

IN THE SUPREME COURT OF OHIO

ORIGINAL

In Re:	:	
	:	
Complaint Against:	:	
	:	
Richard Todd Ricketts	:	Case No. 2010-0806
Attorney Registration No. (0033538)	:	
	:	
Respondent,	:	
	:	
Disciplinary Counsel	:	
	:	
Relator.	:	

RESPONDENT, RICHARD RICKETTS' OBJECTION TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

Now comes Respondent, Richard T. Ricketts (“Respondent” or “Mr. Ricketts”), by and through counsel, and hereby objects to the Findings of Fact, Conclusions of Law and Recommendation of The Board of Commissioners on Grievances and Discipline filed with this court on April 28, 2010. *See*, Findings of Fact, Conclusions of Law and Recommendation of The Board of Commissioners on Grievances and Discipline, Appendix A.

As suggested by the Relator in its Closing Argument, this appears to be a case of first impression for this type of matter in the State of Ohio. In fact this case raises important questions regarding the interrelationship between the application of ethics and

the substantive laws of the State of Ohio and the United States. Stated differently, if the Respondent's actions were based upon Ohio or Federal law(s); or his conduct was premised upon a reasonable interpretation or extension of that law, can those actions be determined to be unethical?

Respondent will in this brief overview the issues before the Court and the facts of this proceeding. This will be followed by an analysis of the relevant substantive law and then be concluded with the application of both the facts and substantive law to the ethics issues presented.

I. STATEMENT OF THE CASE

This case arises out of a formal complaint filed by Relator, Disciplinary Counsel. An evidentiary hearing was held on September 17, 2009, and January 22, 2010 before a three-member panel of the Board of Commissioners on Grievances and Discipline ("Panel"). The Panel determined that Count I of Relator's Complaint [involving the execution and recording of a mortgage in favor of Ag Credit] should be dismissed, yet the Board disagreed with the Panel's decision. The Board and the Panel both found that the Respondent had committed misconduct under Count II of Relator's Complaint [involving the release of the Ag Credit Mortgage], a determination with which Respondent disagrees.

Mr. Ricketts maintains that clear and convincing evidence of misconduct was not established and that both the execution of the mortgage and the release of that mortgage were either allowable under Ohio law; or at a minimum were within the bounds of advocacy and the protection of the interests of his clients, Lemke Sales and Service, Inc.

("Company" or "Lemke Sales") and its sole shareholder, Christine ("Chris") Lemke individually ("Ms. Lemke").

II. FACTUAL BACKGROUND

A. BACKGROUND OF MR. RICKETTS

Mr. Ricketts was licensed to practice law in the state of Ohio in 1986, and is a lifelong resident of Pickerington, Ohio. (Tr. 326). Mr. Ricketts earned a Bachelor's and Master's of Science Degree in Agriculture from the Ohio State University. (Tr. 327-328). Mr. Ricketts later obtained a law degree from Capital University, while continuing to work on the family farm. *Id.*

Mr. Ricketts started his legal career working in a law firm that focused on representing the interests of business clients, with his emphasis being directed to the area of debtor-creditor law. Respondent subsequently worked in the bankruptcy department of a major Columbus, Ohio law firm, Schottenstein, Zox and Dunn, LLP. (Tr. 328-331), primarily handling business reorganizations for small business. Thereafter, Mr. Ricketts returned to the law firm with which he had started working on business matters and leading that Firm's efforts in the area of debtor business reorganizations. *Id.* Mr. Ricketts has for the last approximately twenty (20) years owned and managed his own law firm, focusing on debtor-creditor rights, general business and corporate. *Id.* During an extended period of this time Mr. Ricketts coordinated the efforts of up to four full time attorneys practicing in the area of business reorganizations and creditor rights. More recently, Mr. Ricketts has slowed the pace of his practice by changing its focus away to

agricultural law, real estate and mergers and acquisitions, along with creditor representation. (Tr. 331-332).

Mr. Ricketts has enjoyed the benefit of having excellent mentors during his legal career that provided him with a solid base for both leadership in and having an understanding of the areas in which he practices. He is highly regarded and has frequently been asked to lecture and present on numerous aspects of the law, especially in the area of debtor-creditor law. He has also participated in a number of national, state and local committees, focused on debtor/creditor or agricultural law, serving as the vice-Chair and the Chairman of the Ohio State Bar Association Agricultural Law Committee and as vice-Chair and Chairman of the Columbus Bar Association Agricultural Law Committee. (Tr. 223-336). Mr. Ricketts has also served as an expert witness in both federal and state court on the topics of debtor/creditor and agricultural law. (Tr. 337).

Mr. Ricketts also testified that he regularly has and continues to do pro bono work for dozens of not for profit entities in the Pickerington/Violet Township area, serves on and has acted as Chairman, President or legal counsel for multiple organizations and is actively involved in his church and the extracurricular activities of his children, including serving as a volunteer coach. (Tr. 223-336).

B. REPRESENTATION OF LEMKE SALES AND MS. LEMKE

Mr. Ricketts received a referral from an investment banking firm, J.R.P. Consulting, to assist Lemke Sales and Ms. Lemke in winding down a farm equipment business in a fashion that would best protect the interests of both the Company and Ms. Lemke. (Tr. 145). Respondent thereafter met with Ms. Lemke, reviewed the financial

information and legal documents for the Company, researched the lien positions of the creditors and completed both real estate title and Uniform Commercial Code searches and other due diligence (collectively, the "Due Diligence"). A number of important facts were revealed as a result of the Due Diligence, including the following:

1. Ms. Lemke was personally signed on most of the obligations of Lemke Sales.
2. One of the express objectives of Ms. Lemke was the creation of an exit strategy that would maximize the value of the sale of the business assets (she wanted to avoid "fire" or "forced" sales) and also fairly and equitably deal with her and the Company's creditors. Ms. Lemke sought the implementation of a plan that would seek to pay all of the creditors of the Company and her individually. (Board Report, at 9)
3. Ms. Lemke had individually substantially subsidized the operations of Lemke Sales by borrowings against real estate she owned personally, the loan proceeds of which had been used in the operations of the Company. These numerous loans had resulted in Ms. Lemke personally being one of the largest creditors of the Company (*Id.*)
4. Ms. Lemke and the Company each separately owned multiple parcels of real estate. However, the mortgages against those properties did not reflect an accurate or proper collateralization of the real estate, based upon the use of the funds. In other words, money that had been borrowed and used by the Company was not mortgaged as against the real estate owned by the Company. (See Hearing Exhibits A and B).
5. Most, if not all of the Companies' material creditors, had provided Lemke Sales with "floor plan financing" for equipment or parts the outstanding debt for which was approximately equal to or less than the fair market value of the items in which they held liens. Ms. Lemke wanted those creditors to cooperate in an orderly sale of those items in an effort to obtain the maximum sales proceeds in satisfaction of their claims.
6. Ms. Lemke desired to sale, in the ordinary course, sufficient of her real estate to minimize or eliminate her and the Company debt, but did not know which tracts of real estate would ultimately be sold and/or the order of their sale.
7. Ms. Lemke was essentially current with all of her creditors and no legal actions were pending. Respondent did not want any of her creditors to act

precipitously by filing legal action to the extent they became aware of the Company's efforts to liquidate its assets and wind down its business affairs.

After completing the Due Diligence and his analysis Mr. Ricketts directed an email to the president of the investment banking firm, James M. Leonard, (to be passed on to Ms. Lemke who at that time did not receive e-mail), reflecting a plan to cross-collateralize the real estate mortgagees so that Ms. Lemke, who was personally signed on most of the businesses' obligations, could be protected and an exit strategy effectively implemented (Hearing Exhibit 3). This plan was part of a detailed analysis and integrated strategy prepared by the Respondent which was designed to ensure that Ms. Lemke and her primary secured creditors were protected. It also established a viable procedure for those debts to be paid in the event Lemke Sales and Ms. Lemke were forced into bankruptcy or were pushed to sell corporate or personal real estate outside of the ordinary course. *Id.* While Respondent's plan was misinterpreted by the Relator and the Panel, its intent and legal basis was explained by Mr. Ricketts in his testimony and is more explained in Section III B 6 below.

C. EXECUTION OF THE MORTGAGE

In November, 2001, Mr. Ricketts prepared a Mortgage from Lemke Sales to Ag Credit in order to provide additional collateral to Ag Credit. This mortgage was recorded on December 28, 2001 (Exhibit 1) and was a part of the integrated plan of the Respondent to cross collateralizes the real estate interests of Lemke Sales and Ms. Lemke based upon the Due Diligence. The Mortgage provided Ag Credit an interest in real property owed by Lemke Sales. *Id.* Mr. Ricketts also prepared and filed three other Mortgages on behalf of Lemke Sales as part of the integrated plan (Exhibits 5, 6, and 7).

The integrated plan was designed to provide flexibility to the goals of Ms. Lemke since she did not know the timetable or order in which the tract(s) of real estate would be sold or the exact amount that would be received from their sale. The integrated plan was also designed to discourage any “races” to the court house by the creditors of Lemke Sales or Ms. Lemke that might believe then needed to secure judgment arising out of any concerns generated by the winding up of the business affairs of the Company.

