

**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

In Re:

:

08-0412

Complaints against

:

Case No. 07-032

**Darren Joseph Mullaney
Attorney Reg. No. 0075929**

:

**John S. Brooking
Attorney Reg. No. 0055654**

:

**Findings of Fact,
Conclusions of Law and
Recommendation of the
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**

**Patrick F. Moeves
Admitted *Pro Hac Vice***

:

Respondents

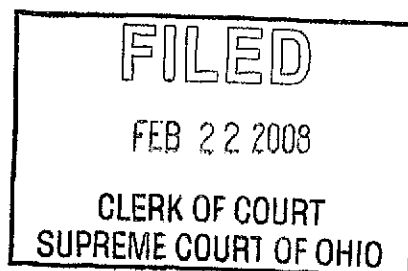
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Cincinnati Bar Association

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Relator

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{¶1} Case No. 07-032, Darren J. Mullaney, Respondent, Case No. 07-033, John S. Brooking, Respondent, and Case No. 07-034, Patrick E. Moeves, Respondent, all on the Complaint of the Relator, Cincinnati Bar Association, were consolidated into one disciplinary case by order of the Board Chair entered June 27, 2007. By order of the panel chair, all pleadings thereafter were filed only in Case No. 07-032 to avoid unnecessary duplication. Hearing was held December 17, 18, and 19, 2007 in Columbus, Ohio, before a panel composed of Nancy D. Moore, Esq. of Columbus, Ohio, Lisa M. Lancione Fabbro of Sheffield Village, Ohio, and Panel Chair, Judge Thomas F. Bryant, of Findlay, Ohio.

{¶2} None of the panel members is from the appellate judicial district in which the complaint arose and none was a member of a probable cause panel that certified any of the matters to the Board.

{¶3} Rosemary D. Welsh, Esq., Richard L. Creighton Jr., Esq., and John G. Slauson, Esq. appeared as counsel for the Relator, Cincinnati Bar Association. Respondent Mullaney was represented by John J. Mueller, Esq. Respondents Brooking and Moeves were represented by Christopher J. Weber, Esq.

{¶4} Relator's Complaints allege that each of the three respondents has violated the following disciplinary rules in effect at the times alleged:

DR 2-103. RECOMMENDATION OF PROFESSIONAL EMPLOYMENT.

(C) A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, except that:

DR 3-101. AIDING UNAUTHORIZED PRACTICE OF LAW

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

DR 3-102. DIVIDING LEGAL FEES WITH A NON-LAWYER

(A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(No exceptions are claimed to apply to the circumstances at hand. All respondents deny dividing legal fees with a non-lawyer.)

DR 3 – 103. FORMING A PARTNERSHIP WITH A NON-LAWYER

(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

DR 6-101. FAILING TO ACT COMPETENTLY.

(A) A lawyer shall not:

(2) Handle a legal matter without preparation adequate in the circumstances.

DR 7 – 101. REPRESENTING A CLIENT ZEALOUSLY

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7 – 101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to the reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

{¶5} Each respondent, by Answer or Amended Answer to the Complaint against him, has admitted most of the facts alleged, and has denied that his conduct violated any of the disciplinary rules.

{¶6} Reproduced without formalities and signatures and attached to this report are the written stipulations of the parties entered, offered and received in evidence or proffered at panel hearing. All the respondents testified at hearing upon direct and cross-examination.

{¶7} Testifying in behalf of Relator were Jessica Nielson, Esq., a former associate of Brooking, Moeves and Halloran, PLLC, and John Rose, Esq., Relator's expert.

{¶8} Hon. Douglas Michael Stevens, Retired Kenton County, Kentucky Circuit Court Judge testified in behalf of respondents Moeves and Brooking.

{¶9} Received in evidence over objection were the depositions of twelve of Respondents' clients, whose testimony illustrates the client circumstances in which respondents' conduct arose giving rise to these disciplinary complaints.

{¶10} The investigation of the respondent Mullaney's representation of Foreclosure Solutions clients was apparently begun by relator, in part, because of an article appearing in Cleveland Scene or e-scene magazine marked for hearing as Relator's Exhibit HH. The authenticity of Exh. HH was stipulated. Its content is discussed in some detail in the cross-examination of respondent Mullaney. The exhibit was admitted over objection. A copy of Exh. HH is attached.

FINDINGS OF FACT

{¶11} The panel finds the following facts to have been proven by clear and convincing evidence stipulated or established by the testimony of the witnesses at hearing and by the exhibits received.

{¶12} In November, 2003, Respondent Patrick E. Moeves (Moeves) was a principal in the Kentucky law firm of Moeves and Associates, PLLC. At that time Timothy Buckley, President of Foreclosure Solutions, Inc., came to Moeves and offered to refer to him for legal work, clients of Foreclosure Solutions for whom Foreclosure Solutions held powers of attorney. All the cases involved Kentucky foreclosures. Moeves agreed to accept the referrals for a flat fee of \$125.00 each.

