent was thereby in violation of Rule 4-8.4(d).

Respondent raises again the argument that she was not acting as an attorney. The response is, of course, the same; namely that the rule in Della-Donna, supra is contrary to her position.

In addition, Respondent argues that Herb Stettin had been appointed as Administrator Ad Litem to represent the estate and therefore no conflict existed. What she failed to point out is that he was appointed despite her objections, in response to legal proceedings initiated by Richard and Eve. (TFB exh. 45, p.130; TFB exh. 26).

The Florida Bar v. Niles, supra governs as to the effort of Respondent to reargue the case factually. Here also, there is ample evidence to support the Referee's conclusion and Respondent has set forth no basis for overcoming the presumption of correctness.

In Brake v. Murphy, 636 So.2d 72, 74 (Fla. 3d DCA 1994) the majority of the Court held that:

> In view of the fact that the fourth mortgage was invalidated because it was an encumbrance in favor of the personal representative obtained without required court approval, see §733.610, Fla.Stat. (1991), we conclude that a surcharge would be within the discretion of the trial court to assess for a reasonable allocation attributable to that one mortgage.

F.S. 733.610 states:

> **Sale, encumbrance or transaction involving conflict of interest.** Any sale or encumbrance to the personal representative or his spouse, agent, or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction that is affected by a conflict of interest on the part of the personal representative, is voidable by any interested person except one who has consented after fair disclosure, unless:
>
> (1) The will or a contract entered into by the decedent expressly authorized the transaction; or
>
> (2) The transaction is approved by the court after notice to interested persons.

Respondent seeks to utilize the advice of tax attorney Thomas Korge as a defense. Obviously Mr. Korge could not advise Respondent to ignore the statutory directives to personal representatives. In fact, he did not advise Eileen regarding the fourth mortgage. (T. 613). Furthermore, he did not know whether the will authorized the transaction. (T. 612-13). He did not

provide Eileen with any advice as to her ethical obligations. (T. 609).

The information which was given to Thomas Korge came primarily from Robert Brake. (T. 614). Korge was not aware of any of the conflicts at the time he gave legal advice to the Brakes and Murphys. (T. 614). He also testified that he would not have given the same legal advice if he had known that each of the four beneficiaries owned 25 shares of Murphy Investments, Inc. (T. 615).

Furthermore, Respondent cannot hide behind the corporation. She is individually liable for acts carried out in a corporate capacity. Rule of Professional Conduct 4-8.4(d); In the Matter of The Florida Bar, 133 So.2d 554, 556 (Fla. 1961); Corlett, Killian, et al. v. Merritt, 478 So.2d 828, 833 (Fla. 3d DCA 1985).

Foreclosure would have been unnecessary if Respondent acceeded to the requests to sell to the Deganis. Instead, her conduct, as the Referee pointed out, increased the antagonism,multiplied the conflicts of interest and prolonged resolution of the estate proceedings. (ROR, 29).

ARGUMENT
III

THE RESPONDENT HAS NOT ESTABLISHED THE EXISTENCE OF ANY SOURCE OF ERROR REGARDING THE FINDING OF A FRAUDULENT CONVEYANCE

Respondent Eileen seeks to argue the same issue as Argument III of Robert's brief. She argues that a resulting trust took place, not a fraudulent conveyance. The Bar adopts by reference its answer to Robert's argument in regard to this issue raised again by Eileen. Among the cases cited by the Bar (in addition to a discussion of the appellate statutes) was Sponholtz v. Sponholtz, 180 So.2d 497 (Fla. 3d DCA 1965) in which the Court held that a resulting trust cannot arise in favor of a person participating in a fraud.

ARGUMENT
IV

RESPONDENT HAS ESTABLISHED NO ERROR BASED UPON ALLEGED DUE PROCESS VIOLATIONS

A. Committee Make-up.

Assuming arguendo that this issue could constitute an affirmative defense, Respondent did not set forth any defense of this nature in her pleadings and, therefore, it is waived. Fla.R.Civ.P. 1.110(d); Wyman v. Robbins, 513 So.2d 230 (Fla. 1987). Furthermore, Respondent provides no references to any portion of the record which demonstrates that any committee member had a conflict and did not excuse himself. In fact, those individuals with a potential conflict did excuse themselves, as the Bar advised the Respondents in regard to this claim which they have repeated many times. The Bar's response follows:

> 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).