Mr. Ricketts then actively assisted Lemke Sales with the announcement and coordination of the scheduling of an auction sale of the Company’s personal property held in early 2002 and communicated with creditors of the Company to facilitate the integrated plan (Tr. 341-348). The business plan was implemented and Ms. Lemke's and Lemke Sales' efforts to wind down the business were successful. As a consequence of the auction sales of the personalty, the disposition of its remaining assets and the sale by Ms. Lemke of certain of her personally owned real estate, Lemke Sales creditors were paid and satisfied.¹ Subsequent to the successful winding down of the business in 2002, Ms. Lemke, who testified she was pleased with the efforts and results of Mr. Ricketts legal strategy, confirmed to Respondent that his role had been concluded. (Tr. 385).

D. RELEASE OF THE MORTGAGE

Five years later, in 2007, Ms. Lemke was in the process of constructing a building on the Lemke Sales real property (now titled in her name) and she went to American

¹ AGCO, an equipment supplier for Lemke Sales, did agree to write off approximately \$30,000 of a disputed amount, after Ms. Lemke complained to them that they had not given her fair value for inventory. (Tr. 399-401). Ms. Lemke was personally signed on the AGCO obligation and none of the events associated with the Mortgages in any way impacted the determination by AGCO or Ms. Lemke as to this adjustment. (Tr. 484-485).

General Finance to obtain a \$60,000 mortgage loan on the property to finance the project. (Board Report, at 5). American General Finance performed a title search of the properties and discovered that the mortgage in favor of Ag Credit that had been placed against the property by the Respondent in 2001 were still of record and unreleased. (Tr. 156). John J. Hunter Jr., counsel for Ag Credit, was adamant that his client would not release the Mortgage (Tr. 423-425) notwithstanding the fact that its debt had been fully paid. Mr. Ricketts ultimately telephoned Mr. Hunter and advised him that the Mortgage was prepared and recorded to give additional collateral to Ag Credit and to ensure that Ag Credit was paid. (Tr. 408-409) During the discussion Mr. Hunter confirmed to Respondent that the Ag Credit debt was wholly paid and the possibility of a declaratory judgment action was discussed, albeit Mr. Ricketts testified that he thought the refusal to release the Mortgage was some type of April Fools joke being played upon him (*Id.*). Subsequent to that conversation Ms. Lemke again confirmed that no monies were owed to Ag Credit and that she had an imminent need to close on the refinancing deal with American Credit. It was at that point that Mr. Ricketts prepared a document entitled "Release of Real Estate Mortgage in Favor of Ag Credit." (Tr. 426). The document clearly indicated that it was prepared and filed by Mr. Ricketts and does not reflect or state that Mr. Ricketts was representing Ag Credit. (Tr. 428).

E. TESTIMONY OF EXPERT WITNESSES

Both Relator and Mr. Ricketts called expert witnesses. Relator's expert, Reginald Jackson, ("Jackson") testified that granting and releasing the Mortgage as Mr. Ricketts did, was not "standard procedure" or "appropriate." (Tr. 115-116). However, Mr.

Jackson conceded that he would have liked to have had the benefit of reviewing additional information prior to giving his opinions, including details of Ms. Lemke's and The Company's financial condition and details of Mr. Ricketts' explanation regarding his conduct. (Tr. 128-136). In fact, Jackson never opined that to a reasonable degree of legal certainty that Mr. Ricketts' actions were inappropriate. Conversely, both James Nobile ("Nobile") and J. Matthew Fisher ("Fisher") provided expert testimony, on behalf of Respondent. (Tr. 208; 219; 223; 275; 283). Both experts, having reviewed the details of Ms. Lemke's and Lemke Sale's financial condition, and the strategy and legal basis for Mr. Ricketts' actions, provided opinions to a reasonable degree of legal certainty that Mr. Ricketts' actions were both legally and ethically proper. (Tr. 206-207; 274-275). While Messrs. Nobile and Fisher did note that the release of the mortgage could have been accomplished in other fashions, such as an Affidavit of Facts, their testimony remained that the preparation and filing of the mortgage release was legal and not unethical. (Tr. 224-228, 283-285).

III. ANALYSIS AND APPLICATION OF SUBSTANTIVE LAW

A. INTRODUCTION

As referenced above, this case raises important questions regarding the interrelationship between ethics and the substantive laws of the State of Ohio and the United States. In this Section of Respondent's Brief, Mr. Ricketts will address the applicable substantive areas of law applied to the facts presented to him in connection with the Due Diligence. While Respondent did at all times believe and continues to believe that the Mortgage was valid and enforceable under applicable law, it should be

noted that the issue before the Court is not whether the instrument in question was valid but rather (even if arguably not valid and enforceable) did the Respondent have a reasonable basis for his position under applicable law or an extension thereof.

The following issues of substantive law are pertinent to the analysis of this case:

1. Whether the mortgage in question (“Mortgage”) was valid under applicable law, or any reasonable extension of that body of law; and
2. Whether the release of the Mortgage was proper under applicable law, or any reasonable extension of that body of law; and
3. Does the Respondents’ conduct in the implementation of pre-bankruptcy planning (to the extent allowable under the United States Bankruptcy Code or other Law) or other federal laws constitute an ethics violation under Ohio law?

In considering these questions, Respondent requests that the Court note that attorneys at all times take differing positions regarding the application of both statutory and case law; and reasonable minds can disagree on positions arising out of those laws, without that disconnect arising to the level of an ethics violation. Respondent would further note that it is difficult, if not impossible, to avoid “Monday morning quarterbacking” the decisions that were made without a complete understanding and application of the specific facts applied to the substantive laws being interpreted and an appreciation of the real time in which those decisions must be made. This is especially true whereas here a significant basis for the granting of the Mortgage was premised upon the application and interpretation of the United States Bankruptcy Code and strategy commonly applied by practitioners in this arena.

B. THE MORTGAGE WAS LEGALLY ENFORCEABLE UNDER OHIO LAW

1. Overview

The Relator's argument at the Hearing and the testimony of its witnesses were premised primarily upon the following theories/positions ("Positions"):

1. The Mortgage was not valid because it was "fraudulent" or constituted a fraudulent conveyance; and as a result Respondent's conduct in preparing and recording it was unethical;
2. The Mortgage was not valid under Ohio law for lack of consideration and failure of delivery; and
3. The Mortgage could not have been prepared or filed for any valid purpose, but was rather to deceive or mislead creditors

As more fully set forth below, Respondent believes the Mortgage was a valid and enforceable mortgage, and that the position of the Relator is not premised upon a proper interpretation or application of the laws.

2. Validity of a Mortgage-Ohio Law

A valid mortgage of an interest in real property must be signed by the mortgagor and be properly acknowledged. O.R.C. §5301.01 A mortgage which on its face appears to have been duly executed is presumed to be valid and anyone challenging the validity of a duly executed mortgage must prove its invalidity by a preponderance of the evidence. *Coshocton National Bank v. Hagans* (1931), 40 Ohio App. 190, 10 Ohio Law Abs. 203, 178 N.E. 330. A mortgagee is not required to execute or countersign a Mortgage under Ohio law for it to be valid and enforceable. O.R.C. §5301.01.

In this instance, there is no dispute that the Mortgage was duly and properly executed. As such, to prove an ethics violation Respondent believes the burden would be

upon the Relator to demonstrate that the Mortgage could not have been filed for any valid purpose and was void ab initio. As such there would have to be an applicable statute or case law that provides that a properly executed mortgage (which clearly existed in this instance) could under some set of facts be illegal or void ab initio (as opposed to voidable) under Ohio law. The Respondent has not asserted the existence of any such law; and no such law exists in the State of Ohio.

At the Hearing in this matter the Relator and its witnesses (all of whom acknowledged they had completed no due diligence of and had no knowledge or understanding of the underlying facts of the Lemke transactions) attempted to establish there could have been no legitimate basis for the Mortgage, and the Relator asserted that this Position was premised upon the theories of “lack of consideration” and/or a “lack of delivery,” both of which are addressed in the sections below.

3. Consideration

Relator’s first witness, John Hunter, Jr. (“Hunter”), while acknowledging that his client was paid in full, testified that the ethics complaint was filed as against Respondent because the Mortgage must have been “fraudulent” and that it was an “inappropriate mortgage” because it was not supported by consideration. Specifically, Hunter stated as follows:

In this case in particular we view the mortgage as fraudulent because, again, it was- it simply is an inappropriate mortgage, if that’s a better word. There never was a mortgage, there never was a debt. There was no underlying consideration out there.

Tr., p. 82.

However, Hunter acknowledged in his testimony that Ms. Lemke”, (the sole owner of Lemke Sales) was personally indebted to Ag Credit at the time of the granting of the Mortgage. Furthermore, on cross examination, Mr. Hunter acknowledged that his position was not based upon legal research and he had not completed or conducted any due diligence in respect of the facts to support the basis for his position.