{¶13} Foreclosure Solutions, Inc. (Foreclosure Solutions) is a company offering to defendants in home foreclosure lawsuits a solution to prevent the foreclosure sale. (Stip. 6) It is not a licensed or accredited Consumer Credit Counseling Agency. Timothy Buckley, Foreclosure Solutions President, is not an attorney-at-law licensed to

practice law in Ohio and no other Foreclosure Solutions employee is so licensed. (Stips. 10 and 11)

{¶14} Early in 2004 the firm of Moeves and Halloran, PLLC was formed. Respondent Darren J. Mullaney (Mullaney) who had been an associate with Moeves and Associates, PLLC became an associate with the new firm. Mullaney was the only lawyer in Moeves and Halloran, PLLC who was licensed to practice law in Ohio.

{¶15} Also early in 2004, Mr. Buckley offered to refer Foreclosure Solutions' Ohio foreclosure clients to Moeves. Moeves agreed to take the Ohio cases for the fee of \$125.00 offered by Buckley. All the Ohio cases were assigned to Mullaney.

{¶16} In September 2004, the firm of Brooking, Moeves and Halloran, PLLC (the Law Firm) was formed. The Law Firm is based in Ft. Wright, Kentucky.

{¶17} John Samson Brooking ("Brooking") is a principal in the Law Firm. Brooking was admitted to the Kentucky Bar in 1990 and the Ohio Bar in 1991. He is a member in good standing of the Kentucky Bar and the Ohio Bar.

{¶18} Patrick E. Moeves ("Moeves") is a principal in the Law Firm. He was admitted to the Kentucky Bar in 1995 and is a member in good standing.

{¶19} Moeves is now and always has been the lawyer at the Law Firm considered the primary contact with Foreclosure Solutions and the lawyer responsible for managing the relationship with Foreclosure Solutions.

{¶20} Brian P. Halloran ("Halloran") is a principal in the Law Firm. He was admitted to the Kentucky Bar in 1994 and is a member in good standing. Relator has made no allegations of Halloran's individual misconduct. He is not a party to these proceedings.

{¶21} Darren J. Mullaney ("Mullaney") was admitted to the practice of law in Ohio in June 2003. From at least September 2004 to May 2006, Mullaney worked as an associate for the Law Firm or its predecessor.

{¶22} At the time of the formation of the Law Firm in September 2004, Foreclosure Solutions began employing the Law Firm to represent Foreclosure Solutions' customers in foreclosure proceedings in Ohio.

{¶23} Foreclosure Solutions advertises for clients who have been sued in home foreclosure actions and also solicits by direct mail and by telephone prospective clients whose names appear in court dockets as defendants in foreclosure actions, offering its services to the prospective client in finding a solution to the foreclosure suit to save the client's home from foreclosure sale, or to accomplish the result desired by the client. Its non-lawyer agents represent to the prospective client that an attorney and legal services will be furnished to them.

{¶24} Because Foreclosure Solutions is not a law firm and its sales representatives are not lawyers, neither the content of Foreclosure Solutions' advertising nor the representations made by its representatives are subject to the ethical considerations and restrictions of DR 2-101 governing lawyer advertising and solicitation of clients for legal services.

{¶25} When Foreclosure Solutions has contacted a willing client, its representative visits the client, obtains the client's signature on a contract called a Work Agreement, and obtains the client's signature on a Limited Power of Attorney appointing Foreclosure Solutions the client's attorney in fact to negotiate with the client's creditor in the foreclosure and to hire an attorney for the client.

{¶26} There is no provision in the Work Agreement or in the Limited Power of Attorney identifying a lawyer, establishing when an attorney would be hired, or advising the client of the amount of the lawyer's fee to be paid.

{¶27} The Foreclosure Solutions method is to delay the foreclosure proceedings as long as possible to try to work out a settlement of the suit. The Foreclosure Solutions Work Agreement establishes that Bankruptcy is to be the last resort before foreclosure sale. The Work Agreement provides that the solution to the foreclosure suit is to be accomplished by the client establishing a special savings account to finance a settlement with the creditor plaintiff. The amount of the client's required periodic savings deposit is determined by Foreclosure Solutions.

{¶28} When a client has signed a Foreclosure Solutions work agreement and a limited power of attorney, the sales representative fills out a financial worksheet and savings recommendation and collects the Foreclosure Solutions fee of between \$700.00 and \$1,000.00. No portion of the fee collected from the client by Foreclosure Solutions is designated for attorney fees and no separate legal fee is collected or established for attorney services.

{¶29} It is essential to Foreclosure Solutions' business to represent to its prospective clients that an attorney and legal services are being furnished to them. The client is given no choice in the selection of that attorney.

