IN THE SUPREME COURT OF THE STATE OF OREGON

In Re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 11-52
	)	
MICHAEL L. SPENCER	)	SC S060977
Michael Spencer	)	060977
Accused-Petitioner.	)	

ACCUSED'S REPLY BRIEF

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ACCUSED'S REPLY BRIEF

SUPPLEMENTAL STATEMENT OF FACTS

The retaining wall which is involved in this case was three (3) feet high. (Tr. 184) There are no building codes regarding retaining walls of less than four (4) feet high. (Tr. 122, 168) The City of Klamath Falls Code provision relating to the slope is not part of the State Building Codes nor a requirement anywhere else in Klamath County. (Tr. 125, 128)

Ms. Smith-Canfield waived a professional inspection but did not waive a final inspection, which she actually did. (Ex. 5, p.3; Tr. 34)

Ms. Smith-Canfield converted her case to Chapter 7 on September 28, 2011. (Ex. 9 page 5) She converted her case, hired an new attorney and surrendered the home because her employer went out of business and she lost her job. (Tr. 71-72)

The Accused did not recommend any professional inspections due to the cost and because he did not feel they were necessary on a one year old house. (Tr. 111-112)

ARGUMENT

A. RPC 1.7(a)(2)

The Bar, in its Brief, does not make any attempt to explain how there is clear and convincing evidence that there was a "**. . . significant risk . . .**" that the

Accused's representation of the client would be materially limited by a personal interest of the Accused, as required by this Rule. Two issues seem to be raised by the Bar. The first is the initial sale transaction and the second seems to be that the Accused did not make any of the required disclosures after the issue of the slope was brought up.

As to the first issue, as pointed out in the Accused's Opening Brief, there is absolutely no evidence that a real estate broker is likely to violate the law by putting his interest in his fee ahead of that of the client.[1] Thus, at the very least, on this question, the Bar failed to produce clear and convincing evidence.

The Bar does not even discuss how there can be a conflict of interest when the action they complain of is a violation of the law.

As to the second issue, it is not properly before this Court. The Complaint filed in this case alleges:

"5

> At all relevant times there was a significant risk that the Accused's representation of Smith-Canfield would be materially limited by the Accused's personal interest in a sales commission.

6.

> The Accused did not at any time recommend to Smith-Canfield that she seek the advice of independent counsel regarding whether she should hire

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[1] Interestingly, the Bar concedes that it is not contending ". . .that brokers are not inherently more likely than attorneys to subordinate client's interest to the own interest in earning a fee." (Respondent's Brief page 11)

> the Accused as her realtor or real estate broker and the material risks of or reasonably available alternatives to his acting as her realtor or broker."

(ER-3)

There is no allegation that the Accused's conduct following the sale was a violation and the Bar did not seek to amend the complaint at the trial.

The Trial Panel, in its Opinion, limited its findings and conclusions to the representation of the client as a realtor and did not discuss or rule on any issue relating to actions taken after the sale was completed. The Bar did not cross-appeal or in any other way raise the failure of the Trial Panel to rule on this issue and therefore this Court should not consider this argument in any fashion.

Rule 10.3 of the OSB Rules of Procedure provides:

> "Within 60 days after the Disciplinary Board Clerk has acknowledged, as required by BR 2.4(i)(4), receipt of a trial panel opinion, the Bar or the accused may file with the Disciplinary Board Clerk and the State Court Administrator a request for review as set forth in BR 12.8."

The Bar did not file a request for review.

Even if, somehow, this is properly before this Court, the Bar has again failed in its burden of proof. The simple fact that a problem has arisen does not necessarily create a conflict of interest. The Bar has attempted to have this made a rule but this Court rejected that attempt and has held:

> "The Bar's interpretation is incorrect. Many errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the

> client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if an error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk. See In re Hopp, 291 Or. 697, 634 P.2d 238 (1981) (finding no DR 5-101(A) violation when accused had incidental financial or proprietary interest in outcome of litigation). It simply does not follow, then, that any error made during the course of a lawyer's representation will or reasonably may affect his or her professional judgment in a way that requires consent after disclosure under DR 5-101(A).
>
> We do not catalogue the myriad situations in which a lawyer's error does or does not trigger DR 5-101(A). It suffices to say that, to prove a violation of DR 5-101(A), the Bar cannot assert simply that an error occurred and, therefore, created some risk, however minimal, of impaired professional judgment as a result of the potential malpractice liability. Rather, the Bar must show by clear and convincing evidence that the lawyer's error, and the pending or potential liability arising from that error, will or reasonably may affect the lawyer's professional judgment. That conclusion will depend on the facts and circumstances of each case."