Notwithstanding the position of Relator and Hunter, it is well settled law in Ohio that any consideration recognized by law, as sufficient to support a promise to pay or a contract, generally will be deemed sufficient to support a mortgage. 69 O.Jur.3d, *Mortgages and Deeds of Trust*, § 55. The consideration need not pass at the time of the execution of the mortgage; and may be either prior to, at the same time as, or subsequent to the execution of the mortgage. *Mussey v. Budd* (1896), 11 O.C.C. 550. See, also, *Ramsey v. Jones* (1885), 41 Ohio St. 685; *Shinkle v. First Nat. Bank* (1872), 22 Ohio St. 516; *Farmers' & Merchants Nat. Bank v. Wallace* (1887), 45 Ohio St. 152, 12 N.E. 439; and *Bertrand v. Lax*, 2005-Ohio-3261 (“It is well settled that a note given as security for an antecedent debt is sufficient consideration to establish a valid obligation”). This area of the law is not refuted in the Respondent’s Closing Argument and neither Relator’s expert, Reginald Jackson (“Jackson”) nor could Hunter identify a single case or treatise they consulted in formulating their opinions on this point of law. See Tr. at 132-133.

The Relator also advocated, and Hunter testified he believed, there was not consideration for the Mortgage in that Lemke Sales (as opposed to Ms. Lemke) was not directly indebted to Ag Credit. Relator provided no statutory or case authority for that position and there is clearly law in Ohio that the mortgagor need not receive

consideration from the mortgagee. 69 O. Jur.3d, *Mortgages and Deeds of Trust*, § 55. In fact, a mortgage given to secure the obligation of a third person is valid and enforceable. *Id.* at §67. Furthermore, while a mortgage typically secures the repayment of a monetary debt, the debt may be represented only by a promise contained in the mortgage itself and need not be evidenced by a separate promissory note. Curry and Durham, *Ohio Real Property Law and Practice* (6th ed.), § 17.01[4].

In the case of *Farmers' and Merchants' National Bank v. Wallace* (1887), 45 Ohio St. 152, 12 N.E. 439, the Ohio Supreme Court dealt with this issue. In *Wallace*, the decedent's real property holdings were partitioned and distributed to his children. His son-in-law then gave a mortgage to Farmers' and Merchants' National Bank to secure a pre-existing obligation and eventually defaulted. The property went to foreclosure, and his wife—the actual heir—asked that the mortgage be voided for lack of consideration. When the issue reached the Supreme Court, the Court held that the mortgage was enforceable. See, also, *Lewis v. Anderson* (1870), 20 Ohio St. 281.

In a more recent and telling case, *Su-Gro Plant Food Co. v. Morgan* (1985), 29 Ohio App.3d 124, 504 N.E.2d 445, the Court faced the question of whether a note and mortgage given by the parents of a debtor to secure the son's pre-existing debt was enforceable. There was no consideration for either the note or mortgage, other than to secure the pre-existing obligation of the son. The parents claimed that neither the note nor the mortgage were enforceable for lack of consideration to them. The Court of Appeals disagreed, finding as follows:

We find that the note and mortgage executed by Harry and Bertha Morgan were given in exchange for the antecedent debt of their son, *** the fact

that the Morgans did not receive any actual proceeds from the transaction does not invalidate the note for want of consideration. ***

Id. at 130. This case is squarely on point with this case in that even though no direct consideration was given by the mortgagee to the mortgagor, the note and the mortgage in the Morgan case were deemed valid and were enforced. In short, there is no question that the execution of a mortgage for the benefit of a third party can constitute valid consideration to support a mortgage. This was clearly explained by the Respondent in his testimony as to the basis for the granting of the mortgage and it was compared by him as a form of hypothecation, which are clearly valid and enforceable under Ohio law.

4. The Recording of the Mortgage in the Public Records Constitutes Delivery

Hunter and Jackson also testified that a lack of delivery or acceptance could render the Mortgage unenforceable. See Tr. at 49 and 115 [Note, their testimony was that it could render the Mortgage unenforceable, not that it rendered it void]. However, Jackson also admitted he had done no legal research to support this expressed position (See Tr. at 84); and as set forth in the paragraphs below this is not the law of Ohio. It was also not disputed that a mortgage does not need to be executed or countersigned by a mortgagee to be valid under Ohio law.

As a beginning point to this issue, O.R.C. § 5301.01(B)(1)(a) provides that, in respect of a mortgage, the instrument is deemed properly executed and presumed to be valid unless the signature of the mortgagor was obtained by fraud. Thus, unless there is an allegation that the execution of a document was obtained through fraud (an argument that has not in any way been made in this matter) a mortgage is generally enforceable.

Furthermore, as set forth by the 5th District Court of Appeals in the case of *Coshocton National Bank v Hagans, et al.* 40 Ohio App. 190, 178 N.E. 330 (1931) a mortgage that is duly executed and recorded is presumably valid, and must be shown to be defective by a preponderance of the evidence, *Id.* at 190, Syllabus #2. Again, in this instance, there has not even been an assertion that the mortgage was not properly executed and/or recorded.

In addition, delivery of a mortgage to the recorder for recording constitutes prima facie evidence of delivery to the grantee. *Alaska Seaboard Partners v. Godwin*, 2002 Ohio App. LEXIS 5372; *Gatts v. GMBH* (1983), 14 Ohio App.3d 243, 246, 470 N.E.2d 425; *Dowler v. Stutler*, 1991 Ohio App. LEXIS 2946; 69 O.Jur.3d, *Mortgages and Deeds of Trust*, § 113-114. Furthermore, Ohio law is quite clear that (unlike a deed) no express acceptance of a properly executed mortgage is required. *Bundy v. Iron Co.* (1882), 38 Ohio St. 300, syllabus 3. See, also, 69 O.Jur.3d, *Mortgages* §115.

Relator in its closing argument initially acknowledges that there is little case law on this particular issue and then attempts to make a general characterization (“One can presume that the reason for this is because the answer is obvious-of course a mortgagee must have knowledge”) without noting that a thorough analysis of the cases (including the ones cited above) contradict that point. The Relator’s legal argument on this point is also flawed. For example, Relator (on page 8 of its Closing Argument) cites to the Appellate Court’s decision in the *Godwin* case for the proposition that delivery and acceptance of a mortgage by the mortgagee are required; when the express language of the decision Relator quoted reflects that a deed requires delivery and acceptance, whereas

a mortgage only requires delivery. More importantly, Relator does not acknowledge that the exact case being cited (*Godwin*, along with the ones outlined above) specifically state that recordation of a mortgage constitutes delivery under Ohio law.

In fact, a proper analysis of *Godwin*, supra, supports the position of the Respondent. In that case the defendants purchased a parcel of real property in Hide-A-Way Hills through the proceeds of a mortgage. The note and mortgage were assigned multiple times until the plaintiff acquired them. The Godwins ran into financial trouble and conveyed the property back to Hide-A-Away Hills and then defaulted on the note. A dispute arose over the validity of the mortgage—recorded 1 minute after the deed—and the priority of the liens against the property. The Court of Appeals, in reviewing a grant of summary judgment, determined that title had passed before the mortgage was delivered, and that, as a consequence, the mortgage was valid. It is important to note that this decision was premised upon the time of recordation and the Court specifically states in its decision that it is irrelevant as to when the deed or mortgage were actually tendered or accepted.

Here, it is clear that the delivery of the Mortgage to the recorder along with its recordation constituted not less than constructive delivery under Ohio law. It was, therefore, a valid and enforceable mortgage against the property that could have been enforced by the lender. More importantly, under no circumstances would the issue of delivery and acceptance render a mortgage void ab initio, but rather at most voidable. In other words, even if Ag Credit at some point elected to disclaim the benefits of the mortgage (which can be done by a mortgagee in any circumstance) it would not have

rendered the Mortgage void or unenforceable under Ohio law. Furthermore, as testified to by Respondent's expert, James Nobile, it would be equally true that had the mortgagee not been fully paid and a dispute arose over the validity of the Mortgage, Ohio law would have allowed Ag Credit to ratify the Mortgage

5. Enforceability of Equitable Mortgages

Assuming arguendo that there is any merit to the Relator's position on the foregoing issues, it did not address that Ohio law also expressly provides that any transaction intended to secure performance of an obligation by way of conveyance of property will be enforced in equity as a mortgage, even if it is not a mortgage at law. *Cotterell v. Long* (1870), 20 Ohio St. 554. See also, *Bank of Muskingum v. Carpenter's Adm'rs* (1835), 7 Ohio 21; *Lake v. Dout* (1841), 10 Ohio 415.

Part and parcel therewith are the legal principles of an indemnity mortgage under Ohio law. An indemnity mortgage is valid and enforceable under Ohio law, 69 O.Jur.3d, *Mortgages and Deeds of Trust*, § 74 and is one which is given by way of indemnity to secure against loss or damage in consequence of the assumption of a contingent liability as surety, endorser. There is no requirement that the mortgagee be a party to an instrument or to a transaction for such a mortgage to be enforceable so long as the mortgage secures the primary obligation. As was testified to by the Respondent and demonstrated by Exhibit A of the exhibits at the Hearing, it was Respondent's intent that the Mortgage provide Lemke with indemnification for the possibility that one or more tracts of her personal real estate might be sold and the proceeds used to pay the debts of Lemke Sales. In fact Respondent anticipated this set of events and it in fact occurred. As

a result of the planning by Respondent, the interests of his clients were fully and properly protected.