{¶30} When the fee has been paid, Foreclosure Solutions attempts to negotiate a settlement directly with the foreclosing creditor plaintiff and continues or attempts to continue to do so after counsel has been hired for the debtor defendant. It hires a lawyer for the client when it is necessary to file a pleading in the foreclosure action.

{¶31} Foreclosure Solutions employed the Law Firm to represent customers pursuant to the limited power of attorney which expressly authorized Foreclosure Solutions to employ an attorney to represent the customer.

{¶32} The Law Firm agreed to represent, for a flat fee of \$125.00, those clients that Foreclosure Solutions employed the Law Firm to represent in foreclosure cases. This flat fee was later raised to \$150.00 per case by agreement between the Law Firm and Foreclosure Solutions.

{¶33} The Law Firm accepted representation of approximately 2,000 customers of Foreclosure Solutions sued for foreclosure in Ohio during 2005 and 2006.

{¶34} The Law Firm customarily picked up the customer files from Foreclosure Solutions' office in Cincinnati or, sometimes a Foreclosure Solutions employee delivered customer files to the office of the law firm. A client's file generally contained the Limited Power of Attorney, a Work Agreement, an intake sheet completed by a representative of Foreclosure Solutions, and a copy of the Complaint in foreclosure. The Law Firm would often receive several client files per pick-up or delivery, together with a Foreclosure Solutions check for the law firm's legal fees for the work to be done on the files received. The clients did not pay any fees directly to the Law Firm.

{¶35} The standardized "Work Agreement" prepared by Foreclosure Solutions contains the basic terms and conditions of the contract between Foreclosure Solutions and its customers. Ex .G

{¶36} The standardized "intake form" is prepared by Foreclosure Solutions and contains information concerning the clients and their financial situation. Ex. F.

{¶37} The Law Firm sends its clients copies of every pleading filed in the case.

{¶38} In the cases in which the trial court grants judgment and an order for the sale of the property, after the Law Firm receives notification of the sale date, the Law Firm in turn notifies its client and recommends that the client contact a bankruptcy lawyer.

{¶39} Moeves drafted a document entitled "The Nuts and Bolts of a Kentucky Foreclosure." When the Law Firm began representing clients in Ohio, Mullaney modified the document entitled "The Nuts and Bolts of a Kentucky Foreclosure" to account for differences in Ohio law and practice. The Law Firm entitled this document "The Nuts and Bolts of an Ohio Foreclosure." A copy is sent by the law firm to every client it accepts from Foreclosure Solutions. Ex. C.

{¶40} The Law Firm and Mullaney were aware that all clients that Foreclosure Solutions had employed the Law Firm to represent were parties to pending foreclosure lawsuits, and understood that the selection of counsel was made by Foreclosure Solutions as opposed to the clients. The clients were not advised, in writing, if at all, as to the amount of the flat fee paid to the Law Firm by Foreclosure Solutions.

{¶41} The Law Firm and Mullaney were aware that Foreclosure Solutions obtained its customers through advertising and mailings, although neither Mullaney nor the Law Firm had anything to do with the marketing of Foreclosure Solutions' services.

{¶42} The Law Firm and Mullaney were aware that Foreclosure Solutions continued to negotiate for a repayment plan with lenders on behalf of Foreclosure Solutions' customers who were also clients of the Law Firm.

{¶43} From September 2004 to the spring of 2006, Brooking had little involvement in the foreclosure cases that the Law Firm had been employed to defend on

behalf Foreclosure Solutions' customers. For a short time in the spring of 2006, and then again beginning in September 2006 and continuing to the present time, Brooking represented clients that Foreclosure Solutions had employed the Law Firm to represent, including making court appearances on their behalf in Ohio courts.

{¶44} In his testimony at hearing, Brooking asserted that his representation of Foreclosure Solutions clients in Ohio was for the limited scope of defense of foreclosure actions, that he was not retained as bankruptcy counsel and his only responsibility respecting bankruptcy was to “advise clients to seek bankruptcy at the appropriate time.” Hearing Transcript Vol. II, pp 104-105.

{¶45} Moeves has been admitted to practice in Ohio courts located in the following Ohio counties pursuant to *pro hac vice* motions in numerous foreclosure cases where the Law Firm had been employed to represent customers of Foreclosure Solutions: Cuyahoga, Hamilton, Stark, Summit, Portage, Defiance, Van Wert, Sandusky and Butler. Stip. 28.

{¶46} The Law Firm represented clients in foreclosure actions pending in the Court of Common Pleas of Hamilton, Butler, Clermont, Cuyahoga, Montgomery, Union, Van Wert, Auglaize, Franklin, Greene, Lucas, Stark, Trumbull, Muskingum, Perry, Mercer, Lorain, and Summit Counties among others. Stip. 29.