In re Knappenberger, 337 Or 15, 28-29, 90 P.3d 614 (2004)

In evaluating the facts of this case to determine if the Bar has met this burden, it is clear that there is no evidence whatsoever that the Accused even committed an error. The Bar's position is that the Accused's advice to the client to not incur the cost a professional inspection was the error. However, the Bar does not even identify what form of professional inspection the Accused should have recommended. The Bar did not produce any evidence that a reasonable professional in this situation would have recommended any specific inspection(s). The Bar did not produce any evidence that whatever inspection should have been

done would have revealed that the City of Klamath Falls had not enforced its slope ordinance during the construction of the home.[2]

The evidence in this case clearly shows that the three foot retaining wall was not subject to any building codes. Likewise, the retaining wall is not subject to the City of Klamath Falls Code, which does not even discuss retaining walls. (Ex 14 pg. 2)

Even if there was evidence of error, there is no evidence that it had any impact on continuing representation in the Bankruptcy. The only factor that the Bar claims is that another attorney might have question the advice and that, therefore, this would be sufficient. That is not clear and convincing evidence and, in fact, is not evidence at all.

B. RPC 1.8(a)

In it's Brief, the Bar has not addressed any of the issues raised by the Accused in the Opening Brief. The Bar does not set out why the representation of a client as a real estate broker, where the broker is absolutely prohibited by law from putting his interest ahead of that of his client, is any different that the representation of a client as an attorney, where the attorney is likewise prohibited by law from putting his interest ahead of the client's. Why is one a "business

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[2] A professional home inspector is not required to report on compliance or non-compliance with codes, ordinances, statutes, regulator requirements or restrictions. OAR 812-008-0202(1)(e)

transaction" subject to RPC 1.8(a) while the other is not? The Bar does fall back on its argument that since the commission is paid upon the consummation of the sale, that this somehow makes this a "business transaction" without discussing why a contingent fee earned by a personal injury attorney is not.

The Bar, in it's Brief as set out below, seeks to carve out an exception from the rule only for attorney fees. However, as shown in the ABA Comments to Model Rule 1.8(a):

> "A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable."

While there are no cases from this Court interpreting this section, this Court

has previously rule in regards to DR 5-104(A):

> "Although fraught with peril, business transactions with clients are not inherently unethical. In re Brown, 277 Or. [296 Or. 233] 121, 134, 559 P.2d 884 (1977). It is when the client and the lawyer have differing interests and the client expects the lawyer to exercise his professional judgment for the protection of the client that DR 5-104(A) comes into play. Here, in the peculiar circumstances of this investment transaction, we, as did the Trial Board, conclude that the accuseds had no differing interests with the other investors or with the resulting F-D Apartments Joint Venture. Also, we conclude that there is insufficient evidence to establish that any of the investors, including the two client investors, expected the accuseds to exercise their professional judgment in the transaction for the protection of one or more of the investors. As discussed immediately below ("Count IV"), because of the nature and manner of the investment made by the accuseds, we do not find differing interests between the accuseds and their client, A.P.T.S."

In re Conduct of Samuels and Weiner, 296 Or. 224, 233, 674 P.2d 1166(1983)

> "Lest there be any doubt concerning that duty as being encompassed by DR 5-104, we now hold that in any situation in which a lawyer shall enter into a business transaction with his client where they have differing interests and the client expects the lawyer to exercise his professional judgment in the transaction for the protection of the client, the lawyer must at least advise the client to seek independent legal counsel. Compare In re Brown, 277 Or 121, 129, 559 P.2d 884 (1977); In re Boivin, 271 Or 419, 427-28, 533 P2d 171 (1975)."