Also, as testified to by Respondent (who testified that he has previously been qualified as an expert in bankruptcy court cases and/or witnessed the existence of these types of fact patterns in cases before a bankruptcy court), mortgages comparable to the Mortgage have never been challenged or in any way determined to be invalid in bankruptcy proceedings in which the Respondent has participated. Given the realization that the attorneys that practice in those courts along with the United States Bankruptcy Judges that hear those cases are experienced in matters of this nature, Respondent would suggest that this is compelling testimony as to the good faith belief of the Respondent that the steps being taken were appropriate.

The Respondent has demonstrated that under Ohio law the Mortgage was or could have been valid and enforceable; or at a minimum, the Respondent had a reasonable good faith belief that the Mortgage was a valid encumbrance under Ohio Law (until the time the underlying indebtedness was satisfied). Conversely the Relator did not meet its burden in demonstrating that the Mortgage was illegal or void ab initio.

6. Application of Specific Facts of the Lemke Matters

Throughout this proceeding there has been a suggestion that the Respondent could have held no proper reason or basis for the granting of the Mortgage. However in the paragraphs below, Respondent will outline his Testimony as to why this was not the case.

As thoroughly explained by the Respondent at the Hearing, one of the most critical components to the formulation of a successful business restructuring (regardless

of solvency or insolvency) is a complete understanding of the facts and the creation of a plan that takes into consideration the numerous alternatives and “what ifs” that might be confronted. This includes a complete understanding of the assets and liabilities of the client, the existence of equity in any given asset of the client, the positions that may be taken by significant creditors based upon the specific facts presented, and of course, preparation for the worst case scenarios that might occur. Respondent testified that this almost always necessitates application of the relevant provisions of the United States Bankruptcy Code (“Bankruptcy Code”) in case a filing becomes unavoidable. In fact, Respondent testified he typically generates these types of plans for every business restructuring client he represents and it was this reason that his success in reorganizing businesses was approximately three to five times higher than the average. (Tr. at 405-406).

In this particular instance, Respondent interviewed Lemke, completed the Due Diligence and explained in his testimony how the following facts were applied to the Law based upon his training and experiences:

1. Ms. Lemke had subsidized the operations of Lemke Sales by borrowings against real estate she owned personally, the loan proceeds of which had been used in the operations of the Company. This meant that Respondent needed to recognize Ms. Lemke was one of the largest creditors of the Company, but had not taken any steps to protect her position or for that matter the interests of the creditors on which she had personally signed for or guaranteed loans used by the Company. Respondent needed to take steps to address that issue as part of the business plan, which included the need to cross collateralize the creditors that had provided the funds used by the Company in its operations. (Board Report, at 9).

2. Ms. Lemke was personally signed on most of the obligations of the Company and she wanted the creation of an exit strategy that would maximize the value of the sale of those assets (she wanted to avoid “fire” or “forced” sales). This meant that Respondent needed to take steps to eliminate the need for those creditors holding

cognovit promissory notes or guarantees from engaging in a race to the court house to take judgment and file judgment liens to protect their interests. Respondent specifically testified that in one other instance that exact scenario occurred with disastrous consequences to the orderly sale process. (*Id.* at 3).

3. Ms. Lemke owned multiple parcels of real estate individually; and the Company also owned several parcels of real estate. However, the mortgages against those properties did not reflect an accurate or proper collateralization of the real estate based upon the use of the funds. In other words, money that had been borrowed and used by the Company was not mortgaged as against the real estate owned by the Company. This meant that Respondent had to address that (in a worst case scenario) should a bankruptcy filing have been necessary this would have greatly complicated a sale of assets under Section 363 of the Bankruptcy Code or confirmation of a reorganization plan or liquidating plan under Section 1129 of the Bankruptcy Code. It would also not have provided proper protection to the interests of Ms. Lemke individually if those steps had not been taken. Again, Respondent specifically testified that these and other provisions of the Bankruptcy Code must be taken into consideration when preparing the integrated plan.

4. Most, if not all of the Companies' creditors, had provided Lemke Sales with "floor plan financing" for equipment or parts the value of which was approximately equal to or in excess of the value of the items in which they held liens. This meant that Respondent wanted to encourage those creditors cooperate in an orderly sale of those items in an effort to obtain the maximum sales proceeds. Respondent was aware that in many instances creditors of this nature repossess and then notice up a "UCC sale" of those items that does not maximize the sale proceeds, and generates a deficiency claim. While (in artfully) set forth in Exhibit 3 but later explained by Respondent, the best way to get creditors of this nature to cooperate is for them to understand that the best way to get paid is for there to be a cooperative effort to auction the property as opposed to them believing that regardless of how their collateral is sold they will get paid from other sources.

5. Ms. Lemke desired to sale, in the ordinary course, sufficient of her real estate to minimize or eliminate her debt, but did not know which tracts would sale first. This meant that Respondent desired to eliminate the need for any creditor to take legal action because they did not have collateral in all of the real estate and were not sure if they would get paid from the proceeds of the tracts being sold. As clearly set forth in Hearing Exhibit A and B, the Respondent needed to consider that while there was equity in the collective real totality of the real estate, the interests of the mortgagees were not completely covered prior to the implementation of the integrated plan. Once again, Respondent testified that proper bankruptcy planning necessitated him addressing the "adequate protection" of the interests of those creditors under the Bankruptcy Code. (Board Report at 3).

6. Ms. Lemke was essentially current with all of her real estate debt and none of those creditors were in default and/or were raising any significant issues with her. Respondent in his testimony recollected that in a comparable situation contact was made with a creditor which reacted by taking a cognovit judgment based upon the provisions of the loan documents that would allow them to take such steps should they deem themselves insecure. Respondent testified that this could cause great issues with the completion of an orderly sale of assets and did not want to see those events repeated.

7. In connection with the foregoing facts, Respondent conducted a "marshalling of assets" and "marshalling of liens" analysis and believed it appropriate to cross collateralize Ms. Lemke's creditors in all of the real estate. Only under that scenario was each of the creditors Ms. Lemke wished to see paid, full collateralized. This is the same analysis that occurs in a state court receivership and/or bankruptcy action and the Respondent testified that this was ordinary and appropriate planning.

Respondent appreciates that in a vacuum and without the benefit of a full understanding of the facts (and/or a full appreciation of debtor/creditor law) the steps that were taken could be interpreted to be "sharp practice". However, the court should note that Relator's witnesses were not aware of these facts in giving their testimony and/or opinions, while Respondent's experts, skilled practitioners and experts in this area of the law, both testified that there was nothing inappropriate with these steps either under substantive law and/or in their opinion with respect to ethics.

Respondent would also like to specifically address several points that have been asserted in connection with the evidence presented to the Panel in respect of these matters. First, the Relator makes much of the language of Hearing Exhibit 3, where the Respondent used the language, "To do this, they must perceive that they will not otherwise collect from the company". While Respondent acknowledged in his testimony that, in retrospect this was a poor choice of words, he also noted that this comment was taken out of context and when reviewing the memo in full was never intended that this perception would be created by inappropriate means or inaccuracies, but rather by

implementation of a bona fide plan. The Relator also made reference to the statement “we need to eliminate the potential for equity” as being inappropriate when, as testified to by Mr. Ricketts and his experts this is part of the pre bankruptcy planning that would be considered by all practitioners with expertise in this area of the law. The Relator also continues to reference the testimony of Mr. Hunter that Respondent stated that he intended to “create debt”. While Respondent testified he did not recall using that language, it was undisputed by Mr. Hunter that Respondent also clearly indicated that he intended to provide additional collateral for the benefit of Ag Credit. Furthermore, there is no evidence that Respondent, in fact, “created debt” and/or misrepresented the amount of Lemke Sales or Ms. Lemke’s debt to anyone. In short, the Respondent requests that the Court look at each of these references or comments (to the extent made) in the context and entirety of the entire conversation or memorandum in which they were made.

C. THE MORTGAGE WAS PROPERLY RELEASED BY THE RESPONDENT.

Initially, it should be noted that there was and is no dispute that the indebtedness of Lemke and/or Lemke Sales to Ag Credit had been fully satisfied and discharged at the time the mortgage release was filed. This fact was admitted to by Hunter and testified to by Lemke. Further there is no dispute that the Respondent affirmatively and repeatedly confirmed this to be the fact, both with Lemke and Hunter, prior to the filing of the document in question. As such the question that is again raised is whether what Respondent did was allowed under applicable Law and/or did Respondent have a good faith belief that what was being done was allowable under applicable Law.