{¶47} Darren Mullaney represented clients in foreclosure actions pending in the Court of Common Pleas of Hamilton, Butler, Clermont, Cuyahoga, Montgomery, Union, Van Wert, Auglaize, Franklin, Greene, Lucas, Stark, Trumbull, Muskingum, Perry, Mercer, Lorain, and Summit Counties among others. Stip. 30.

{¶48} The Law Firm represented Richard and Karen Godfrey, Fred Grant, Valerie Johnson, Dorene Brown, Rick Dorn, Roger Porter, William Armitage, Shelia Keyes, Lorrinzo Wimberly, Martiese Head, Roberta and Frederick Warr, Michael Zaback, Annie Crowell, Thomas and Michelle Sambor, and Mark Stoves, among others, in foreclosure actions. Stip. 31.

{¶49} Darren Mullaney represented Richard and Karen Godfrey, Fred Grant, Valerie Johnson, Dorene Brown, Roger Porter, William Armitage, Shelia Keyes, Lorrinzo Wimberly, Martiese Head, Roberta and Frederick Warr, Michael Zaback, Annie Crowell, and Thomas and Michelle Sambor, among others, in foreclosure actions. Stip. 32

{¶50} Respondents followed the same general procedure or format in representing all the foreclosure clients whose files were furnished to the firm by Foreclosure Solutions. That procedure or format did not include an initial or early contact with the clients to discuss the clients' objectives and to gather important facts as to the client's financial status and possible defenses.

{¶51} The law firm's contact with the clients was routinely made by boilerplate correspondence from the Law Firm to the client asking whether the clients believed they had any defenses, relying on the client to identify and understand what facts might constitute a legal defense to foreclosure. Exh. B, C.

{¶52} Instead of counseling each client as to their choice of remedy and whether bankruptcy would be appropriate, Respondents simply followed the "savings plan" offered by Foreclosure Solutions and allowed the foreclosure proceeding to proceed until

sale was ordered, interposing routine pleadings at critical stages to carry out the delay upon which the foreclosure solutions savings plan was based.

{¶53} Only after a notice of sale was issued did Respondents send a letter to clients advising them to consult a bankruptcy attorney.

{¶54} The testimony at hearing of Relator's expert, John Rose, Esq., a bankruptcy attorney, is informative concerning the need for an attorney to initially gather complete information about a client's financial situation in order to recognize the client's options and to adequately counsel the client about them. Hearing Transcript Volume II, pp. 7-84.

{¶55} Attorney John Rose explained that when delay occurs in foreclosure proceedings, as encouraged by Foreclosure Solutions and implemented by respondents, the clients become responsible for greater arrearages and the legal fees incurred by the lender increase, making it even harder for the debtor to get ahead financially or to reach a settlement.

{¶56} Delay in pursuing some form of bankruptcy relief may result in lost opportunities to achieve maximum relief available to a debtor. An example is invocation of the 910-day rule which permits a debtor in bankruptcy to return to a lien holder in full satisfaction of the debt owed on it, an automobile purchased within 910 days of the filing of the bankruptcy, thus relieving the debtor of the need to make installment payments on that debt which sums may then be used to satisfy other non-foreclosure debts or fund bankruptcy court supervised savings.

{¶57} The 910 rule was a relevant option not considered by any of the Law Firm's lawyers, including respondents, when representing Richard and Karen Godfrey to

whom the rule's application was of substantial benefit in evaluating their financial affairs and seeking effective relief to accomplish their financial objectives.

{¶58} In other client's circumstances, respondents gave no consideration to ascertainment and use of other available financial resources that might be redirected or eliminated as an alternative to a savings account for payment of a negotiated settlement such as borrowing from the client's IRA, if any, or elimination of other non-foreclosure debt and payments to free funds for use to avoid foreclosure sale.

CONCLUSIONS OF LAW

{¶59} DR 2-103(C) prohibits a lawyer from improperly using an organization or person to promote the lawyer's services.

{¶60} The panel concludes that the evidence is clear and convincing that respondents Mullaney, Brooking and Moeves have violated DR 2-103(C) in the circumstances.

{¶61} DR 3-101(A) prohibits aiding in the unauthorized practice of law.

{¶62} The Ohio Supreme Court of Ohio held in *Cincinnati Bar Association v. Cromwell*, 82 Ohio St. 3d 255, 1998-Ohio-237, and *Cincinnati Bar Association v. Telford*, 85 Ohio St. 3d 111, 1999-Ohio-439, that making representations to creditors on behalf of third parties in connection with pending lawsuits constitutes the practice of law.

{¶63} Foreclosure Solutions and its non-lawyer employees, with the knowledge and acquiescence of respondents, negotiated with the client's adverse party creditor for settlement in a law suit, sometimes simultaneously with respondents' negotiations.

{¶64} In performing the services undertaken according to its contract with its clients, Foreclosure Solutions' non-lawyer employees recommended a "remedy" for the prospective client's foreclosure lawsuit before respondents represented the client.