B. Sex Discrimination.

Assuming that this claim could constitute an affirmative defense, it was not raised and therefore is waived. Fla.R.Civ.P. 1.110(d). Furthermore, one cannot conclude that (if it could be documented) the absence of an interview by a Bar investigator

constitutes sexual discrimination.

C. Participation in Committee Meetings.

Respondent has not included this alleged defense in her pleadings and, therefore, it is waived. Furthermore, Respondent provides this Court with no references to the record to substantiate her argument. She provides no reference to any testimony which was part of the record in this proceeding, except as to the third hearing. In addition, Respondent specified no Rule of Procedure which was allegedly violated, nor does she present any other legal authority. In fact, the appropriate authority establishes that the undocumented argument lacks merit. The attorney under investigation has no right of confrontation or cross examination. The Florida Bar v. Swickle, 589 So.2d 901 (Fla. 1991).

D. The Pleadings.

Rule of Civil Procedure 1.110 (f) provides that: “Each claim founded upon a separate transaction or occurrence ... shall be stated in a separate count ... when a separation facilitates the clear presentation of the matter set forth.” (Emphasis supplied). Respondent has not designated any count of the complaint which violates the foregoing rule, nor has she specified any other rule violation. Furthermore, Respondent has failed to establish the

existence of any (harmful) error resulting from the pleading format.

E. The Trial.

Respondent alleges that her case should not have been consolidated with her husband's because confusion resulted. That claim is disingenuous in view of her testimony (TFB exh. 46, p.80) that: "I left everything up to my husband."

No evidence of confusion has been presented by Respondent at trial or by a motion after the Report was issued. All of the evidence including Respondent's statement above leads to the inevitable conclusion that Respondent and her husband had identical goals and engaged in mutually accepted conduct.

ARGUMENT
V

RESPONDENT FAILED TO ESTABLISH ERROR BASED UPON THE TIME REQUIRED TO COMPLETE THE REFEREE'S REPORT (REPHRASING RESPONDENT'S ARGUMENT V)

This Court has held that a Referee Report issued less than six months after the final hearing is timely. The Florida Bar v. Murphy, 614 So.2d 1090 (Fla. 1993). Even a fourteen month delay is not a basis for invalidation absent a demonstration of discernible prejudice. The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986). Furthermore, an extension of time to file the Report was granted to the Referee by this Court.[2]

Respondent also claims error based upon the length of the pre-trial period of time. No authority is presented to demonstrate that such is a defense. The record is before this Court. A review of the pleadings will reveal that there were few, if any, time periods when there was inactivity in the case. In fact, activity was virtually constant due to the many voluminous motions submitted

[2]A quickly drawn order would have been less desirable than this one which took several months. This trial consisted of not only live testimony, but hundreds of pages of transcripts from other trials and depositions, among the hundreds of exhibits offered into evidence. Sufficient time to read and analyze those materials was clearly conducive to drafting a satisfactory final report. The conflict issues, surcharge orders, and fraudulent conveyance decision required review and evaluation in the context of ten years of family disputes.

by the Respondents.

The Respondents had asked for more than one stay. The Respondents filed various collateral proceedings including extraordinary writs directed to this Court. The Respondents filed a Motion to Dismiss which raised nearly forty arguments. Similar motions for summary judgment and to strike pleadings as sham were submitted. Under these circumstances, it is hardly equitable for the Respondents to be complaining about the time required prior to trial.

ARGUMENT
VI

NO ERROR HAS BEEN ESTABLISHED REGARDING THE RECOMMENDED DISCIPLINE (REPHRASING RESPONDENT'S ARGUMENT VI)

The Referee found that Eileen was in violation of Rule 4-8.4(d), conflict prejudicial to the administration of justice, in respect to two counts. The Referee also found that Eileen violated Rule 4-8.4(c), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

A number of cases support the conclusion that a three month suspension is appropriate discipline for Eileen. In The Florida Bar v. Jones, 403 So.2d 1340 (Fla. 1981) a six (6) month suspension was imposed. 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 a one (1) year suspension 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 participating in a fraudulent conveyance to avoid creditors. Respondent Rood 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). 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 Brake.

CONCLUSION

Respondent has not established any source of error. This 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 Eileen 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 Eileen Brake, Respondent, at her record bar address of 1830 Ponce De Leon Blvd., Coral Gables, Florida 33134, and 1300 Coral Way, Coral Gables, Florida 33134, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this _____ day of _____, 1998.

_____
ARLENE KALISH SANKEL
Bar Counsel