It is well settled under Ohio law that the payment of a debt terminates a mortgage lien by operation of law regardless of whether a formal release of mortgage has been filed of record. Furthermore, the mortgage is discharged, at law and in equity, because the discharge of the underlying obligation also discharges the mortgage, which is but a mere incident to the obligation. 69 O. Jur.3d, *Mortgages and Deeds of Trust*, §200; see, also, *Jennings v. Wood* (1851), 20 Ohio 261. Also, “A mortgage is a security interest which rests on the underlying debt”, *Citizens Loan & Sav. Co. v. Stone*, 1 Ohio App. 2d 551, 206 N.E. 2d 17 (1965). A mortgage is a lien for a debt and, in addition, it is the transfer of title for security, which is void on payment, *Division of Aid for Aged, Dept. of Public Welfare v. Huff*, 110 Ohio App. 483, 168 N.E. 2d 316 (1960). In other words, the lien of the mortgage is extinguished by the payment of the debt secured by the mortgage, See 1 Curry and Durham, § 17.07[1] and the mortgagee (in this instance Ag Credit) no longer held a property interest once payment has been made. In fact, Relator sets forth this exact proposition on Page 5 of its Closing Argument where it is stated; as follows:

“A mortgage is frequently defined as a conveyance of property to secure the performance of some obligation, conditioned to become void on the due performance thereof.” 69 Ohio Jur. 3d (2004), 78. Sec. 1. Emphasis added.

There is also an Ohio Supreme Court case that supports these conclusions. Specifically, in the case of *Lessee of Simon Jennings v. Robert Wood*, 20 Ohio 261, 1851 Ohio Lexis 84 (1851), the Supreme Court of Ohio stated that “The payment of a mortgage debt, both in equity and at law, operates as an extinguishment of the mortgage.” *Id.*, at 265.

The argument of the Relator on this point is that the only way that a mortgage can be released is pursuant to the provisions of Section 5301.28 et. seq. of the Ohio Revised

Code. However this is not the law of Ohio and it is clear that the statutory provisions pertaining to the release of a mortgage are not intended to be exclusive and the courts of Ohio have consistently stated that the statutory provision was intended to be facilitative of the extinguishment of a mortgage instead of the exclusive means of doing so. 69 O.Jur.3d, *Mortgages and Deeds of Trust*, § 220; see, also, *Swartz v. Hurd* (1858), 2 O. Dec. Rep. 134, aff'd 13 Ohio St. 419 and *Snyder v. Castle* (1922), 16 Ohio App. 333.

In the Ohio Supreme Court case of *Swartz v. Hurd*, supra, the Ohio Supreme Court indicated that the statute on releases was intended to facilitate the discharge of mortgage liens, and that it is remedial in nature and should be liberally construed. The Ohio Supreme Court has also specifically held that the filing of a receipt of payment, by the mortgagor is sufficient to enter satisfaction of the mortgage, and the mortgagor has the right to present such a receipt for record. *Id.*, See also, *Ramsey v. Riley* (1844), 13 Ohio 157. (Emphasis added)

In respect of the cases and references cited by the Relator in its Closing Argument several points should be addressed. First, the *Swartz v. Hurd* and the *Snyder v. Castle* cases, clearly stand for the fact that the statute is not the only way that a mortgage can be released. While it is correct that those cases did involve the mortgagees, the Relator failed to note that the *Ramsey v. Riley* case (also an Ohio Supreme Court case) clearly stands for the proposition that the mortgagor can file a document with the recorder in order to evidence a release of a mortgage. It should also be noted that while Relator cites to *Springfield Fire & Marine Insurance Company v. Wagner* (1906), 74 Ohio St. 484, 78 N.E. 1137 as standing for the proposition that a mortgagee must sign a release, the real

holding of that case was that in a dispute relating to the validity of the mortgage, the mortgagee would be a real party in interest in relationship to procedural and evidentiary issues. This is not the same issue that is presented in this matter. Finally, while Relator suggests that the statute provides for a penalty upon the mortgagee (if it does not timely record a release) that provision is only applicable to residential mortgages and there is no comparable provision for the mortgage that was at issue in this case.

Furthermore, the recent trend in the law in Ohio is that a secured obligation may be released without the signature or consent of the secured party under circumstances such as the one at issue. Specifically, when Article 9 of the Uniform Commercial Code was revised in the 1990's, it was overhauled to permit security interests to be released without the signature of the secured party. See O.R.C. § 1309.513 (U.C.C. § 9-513). Clearly, the trend in the law is clearly to permit the release of such interests without requiring the signature of the secured party.

Respondent would again like to note that the testimony of Hunter, which was the sole premise for the initiation of the complaint as against Respondent, was inconsistent with Ohio law. Specifically, when asked by counsel for Relator who could release a mortgage, Hunter stated as follows:

The mortgage is a form of land conveyance. It transfers an interest in real property. In my opinion, you have essentially what would be the mortgagee, the owner of that mortgage. In this case, Ag Credit, through its agents or officers would be entitled to release a mortgage. I don't believe there's any authority, absent some sort of specific grant of authority by the owner, for anyone else to release a mortgage.

Q. Is there a law that supports that statement?

A. Well if you take a look at Chapter 53, Chapter 53 deals with Ohio Real Estate Law and that sets forth the requirements for statutory conveyances such as mortgages and, as well, the form for releases.

I can't tell you that I can find in Chapter 53 anything that says only the owner can release a mortgage (emphasis added)

See Tr. at 52-53.

When asked about the scope of his research on cross-examination, Hunter admitted he could not identify any specific provision of the Ohio Revised Code, or any pertinent case law, that prevented the Respondent from legally releasing the mortgage. See Tr. at 78-79. Nor did Hunter in any way explain how the Mortgagee would continue to hold a property interest once the underlying debt has been satisfied.

In turn, Respondent plainly described his understanding that his actions were legal and authorized by Ohio law, and, in an effort to accommodate his client's exigent needs, he first took steps to confirm that the underlying indebtedness had been fully repaid. The release truthfully and accurately stated the facts, which were that the obligation underlying the indebtedness had been satisfied and the mortgage was discharged and ceased to exist as a matter of law.

Respondent acknowledges that if he had knowingly or recklessly filed a mortgage release when the underlying indebtedness had not been paid, it would clearly be inappropriate. However, not a single witness in any way testified that they had been misled by the filing of the release; or that it was not factually accurate.

Respondent would also like to address Relator's point that he should have filed a "declaratory judgment" action to bring these issues in front of a tribunal. Respondent testified that the issue of the declaratory judgment or quiet title action was raised with

Mr. Hunter in the context of Respondent's disbelief that Ag Credit would not release the Mortgage and was more of an inquiry as to whether Ag Credit would cooperate with that effort. It is not disputed that Mr. Hunter indicated to Respondent he was not sure what Ag Credit would do in that event. In short, Respondent was given no assurance that such an effort would resolve the issue. Moreover on this point, Respondent testified that upon assessing this possibility it was clear to him that a justiciable issue (the basis for a declaratory judgment action) did not exist as no one disputed that Ag Credit had been paid. Respondent also was aware that in considering the options available to his client, he needed to take reasonable steps to mitigate her damages. Since there was no dispute that Ag Credit had been paid and that the delay necessitated by the filing of a suit would cause economic damage to Ms. Lemke, the steps taken by Respondent under the facts presented were not unreasonable.

D. THERE WAS NOT A FRAUDULENT CONVEYANCE IN THIS CASE.

In the original complaint and at the Hearing the Relator spent a great deal of time claiming that the granting of the mortgage was in some fashion fraudulent or a fraudulent conveyance. Relator's witness, Hunter, went so far as to call it a "fraudulent mortgage". Relator has now acknowledged that the evidence at the Hearing did not support this argument and has abandoned this position in its Closing Argument. While Respondent agrees with the Relator's current position, he believes it is important to note that the Mortgage could not have been a fraudulent conveyance in any event. The dismissal of these issues by the Relator does not give due consideration to the intent of the Respondent and his and his experts testimony that transactions, while under certain facts

may be preferential in nature, are absolutely the ordinary and customary practice for attorneys practicing in the arena of debtor/creditor law and entering into such a transaction would in no way be unethical or inappropriate.

1. There is a material difference between a preferential transfer that is avoidable in bankruptcy and a fraudulent conveyance.

A preferential transfer is one in which a debtor prefers one creditor over another by satisfying an antecedent debt while the debtor is insolvent. Typically, such a transfer is avoidable only if it is made within a specified time period prior to the commencement of the bankruptcy; and the creditor received more than he or she would have received in a liquidation and distribution. See 11 U.S.C. § 547. Not every preferential transfer is avoidable in bankruptcy, and preferential transfers are not illegal and void, but rather voidable under certain circumstances. Conversely a fraudulent conveyance is a transaction where the debtor transfers an interest in property for no consideration or less than fair market value, while insolvent. Samuel A. Caulfield, "Fraudulent and Preferential Conveyances of the Insolvent Multinational Corporation", 17 *N.Y.L. Sch. J. Int'l. & Comp. L.* 571, 579 (1997).