{¶65} In *Columbus Bar Association v. Flanagan*, 77 Ohio St.3d 381, 1997-Ohio-61, the Ohio Supreme Court held that counseling clients in financial matters about choice of remedies under the bankruptcy code or whether bankruptcy can be avoided are matters requiring counsel with a qualified lawyer. Here that legal advice was provided by Foreclosure Solutions non-lawyer employees.

{¶66} The panel concludes that the evidence is clear and convincing that respondents Mullaney, Brooking and Moeves have violated DR 3-101(A) in the circumstances.

{¶67} DR 3-102(A) prohibits sharing legal fees with a non-lawyer.

{¶68} Here, clients paid a fee to Foreclosure Solutions for services, some of which were legal services, and that fee was subsequently divided between Foreclosure Solutions and the Law Firm. All the principals and associates of the Law Firm knew of the fee arrangements of Financial Solutions and of the source and amount of the fees paid to the law firm.

{¶69} The panel concludes the evidence is clear and convincing that respondents Mullaney, Brooking and Moeves have violated DR 3-102(A).

{¶70} DR 6-101(A) (2) prohibits a lawyer from handling a legal matter without preparation adequate in the circumstances

{¶71} The only interview or consultation by respondents with the majority of the Foreclosure Solutions clients sent to them was by form letter or telephone reassurance in

furtherance of Foreclosure Solutions' prescribed course of delay, savings accumulation, and settlement attempts, without evaluation of the client's circumstance or consideration of alternative options for protection of the clients' interests presented by those circumstances. It is clear in the case of Richard and Karen Godfrey that respondents' continuing to follow the Foreclosure Solutions prescribed course of settlement while failing to investigate and evaluate of the clients non-foreclosure debts, assets and other resources and to assess the opportunities presented by existing law was inadequate preparation in the circumstances. The testimony and exhibits at hearing are clear and convincing evidence that the application of one course of legal defense or settlement theory to every foreclosure client's circumstance is inadequate preparation for the protection of the individual client's financial and legal interests, regardless of the outcome.

{¶72} The settlement procedure followed in all of the 12 foreclosure cases handled by the Law Firm and noted in the panel findings of fact deprived each of the clients of respondent's individual evaluation, assessment of options and corresponding individual legal advice. All of the respondents participated in some way at some time in the case of Richard and Karen Godfrey.

{¶73} The panel concludes the evidence is clear and convincing that respondents Mullaney, Brooking and Moeves have violated DR6-101(A) (2)).

{¶74} DR 7-101(A) (1) provides that a lawyer shall not intentionally fail to seek the lawful objectives of his client.

{¶75} In the several instances presented to the panel, respondents did not independently and individually assist or counsel their clients in determining what lawful

objective might be obtained and what legal courses were available to them to obtain that objective in the circumstances.

{¶76} Although respondents may be thought only to have represented their clients poorly, or followed a futile or ineffective course in doing so, or overlooked or failed to follow a better course, the panel finds the evidence to be clear and convincing that respondents, by intentionally following the rote solution prescribed by Foreclosure Solutions thus failing to ascertain the lawful objectives available in each client's circumstance and seek them, violated DR 7-101(A) (1).

{¶77} DR 3-103 (A) prohibits lawyers from forming business partnerships with non-lawyers if any of the activities of the partnership consist of the practice of law.

{¶78} For proof of the alleged business partnership of the Law Firm and Foreclosure Solutions, Relator suggests that a business partnership as contemplated by DR 3-103(A) may be inferred from the conduct of the parties in their dealings with each other and their clients. Respondents insist the formal Ohio statutory requirements must be met.

{¶79} The Law Firm agreed to represent all clients referred to it by Foreclosure Solutions with few exceptions and to accept the flat fee per case to be paid the law firm for the work. The nature of that arrangement is otherwise unclear, but there was tacit agreement that the law firm would follow the course of attempted settlement outlined by Foreclosure Solutions.

{¶80} Here, Foreclosure Solutions solicited the clients, referred the cases to the Law Firm for the filing of pleadings and shared with the Law Firm on a flat rate basis the

fees it collected from the client. The Law Firm did not discuss with the client the fee to be paid.

{¶81} In *Cleveland Bar Assn. v. Nosan*, 108 Ohio St. 3d 99, 2006-Ohio-163, a recent case involving a lawyer's partnership with a non-lawyer involving in part the practice of law, a California financial services company associated with Nosan, an Ohio lawyer practicing law in Ohio, to offer customers help in managing their financial affairs. The company leased office space for Nosan in Cleveland and Akron and for other attorneys elsewhere, arranged advertising and provided staff support for them, and in exchange the attorneys charged the customers for all the work done by lawyers and non lawyers and divided their fees with the company according to a fixed percentage.