In re Bartlett, 283 Or. 487, 496-97, 584 P.2d 296 (1978).

Both the comments to Model Rule 1.8(a) and prior Oregon case law show that the purpose of this rule is to protect the client's reasonable belief that his lawyer will put the client's interest first. When the lawyer is legally allowed to put the lawyer's interest ahead of the client's, the lawyer must fully disclose this fact and obtain the client's informed consent. There is no logical, legal or ethical

reason to require such disclosure and consent when the lawyer is prohibited by law from putting his interest ahead of the clients, whether that is for the attorney fees or real estate broker fees. There is no basis to contend that a lawyer, acting as a real estate broker, is in a position to engage in overreaching, since doing so would violate the law.

C. Article I, Section 20 of the Oregon Constitution

The Bar's response to this Assignment of Error is that

> ". . . clients have a right to expect that their lawyers will not be distracted by the prospect of earning a fee unrelated to the practice of law; thus, if the prospect of such a fee arises, the lawyer may not pursue it without the client's informed consent."

(Respondent's Brief page 12)

The Bar provides no authority for its statement other than a provision of the Realtor Ethics that has absolutely nothing to do with this issue.[3] The Realtor Ethics prohibits receiving compensation **from more than one person**. Obviously, when a professional is getting compensated from two different people, conflict issued may arise. That, however, is not the case here.

Additionally, the Bar's position differs from that of it's own publication, *The Ethical Oregon Lawyer*. In Section 8.13, it is pointed out that the purpose of RPC 1.8(a) is to ensure that the client's expectation that the lawyer will exercise his professional judgment on behalf of the client is protected. In both the case of

[3] See arguments regarding Section 1.8(a) regarding what a client reasonably expects.

an attorney performing legal services and an attorney performing real estate broker services, the attorney is mandated by law to exercise his professional judgment on behalf of his client. The Bar's argument actually supports the arguments raised by the Accused.

The Bar seeks to create an exemption from the Rules of Professional Conduct for Attorneys as to the fees earned by the attorneys by saying that RPC 1.8(a) does not apply to those fees while it applies to professional fees earned by the attorney when that attorney is also operating under a different professional license, where the legal duties to put the client's interest always ahead of the attorney's is absolute and unwaivable. The only difference is the professional license, not the duty to put the client's interest first. Certainly RPC 1.8(a) does not contain any such provision. The Bar's argument confirms that it is seeking to distribute a benefit to attorneys and a burden on real estate brokers who are also attorneys without standards and in an ad hoc fashion, in violation of Article I Section 20. *State v. Freeland,* 295 Or. 367, 375, 667 P.2d 509 (1983)

D. Sanction

The Bar argues that the Accused's advice caused the client to lose her home as well as having to obtain new bankruptcy counsel. This is a clear misstatement of the facts. The testimony of Ms. Smith-Canfield was that she gave up the house and converted her case only after her employer went out of business and she lost

her job. All of this occurred 23 months after the Accused withdrew as counsel for Ms. Smith-Canfield. During this time, Ms. Smith-Canfield continued to live in the house and make her Chapter 13 payments.

CONCLUSION

In conclusion, this Court should reverse the Trial Panel as the Bar has failed to meet its burden of proof.

Respectfully submitted:

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Accused-Petitioner

CERTIFICATE OF COMPLIANCE
with ORAP 5.05(2)(d)

Brief Length:

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,901.

Type Size:

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 4th day of June, 2013.

/s/ Michael L. Spencer
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CERTIFICATE OF eFILING
And
PROOF OF SERVICE

I certify that I submitted the original of MICHAEL L. SPENCER'S ("Accused") REPLY BRIEF via eFiling on June 4, 2013, so that it may be filed with the Appellate Court Administrator at this address:

Appellate Court Administrator
Appellate Courts Record Section
1163 State Street
Salem, Oregon 97301

I further certify that on June 4, 2013, I served via eService a true and correct copy of the MICHAEL L. SPENCER'S ("Accused") REPLY BRIEF to Mary A. Cooper.

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