Respondent offered the un-rebutted expert testimony of James Nobile ("Nobile") and J. Matthew Fisher ("Fisher"), both experienced insolvency practitioners that there is nothing illegal or inappropriate about preferential transfers. Both testified that they had an understanding of the facts and circumstances of this case and that Respondent did nothing wrong in preparing and filing the Mortgage and/or the release of mortgage. This is especially important to the Court's analysis where as here the Relator is taking the position there could have been no legitimate basis for the grant of the Mortgage, other

than to mislead or deceive third parties. Respondent's experts and the Respondent all testified that these types of transfers are appropriate planning practices for practitioners and were appropriate under the facts presented. The basis of their opinions must be contrasted with the realization that all of the Relator's witnesses expressly acknowledged they had done little or no due diligence as to nor had they been presented with any of the underlying facts of the Lemke situation.

In summary, the evidence in this case supports the conclusion that debtor/creditor practitioners often advise clients about making transfers that might be avoidable as preferences as part of the planning process. It is standard, common practice, and a significant part of the role of the attorney advising a client. There is nothing inappropriate or illegal to counsel a client to choose one creditor over another and there are legitimate business reasons for doing so.

IV. ANALYSIS AND LEGAL ARGUMENT REGARDING THE ETHICS ISSUES BEFORE THE COURT

With respect to a determination of whether the Respondent's conduct was in violation of the ethics laws, Mr. Ricketts would suggest that if the conduct was supported by applicable Law and/or was a good faith assertion of an extension of that Law, then the conduct would not be in violation of the ethics law of Ohio as asserted by the Relator. Also with respect to the application of the ethical aspects of these matters Mr. Ricketts would ask that the Court take specific note of the following:

1. No creditor of Lemke Sales or Lemke testified that, or has it even been alleged that Respondent made any misrepresentation to them; nor was any misrepresentation made to any creditor of Lemke Sales by either the Respondent or Ms. Lemke;

2. It is not disputed that the objective of paying all of Lemke Sales and Ms. Lemke's creditors was achieved and that all creditors were paid to their full satisfaction;

3. Ms. Lemke testified she was pleased with the efforts of Respondent and had no issue with his representation whatsoever;

4. Prior to the filing of the Complaint in this matter: (i) The Respondent was not interviewed or deposed by the Relator; (ii) Ms. Lemke was not interviewed or deposed; (iii) No determination was made as to whether any creditor of Lemke Sales had not been paid and/or had relied upon any misrepresentation made by the Respondent or Lemke; (iv) An expert was not consulted to review the facts and/or opine that Respondent's conduct was inappropriate; and (v) a search of the public records would have reflected that no litigation had been brought against Lemke Sales and/or Ms. Lemke arising out of any of these matters.

5. The Relator brought the disciplinary action as a result of the receipt of a complaint from a former creditor of Ms. Lemke that admitted it had been paid in full and did no due diligence as to the facts or applicable law. It assumed certain things to be true in asserting its complaint;

6. The Relator's expert, was only contacted and retained shortly in advance of the Hearing and acknowledged he did not have the benefit of understanding the underlying facts, had not interviewed the Respondent, did not have the ability to review a deposition transcript (to understand the underlying facts) and acknowledged he could not completely express an opinion without that information.

PROPOSITION OF LAW NO. I: THE BOARD INCORRECTLY DETERMINED RELATOR ESTABLISHED CLEAR AND CONVINCING EVIDENCE THAT THE EXECUTION OF THE MORTGAGE WAS A MISREPRESENTATION SINCE MR. RICKETTS' APPROACH IN EXECUTING THE AG CREDIT MORTGAGE WAS, AS THE PANEL DETERMINED, A JUDGMENT CALL, FALLING WITHIN THE PROPER SCOPE OF ADVOCACY ON BEHALF OF HIS CLIENTS

The Panel, which heard the evidence, properly determined that Respondent did not violate DR 1-102(A)(4) because there was a basis in law and fact for the plan that

was undertaken on behalf of Lemke and Lemke Sales or a good faith argument for extension, modification, or reversal of existing law:

[T]he panel has concluded that if, under these circumstances, Respondent decides to attempt to give Lemke's personal creditors a mortgage, there appears to be no reason why he could not carry out this plan. Lemke was not under any contractual, statutory, or other restriction preventing her from alienating her property in any manner she deemed fit. One might call the conduct "sharp practice" but in the panel's opinion it falls within the Supreme Court's admonition in *Toledo Bar Assn, v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-120 that [l]awyers are permitted to advance claims and defenses for which "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." *Rust*, at 312.

The Board expressly adopted the Panel's findings of fact, as well as the Panel's conclusions of law, except with regard to whether Respondent violated DR 1-102(A)(4) by executing the mortgage. It is disconcerting to Mr. Ricketts that after the Panel heard the evidence over a two-day period, and carefully considered the legal issues which were briefed extensively by the parties, that the Board, in its review of the Panel's report, did not provide any specific reason for finding that a misrepresentation occurred.

Based upon Respondent's knowledge of the law, he believed the Mortgage was enforceable, or at a minimum he had a good faith argument that the Mortgage was legally enforceable. Moreover, the Panel's express finding as to the solvency of Lemke's Sales and the company's fulfillment of debts negated any finding of intent to mislead:

Aside from her ownership interest in Lemke Sales, Ms. Lemke personally owned a farm, some rental properties and a residence. At the time of the liquidation her personal assets were secured by mortgages to a variety of banks including Marion Bank, Bank One and a farm credit company in Toledo, Ohio, by the name of Ag Credit. She testified that much of the debt that she personally owed were funds that had been used to keep Lemke Sales afloat financially. ..While Lemke Sales was struggling, the

undisputed testimony of all the witnesses in the case was that the company was solvent. It had assets, cash flow, and was meeting its obligations as they came due, albeit with difficulty. Further, there was no pending or threatened litigation against the Company, and no assets had been repossessed.

(Board Report, at 2-3). Moreover, Respondent presented the testimony of two expert witnesses who had thoroughly reviewed the transaction and determined that the conduct was permissible. Finally, Respondent's longstanding and outstanding reputation in the legal community is persuasive that he has not been the type of lawyer to engage in professional misconduct. (Board Report, at 13).

Relator did not dispel that the implementation of Respondent's plan to liquidate Ms. Lemke's assets was not within the proper bounds of advocacy. Indeed, professional misconduct must be shown by clear and convincing evidence. *Ohio State Bar Ass'n v. Reid* (1999), 85 Ohio St. 3d 327, 1999 Ohio 374, paragraph two of the syllabus. "Clear and convincing evidence" has been defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id.* at 331, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

Former DR 1-102(A)(4) states: "It is professional misconduct for a lawyer to...engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation." DR 1-102(A)(4). The Comment to "the current provision," Rule 8.4 (c), does not give any

guidance regarding its application. However, Rule 1.0, which defines certain terminology in the Rules, defines "fraud" as follows:

"Fraud" or "fraudulent" denotes conduct that has an intent to deceive and is either of the following: an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred; a knowing concealment of a material fact where there is a duty to disclose the material fact.

Given this important definition, Relator did not prove by clear and convincing evidence that Respondent "intended to deceive" anyone regarding any "material fact" with respect to his representation of Lemke Sales & Service and Ms. Lemke or that anyone was actually deceived. As the Panel noted:

Given the fact that the evidence in this case shows that Lemke Sales & Service was solvent, that it was meeting its obligations and paying its bills, that no creditor had attempted to repossess its collateral and no creditor had filed suit, there appears to be no legal obstacle to the company creating the "appearance of debt" as Ricketts described it. Lemke's right to pursue this course of action is further buttressed by the fact that from the beginning it was her intention to pay her creditors both for moral reasons and the practical reason that she was personally obligated on a great majority of these obligations

(Board Report, at 9). As further evidence that granting the Ag Credit Mortgage by Lemke Sales & Service was not a material misrepresentation that deceived anyone, Ms. Lemke testified that all creditors of Lemke Sales & Service were paid 100% of that which they were owed, except a single parts vendor, AGCO, which agreed to write off \$30,000 of an approximately \$131,000 debt. (Tr. 153). Ms. Lemke testified that AGCO agreed to write off the debt, as it not been fair in fully compensating Lemke Sales & Service for all its parts. (Tr. 152-153). Importantly, AGCO's write-off decision had

nothing to do with Lemke Sales & Service granting of the Mortgage to Ag Credit. In addition to the fact that Ms. Lemke was personally signed on AGCO debt, Respondent was in no way involved in the negotiation with AGCO with respect to its dispute with Ms. Lemke. Thus, Relator has failed to meet its required burden of clear and convincing evidence to show a material misrepresentation led to harm to a creditor.

Based upon all the facts and circumstances of this case as well as the legal principles on which Respondent relied, the Panel properly found that Respondent's approach in executing the mortgages was a judgment call, falling "within the proper scope of advocacy." Quoting from *Toledo Bar Association v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-120, the panel noted:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

Id at 313.

In short, Respondent wanted to employ the best means possible to maintain order in the winding up of Lemke Sales. The Panel, which heard the evidence over the two-day hearing and considered the extensive legal arguments regarding the propriety of executing the Mortgage, determined that, in the panel's opinion the conduct fell within "the proper scope of advocacy." The Board without explanation disagreed. The clear and convincing evidence standard requires that this Court has a firm belief that Respondent engaged in misrepresentation in creating the Mortgage and intended to mislead Lemke's creditors. Relator has failed to produce such evidence. Accordingly, Respondent,

respectfully urges the Court to follow its precedent in the *Rust* case and adopt the recommendation of the Panel that there was no violation of DR 1-102(A)(4) as to the execution of the mortgage and to dismiss Count I.