{¶82} In *Nosan*, the lawyer's business arrangement with the non-lawyer firm created the appearance of Nosan's law practice performing credit counseling and attendant legal services. There was no apparent formal partnership created and the business was the non-lawyer firm's business with Nosan's participation adding an appearance of legitimacy to all the legal work done, whether Nosan did the work or not.

{¶83} The arrangement between the Law Firm and Foreclosure Solutions created the facade of an attorney client relationship between the Law Firm and each individual Foreclosure Solutions client. Of course the attorney for all of the Law Firm's 2000 Ohio foreclosure clients was the Law Firm, chosen by Foreclosure Solutions pursuant to power of attorney. Although the Law Firm did not share physical facilities with Foreclosure Solutions and confined itself to settlement negotiations and conducting the in-court aspects of the Foreclosure Solutions settlement program, it shared a fixed amount of the fees collected from the clients by Foreclosure Solutions. The legal work to be done by

the Law Firm described by respondent Brooking was circumscribed by its tacit agreement with Foreclosure Solutions.

{¶84} As in *Nosan*, there was no apparent formal partnership created but the business was the non-lawyer firm's business with the Law Firm's assured and compliant participation essential to its sales efforts and to add the appearance of honesty and legitimacy to the work promised.

{¶85} The panel finds the evidence to be clear and convincing that the business arrangement between the Law Firm and Foreclosure Solutions is a partnership as envisioned by DR 3-103(A) and that the respondents Moeves and Brooking have violated that disciplinary rule.

{¶86} The panel does not find the evidence to be clear and convincing that respondent Mullaney, as an associate of the law firm working under the direction of respondents Moeves and Brooking, has violated DR3-103(A).

{¶87} In summary, the panel concludes that respondents Mullaney, Brooking and Moeves have violated DR 2-103(C), DR 3-101(A), DR 3-102(A), DR 6-101 (A)(2), and DR 7-101(A)(1). The panel further concludes that respondents Moeves and Brooking have violated DR 3-103(A).

AGGRAVATION AND MITIGATION

{¶88} Section 10 of the Rules Governing Procedure on Complaints and Hearings before the Board of Commissioners on Grievances and Discipline of the Supreme Court establishes guidelines for imposing appropriate sanctions for misconduct. Among those guidelines considered by the panel in favor of recommending a more severe sanction in these cases are:

{¶89} Respondents have engaged in a pattern of misconduct and in multiple offenses.

{¶90} Respondents do not acknowledge the wrongful nature of their misconduct.

{¶91} Many, if not all, of the clients harmed by the respondents misconduct were obviously unsophisticated, in desperate financial circumstances, about to lose their homes and vulnerable to purveyors of a scheme to save their homes and assets. Respondent's participation as lawyers lent an aspect of legitimacy to the sale of a plan of otherwise dubious value and perhaps of doubtful legality. Respondents participated in and profited from that anomalous plan taking scarce funds from those whose problems stemmed from scarcity of funds.

{¶92} Among those guidelines that may be considered in recommending a less severe sanction, the panel considered the following:

{¶93} Respondents have no prior disciplinary record in Ohio. Stip. 33.

{¶94} Relator suggests respondents had no dishonest or selfish motive.

{¶95} Respondents Brooking and Moeves have demonstrated a cooperative attitude toward these proceedings. Stip. 34.

{¶96} Retired Kenton County Kentucky Circuit Court Judge Douglas Michael Stevens testified as to the good character and professional reputations of Respondents Moeves and Brookings.

{¶97} A letter affirming respondents' good character and reputation was received in evidence with Relator's acquiescence.

PARTIES RECOMMENDATIONS

Relator

{¶98} Relator recommends that each Respondent be suspended from the practice of law for a period of six to twelve months and cites numerous examples from Ohio Supreme Court decisions for disciplinary violations said to be analogous to those of respondents.

Respondents

{¶99} Counsel for respondents urge that there is no law in Ohio that says the marketing and sale of services in counseling people in defending foreclosure cases is the practice of law and cites the testimony of respondents Moeves and Brookings estimating that the Law Firm achieved the clients' goal in 50-60% of the cases undertaken. Further, counsel suggest that the evidence regarding the necessity of a lawyer's inquiry into a client's financial circumstances and legal alternatives when counseling the client respecting bankruptcy law is irrelevant to a lawyer representing the client in the defense of a foreclosure action.

{¶100} Counsel for respondent Mullaney argues in addition that since Mullaney was merely an associate acting on the instructions of his employers and mentors he has no culpability either for any disciplinary violations that may be found in consequence of the Law Firm's business relation with Foreclosure Solutions or in consequence of his having followed the orders or instructions of his superiors.

{¶101} Respondents' counsel both suggest the alleged violations should be dismissed in their entirety.

PANEL RECOMMENDATION

{¶102} For the reasons stated in its conclusions, the panel rejects the arguments and recommendation of respondents' counsel.

Respondent Mullaney

{¶103} Respondent Mullaney, although an associate, not a principal member of the Law Firm, is nevertheless an attorney licensed to practice law in Ohio and subject to the Code of Professional Responsibility in force at all times relevant to this proceeding. He is therefore charged with knowledge of the provisions of that code, is bound by them individually, and is subject to sanction for his own disciplinary violations.

{¶104} The panel has found that Mullaney improperly used an organization to promote services, aided in the unauthorized practice of law, shared legal fees with a non-lawyer, handled legal matters without preparation adequate in the circumstances, and intentionally failed to seek the lawful objectives of his clients, in violation of DR 2-103(C), DR 3-101(A), DR 3-102(A), DR 6-101(A) (2), and DR 7-101(A) (1).

{¶105} Nevertheless, it is clear from the evidence that Mullaney devoted much effort and many hours to the assistance of the clients assigned to him, those efforts circumscribed, however, by the policies of the Law Firm established initially by respondent Moeves in pursuance of the undertaking with Foreclosure Solutions. Mullaney left employment with the Law Firm for unrelated reasons before these proceedings were certified. Until he was subject of inquiry by Relator's investigator, he believed he was helping his clients in their distress and he was apparently unaware that his conduct might be questioned for ethical violation.

{¶106} Although Relator has not conceded that Mullaney was cooperative in the investigation and the proceeding, the panel found his testimony at hearing, while hesitant under the close scrutiny of his counsel, to be essentially forthright. The panel is unwilling to ascribe to Mullaney as a client a lack of cooperation in the proceeding

because of the lack of agreement or manifested indignation evident and inherent in the vigorous and technical defense conducted by his counsel, to which defense he is entitled.

{¶107} Mullaney was admitted to the practice of law in Ohio in 2003. He has no prior disciplinary history. The panel has found Mullaney's violations to have occurred while he was a new lawyer, working as directed by respondent Moeves. Because his disciplinary violations arose in consequence of his continued, knowing participation in the course of his employer's business arrangement with Foreclosure Solutions, and not from any personal selfish or dishonest motive, and because the risk of future violations of this sort by this respondent is unlikely, the panel recommends that respondent Darren J. Mullaney be publicly reprimanded for his misconduct.

Respondent Brooking

{¶108} Respondent Brooking was admitted to the Ohio Bar in 1991. He is a member in good standing of the both the Kentucky Bar and the Ohio Bar. Brooking was an established practitioner when he joined Moeves and Halloran to form the Law Firm.

{¶109} Brooking became principally involved in the active representation of Foreclosure Solutions Ohio clients in September, 2006 and continues to do so. He does not acknowledge any disciplinary violation or wrongdoing, apparently because the specifics of his business arrangement with Foreclosure Solutions and with its clients in the limited nature of the legal work undertaken have never been found specifically to violate the Code of Professional Conduct.

{¶110} The panel has found that Brooking improperly used an organization or person to promote his services, aided in the unauthorized practice of law, shared legal fees with a non-lawyer, handled legal matters without preparation adequate in the

circumstances, intentionally failed to seek the lawful objectives of his client, and formed a business partnership with a non-lawyer in part involving the practice of law, thus violating DR 2-103(C), DR 3-101(A), DR 3-102(A), DR 3-103(A), DR 6-101(A)(2), and DR 7-101(A)(1).

{¶111} In *Cleveland Bar Assn. v. Nosan*, id., noted in the panel's conclusions, the respondent Nosan violated DR 2-106(A) and (B) (excessive fee), DR 3-101 (A) (aiding the unauthorized practice of law), DR 3-102(A) (dividing legal fees with a non-lawyer), and DR 3-103(A) (forming a partnership with a non-lawyer). Nosan acknowledged his wrongdoing. The Court imposed a six-month suspension stayed on condition respondent refund the excessive fee and avoid further misconduct.

{¶112} In *Disciplinary Counsel v. Wheatley*, 107 Ohio St.3d 224, 2005-Ohio-6266, the Supreme Court imposed a six months suspension where respondent was found to have engaged in fee splitting in violation of DR 3-102(A), aiding the unauthorized practice of law in violation of DR 3-101 (A), and allowing a business organization to refer customers only to him and to promote his services, in violation of DR 2-103(C). Respondent's lack of prior violations, cooperation in the proceedings, prior good reputation and his lack of dishonest motive were mitigating factors. His continuing failure to recognize an inherent conflict of interest was considered an aggravating factor.

{¶113} In *Columbus Bar Association v. Fishman*, 98 Ohio St.3d 172, 2002-Ohio-7086, respondent violated DR 2-103(C) (recommendation of professional employment), DR 3-101 (A) (aiding unauthorized practice of law), DR 3-102(A) (dividing legal fees with a non-lawyer), DR 4-101(D) (failing to protect confidences and secrets of a client),

DR 9-102(A) and DR 9-102(B)(3) (failing to preserve client funds). The Court found respondent's conduct to be particularly egregious and imposed a one-year suspension.