PROPOSITION OF LAW NO. II: THE PANEL AND THE BOARD INCORRECTLY DETERMINED THAT THE RELEASE OF THE AG CREDIT MORTGAGE WAS ETHICAL WHERE MR. RICKETTS APPROACH IN RELEASING THE MORTGAGE WAS, LIKEWISE A JUDGMENT CALL, FALLING WITHIN THE PROPER SCOPE OF ADVOCACY ON BEHALF OF HIS CLIENTS

Not a single witness or document was presented by Relator to show that anyone was deceived by Respondent's release of the Mortgage. Contrary to the determination of the Panel and the Board, Respondent did not intend to mislead the County Recorder, the public, nor American General Finance. The debt to Ag Credit had in fact been paid and applicable Law did not preclude this act from being taken. From Respondent's knowledge and experience in debtor-creditor law, the release of the mortgage was based on his good faith interpretation of the law. However, even if the technical legality of the release could be argued, the Panel, in its findings, supported the argument that Respondent did not intend to mislead anyone. The underlying debt Chris Lemke owed to Ag Credit has long been satisfied, which Mr. Hunter admitted. The logic of Ag Credit's position is reflected in that it refused to release the Mortgage after admitting that all Lemke's debts were satisfied, especially when even in a worst case scenario, Ag Credit knew that the applicable statute of limitations on a fraudulent conveyance (had one even existed) had long since expired. As the testimony reflects, Respondent was in a bind because Ms. Lemke needed to immediately close the loan from American General

Finance. Respondent did not have time to engage in litigation (by filing a declaratory judgment action) under the circumstances presented.

The notion of Relator bringing an action against Mr. Ricketts when he did not "intend to deceive" anyone or harm anyone by a "material misrepresentation" is addressed in the Preamble to the Rules:

The Ohio Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself... The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation and the severity of a sanction, **depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.** (Emphasis added).

Prof. Cond. Rules, Preamble. Applying the principles recited in the Preamble to the matter herein, it is evident that reasonable minds can differ regarding the legal effect of the transactions Respondent undertook.

As it is well settled that once a mortgage is satisfied, the debt is extinguished, Respondent's conduct should be deemed within the proper scope of advocacy. He signed his own name, individually, and did not indicate that he was acting on behalf of Ag Credit. Even if another lawyer would have handled the situation differently, the facts do not clearly and convincingly demonstrate intent to mislead.

PROPOSITION OF LAW NO. III: THE BOARD INCORRECTLY DETERMINED THAT A SIX MONTH, STAYED SUSPENSION OF MR. RICKETTS' LICENSE IS WARRANTED, GIVEN THE CONDUCT AT ISSUE AND THE MITIGATING FACTS PRESENTED

The Panel and Board reviewed the guidelines for imposing lawyer sanctions found in BCGD Proc.Reg. 11. Applying the factors to Mr. Ricketts case, the Panel determined:

There are a great many mitigating facts to be considered: [a] Respondent has practiced law 24 years with no disciplinary action against him... [b] The drafting of the release was not the product of a selfish motive on his part...[h]e impetuously filed the document in response to his client's need to conclude a loan with her bank...[c] There is no indication that Respondent was less than cooperative with Disciplinary Counsel... [d] The panel was extremely impressed by Respondent's reputation not only in the legal community within which he practices, but also the community in which he lives. He has lectured at well over a hundred seminars dealing with farm property and debtor/creditor law and has testified as an expert witness in both state and federal cases. From all appearances he has a successful law practice and is well respected by his peers. Outside of his professional life he is active in community organizations, including his church. Furthermore he is involved with the activities of his family, and he volunteers many hours of his time to charitable organizations.

The only "aggravating fact" the panel mentioned was that "Respondent steadfastly clings to his belief that what he did was both legal and ethical." However, the panel declined to put great weight on the fact, given that two qualified lawyers that practice in this area agreed with him on this subject. (Board Report, at 12).

Conceding that this is a fact situation without precedent in Ohio, in its closing argument brief, the Disciplinary Counsel cited a number of cases (all from jurisdictions outside of Ohio) noting that similar conduct has been disciplined. However, Respondent did not engage in clearly improper conduct such as backdating a deed like the respondent

in *Iowa State Bar Association v. O'Donohue* (1988), 426 N.W. 2d 166. Unlike the present case, *In the Matter of De Pamphilis* (1959), 30 NJ 470 involved two lawyers who engaging in a scheme "intended to deceive" known creditors to whom their clients were indebted. The case of *In re Doss* (1995), Commission No. 94 CH 72, involved a lawyer who was publicly reprimanded for transferring real estate belonging to his deceased father to himself for the purpose of avoiding a multi-million dollar claim against his mother and the estate.² See also, *In re Levin* (2004) Commission No. 00 CH 72 (respondent's license suspended for 30 days for placing a client's property in trust for the sole purpose of defrauding a creditor which had a judgment against his client. Finally, one of the precedents cited by Relator involved 12 counts of misconduct, including multiple acts of neglect and an act involving "intent to deceive" his creditors. *In the Matter of Breen* (1989), 113 N J 522. In *Breen*, the respondent was disbarred for, inter alia, neglecting multiple client matters and placing Mortgages on his own residence to avoid the claims of his own creditors. *Id.* at 545. Unlike the facts herein, Breen fabricated the existence of financial obligations which had no basis in fact or law, including "personal loans" which he never received for the sole purpose of "making himself judgment proof" from know creditors who were after him *Id.* at 546.

Assuming the Court determines that Respondent's conduct is disciplinable, which we firmly believe it should not, it is rather apparent that Respondent's granting of the Mortgage or release of the Mortgage did not involve "dishonesty, fraud, deceit and

² Despite making a transfer clearly designed to avoid a known claim, Doss' conduct was found to have violated the proscription against conduct prejudicial to the administration of justice, not the rule against dishonesty, fraud deceit and misrepresentation alleged here.

misrepresentation" directed to a client or court such that his license should be suspended. *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187 (1995) (syllabus) ["When an attorney engages in a course of conduct that violates DR 1-102(A)(4), the attorney will be actually suspended from the practice of law for an appropriate period of time"]; *Disciplinary Counsel v. Greene*, 74 Ohio St.3d 13 (1995) (syllabus) ["When a lawyer intentionally misrepresents a crucial fact to a court in order to effect a desired result to benefit a party, the lawyer will be suspended from the practice of law in Ohio for an appropriate period of time"].

Moreover, despite its essential acknowledgement that Respondent's alleged conduct is without a victim, Relator claims that Respondent should serve an actual license suspension. The precedent of the Court clearly contradicts Relator's position. See, *Lake County Bar Ass'n v. Ezzone*, 102 Ohio St.3d 79, 2004 Ohio 1774. See also *Cleveland Bar Ass'n v. Russell*, 114 Ohio St.3d 171, 2007 Ohio 3603, *Dayton Bar Assn. v. Millonig* (1999), 84 Ohio St.3d 403 (the most serious violations of DR 1-102[A][4] involve dishonesty toward a client or court), attached.

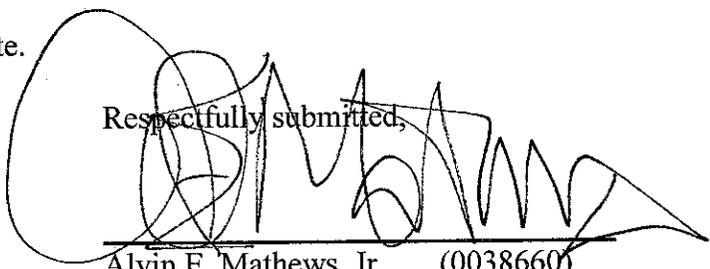
The panel determined that Ag Credit, Lemke Sales' creditors, and the public sustained no harm. And while it is true that Respondent has failed to acknowledge that his conduct was wrong, this lack of remorse derives more from a difference of opinion that an inherent character flaw. Finally, the overwhelming mitigating factors, including character evidence, convince the panel that, if discipline is warranted, a public reprimand is the appropriate sanction.

V. CONCLUSION

In considering these questions in respect of the asserted ethical considerations involved herein, Mr. Ricketts would again ask the Court to consider that attorneys take differing positions regarding the application of Ohio and/or Federal Laws; and reasonable minds can certainly disagree without such disagreement arising to the level of an ethics violation. Stated differently, if Mr. Ricketts's conduct was either appropriate under Ohio law and/or he held a good faith belief that his conduct was proper under Ohio law, those facts should not give rise to a determination that an ethics violation occurred.

Mr. Ricketts does not believe that he engaged in professional misconduct, but understands that these proceedings have called his conduct into question. Having practiced law for approximately 24 years and always having strived to practice with professionalism and integrity Mr. Ricketts would like to conclude his career with an unblemished record. While Mr. Ricketts does not believe his conduct involved any "intent to deceive" any creditor regarding any "material fact," the Court should be assured that given this experience he is mindful of and does not ever wish to travel down a road that this Court determines is inappropriate.