{¶114} In *Disciplinary Counsel v. Kramer*, 113 Ohio St.3d 455, 2007-Ohio-2340, respondent violated DR 2-103(C) (recommendation of professional employment) and DR 3-101(A) (aiding the unauthorized practice of law). The Court imposed a six-month suspension stayed on condition that respondent not engage in any further violations, noting respondent's acknowledgement of wrongdoing, lack of prior violations, cooperation, and reputation as mitigating more severe discipline.

{¶115} Brooking has a good reputation, has no prior violations and has cooperated in the disciplinary process, all of which circumstances the panel finds to be mitigating.

{¶116} The vulnerability of, and respondent's failure to meaningfully assist the large number of clients potentially injured is especially distressing, considering Brooking does not acknowledge that his conduct was misconduct.

{¶117} Considering the range of sanctions imposed in similar cases with similar aggravating and mitigating factors, the panel believes the aggravating factors in this case outweigh the mitigating factors when considering the potential for future injury to the public inherent in respondent's unwillingness to recognize his misconduct.

{¶118} Therefore the panel recommends that respondent John Samson Brooking be suspended from the practice of law in Ohio for a period of one year, the entire period of suspension stayed on condition of no further findings of misconduct and that the Supreme Court of Kentucky and the State Bar of Kentucky be notified of this action and sanction.

Respondent Moeves

{¶119} Respondent Moeves is not licensed to practice law in Ohio. As an attorney in good standing with the state bar of Kentucky, his appearances and representation of clients in nine Ohio courts have been upon motions and orders granting to him the privilege of appearance in the several courts *pro hac vice*.

{¶120} When Moeves joined Brooking and Halloran to form the Law Firm, he brought the business relationship with Foreclosure Solutions to the Law Firm with revenues from that source attributable to Ohio Clients for the relevant period estimated to be between \$250,000.00 and \$300,000.00 from an estimated 2000 Ohio client cases.

{¶121} While Moeves does not concede that any misconduct has occurred, he has stated his willingness to abide by the decision resulting from this proceeding.

{¶122} Moeves testified to his willingness and desire that he alone be sanctioned for any misconduct found to have arisen from the Law Firm's representation of clients referred by Foreclosure Solutions, thus absolving of wrongdoing Mullaney and Brooking who are licensed to practice law in Ohio.

{¶123} As with Mullaney and Brooking, the panel found Moeves to have engaged in multiple violations and a pattern of misconduct. Judge Stevens attested to Moeves continued good character and reputation in Kentucky.

{¶124} Moeves has no prior disciplinary history in Ohio and has been cooperative in the disciplinary process.

{¶125} Moeves and Brooking continue to represent Ohio Foreclosure Solutions clients whose cases are still pending in the Ohio courts. The Law Firm has accepted no new Ohio client cases from Foreclosure Solutions since the Complaints were certified in this cause.

{¶126} Having been permitted to practice *pro hac vice* in several Ohio courts in the foreclosures involved here both past and pending, Moeves is subject to sanction in this proceeding. Prof. Cond. Rule 8.5(a). See Comment 1[A].

{¶127} The panel has found that Moeves improperly used an organization or person to promote his legal services, aided in the unauthorized practice of law, shared legal fees with a non-lawyer, handled legal matters without preparation adequate in the circumstances, intentionally failed to seek the lawful objectives of his client, and formed a business partnership with a non-lawyer in part involving the practice of law, thus violating DR 2-103(C), DR 3-101(A), DR 3-102(A), DR 3-103 (A), DR 6-101(A)(2), and DR 7-101(A)(1).


{¶128} Upon consideration of all the foregoing findings and conclusions, the matters in aggravation and mitigation, the authorities cited, and the relationships of Moeves with the other respondents, the panel recommends that respondent Patrick E. Moeves of the Kentucky Bar, be enjoined from further practice of law in Ohio for a period of two years; that all Ohio courts in which respondent Moeves has been granted privileges to appear and practice law *pro hac vice* be notified of the judgment enjoining his practice in those courts for the period stated; and that the Supreme Court of Kentucky and the appropriate Kentucky Bar authorities be notified of the findings and the sanction imposed in this cause.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 8, 2008. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and

recommends that the Respondent, Darren Joseph Mullaney, be publically reprimanded; that the Respondent John S. Brooking be suspended from the practice of law for a period of one year with the entire year stayed upon conditions contained in the panel report; and that Respondent Patrick F. Moeves receive a two year suspension from practicing *pro hac vice* in the State of Ohio. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of The Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendations as those of the Board.**



**JONATHAN W. MARSHALL, Secretary
Board of Commissioners on Grievances and
Discipline of The Supreme Court of Ohio**