Respectfully submitted,


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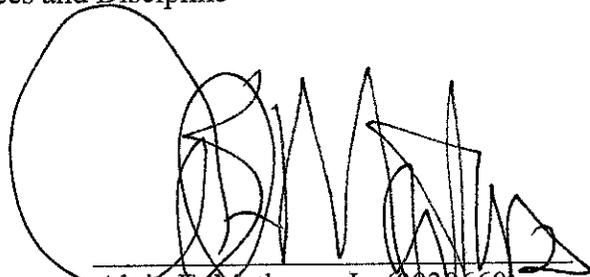
Counsel of Record for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Respondent, Richard Ricketts' Objection to the Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline*, was served, by Regular U.S. Mail, postage prepaid, this 28th day of June 2010, upon the following:

Stacy S. Beckman
Assistant Disciplinary Counsel
Office of Disciplinary Counsel of
The Supreme Court of Ohio
250 Civic Center Drive, Suite 325
Columbus, OH 43215-7411

Jonathan W. Marshall
Board of Commissioners on Grievances and Discipline
The Supreme Court of Ohio
65 South Front Street, 5th Floor
Columbus, OH 43215



Alvin E. Mathews, Jr. (0038660)

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

FILED
MAY 06 2010
CLERK OF COURT
SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	Case No. 09-017
Richard Todd Ricketts	:	Findings of Fact,
Attorney Reg. No. 0033538	:	Conclusions of Law and
Respondent,	:	Recommendation of the
Disciplinary Counsel	:	Board of Commissioners on
Relator.	:	Grievances and Discipline of
	:	the Supreme Court of Ohio

¶1. This matter was heard on September 17, 2009, and January 22, 2010, upon a complaint filed by the Office of Disciplinary Counsel against Respondent, Richard Todd Ricketts of Pickerington, Ohio. The complaint charges the Respondent with violating DR 1-102(A)(4), and Prof. Cond. R. 8.4(c) and 8.4(h). The case was heard by a panel of members of the Board of Commissioners on Grievances and Discipline consisting of attorneys Janica A. Pierce Tucker, Joseph L. Wittenberg, and Stephen C. Rodeheffer, chair. None of the panel members resides in the appellate district from which the complaint originated or served on the probable cause panel that certified the complaint. Respondent appeared represented by Attorney Alvin E. Matthews, Jr., and appearing on behalf of Relator was Attorney Stacey Solochek Beckman.

FACTS

¶2. Cheryl Lemke is the widow of Michael Lemke who died in August 1993 as the result of a brain aneurysm that he suffered while operating a car. During his life Mr. Lemke had

developed a business known as Lemke Sales & Service that sold farm equipment and parts in Marion County, Ohio. Under his guidance the company grew to the point that it had two locations, and Mr. Lemke was contemplating a third location when he died.

¶3. Upon his death Ms. Lemke became the sole shareholder of the company. The new owner and operator attempted to keep the business going but apparently lacked her husband's business acumen, at least insofar as farm machinery was concerned. As the 1990's drew to a close, she found herself continually funneling personal funds into the enterprise to keep it going until finally she reached the determination that it was time to get out. Attempts were made to sell the business, but the high risk and low profit nature of the industry discouraged buyers. Finally in 2001 she reached the decision to liquidate the business, pay off her creditors and close the doors.

¶4. At this time Lemke Sales largest creditors were AGCO, to which it was indebted in the amount of \$830,000 for its equipment floor plan, Agri Credit (to be distinguished from Ag Credit referenced later) to which it owed \$130,000 for financing the parts division of the business, and Bank One in the amount of \$180,000 for a credit line. Bank One held a security interest in personal property owned by the business. It should be noted that Ms. Lemke was personally obligated on all of these debts. In addition to these three major creditors, Lemke Sales also owed a number of lesser, unsecured creditors. The total amount of the company indebtedness, both secured and unsecured, was approximately \$1,200,000. (Ex. A)

¶5. Aside from her ownership interest in Lemke Sales, Ms. Lemke personally owned a farm, some rental properties and a residence. At the time of the liquidation her personal assets were secured by mortgages to a variety of banks including Marion Bank, Bank One and a farm

credit company in Toledo, Ohio, by the name of Ag Credit. She testified that much of the debt that she personally owed were funds that had been used to keep Lemke Sales afloat financially.

¶6. While Lemke Sales was struggling, the undisputed testimony of all the witnesses in the case was that the company was solvent. It had assets, cash flow, and was meeting its obligations as they came due, albeit with difficulty.¹ Further, there was no pending or threatened litigation against the Company, and no assets had been repossessed.

¶7. The consulting company that Lemke hired to do an analysis of her business operations referred her to the Respondent for legal assistance in completing a liquidation of the company. Lemke told the panel that she expected Respondent to effect an orderly liquidation, and to keep company creditors from panicking and moving against their collateral or filing suit while the sale was being organized.

¶8. After being hired, Respondent analyzed the company's financial situation and was surprised to find that Lemke Sales owned two pieces of real estate on which the company operations took place that were entirely unencumbered. For reasons that will be discussed later in this Recommendation, Respondent decided that Lemke Sales would execute mortgages on these properties to four personal creditors of Lemke: Bank One, Marion Bank, Ag Credit and a man by the name of Ray Hildreth to whom Lemke owed \$15,000. Three of these creditors, Bank One, Marion Bank and Ag Credit, already held collateral in the form of mortgages on real property owned personally by Lemke. None of these creditors, except Bank One, had loans with Lemke Sales. In fact, Ag Credit declined to loan Lemke Sales money sometime prior to the events at issue in this disciplinary proceeding.

¹ Lemke did admit to being two payments behind to Bank One, but that she had spoken with the company about this. (Tr. 170)

¶9. The mortgages were signed by Lemke on behalf of Lemke sales in November, 2001, and were recorded with the Marion County Recorder on December 28, 2001. The mortgages were structured by Respondent as follows:

a. Business Property #1

- i. Bank One - \$173,000
- ii. Marion Bank - \$250,000
- iii. Ag Credit - \$300,00

b. Business Property #2

- i. Marion Bank - \$250,000
- ii. Bank One - \$200,000
- iii. Ray Hildreth - \$15,000
- iv. Ag Credit - \$300,000

(Ex. A)

¶10. These mortgages were never requested by the mortgagees, the mortgage deeds were never delivered to the mortgagees, and the mortgages were not given for any extension or renewal of credit. Indeed, Lemke was current on all of the obligations that she personally owed to these finance companies.

¶11. An auction of the company's personal property assets occurred sometime in 2002. The proceeds from the auction were insufficient to payoff all of the creditors, and Lemke provided \$60,000 of her personal funds to make up the deficiency. Only one creditor, Agri Credit, came up short in the amount of \$30,000. However, Lemke explained that Agri Credit agreed to absorb this deficit in return for Lemke not pursuing legal action against it based on the manner in which Agri Credit had valued the collateral Lemke Sales had surrendered to it.

¶12. It appears from the evidence that after the liquidation everyone was satisfied. The creditors had been paid and Lemke had managed to successfully wind up a business that was causing her a great deal of stress. Lemke was completely satisfied with the work that

Respondent performed for her and offered no criticism of his legal representation at the hearing on the Relator's complaint. (Tr. 157)

¶13. Five years later, in 2007, Lemke was in the process of constructing a building on the Lemke Sales real property (now titled to her) and she went to American General Finance to obtain a \$60,000 mortgage loan on the property to finance the project. American General performed a title search of the properties and discovered that the mortgages that had been placed against the property by the Respondent in 2001 were still of record and unreleased. When contacted, Marion Bank and Bank One released the mortgages. Ag Credit, on the other hand, would not.

¶14. Initially Lemke called Ag Credit herself and was told by a representative of the company that they never had a loan with Lemke Sales and had nothing on their records regarding a mortgage. The company declined to issue a release. Lemke then re-connected with Respondent and asked him to take care of the matter.²

¶15. Respondent directed his legal assistant to call Ag Credit and request a release. Again, Ag Credit declined for the same reasons given Lemke. At this point the matter was referred to the company's outside legal counsel, Attorney John Hunter of Toledo. Hunter wrote Respondent informing him of Ag Credit's position in the matter. This letter prompted Respondent to call Hunter and a phone conversation took place, the contents of which are subject to dispute. Hunter testified that he pointed out to Respondent that Ag Credit had no record of a loan transaction and did not have a mortgage. According to Hunter, Respondent responded as follows:

² It is unclear how and when the other mortgages encumbering the property were released. Suffice it to say that Marion Bank, Bank One and Ray Hildreth all voluntarily released their mortgages.

"[He] had indicated to me at that time that he understood that there was no obligation with Lemke Sales & Service. He indicated, as well, that there was some sort of financial difficulty at Lemke Sales & Service and that, as he put it, they had created debt to Ag Credit and that the mortgage was granted to Ag Credit to -- I believe the term was to protect the interest of Ag Credit." (Tr. 44-45) Hunter then told Ricketts that his client felt that a fraud had been perpetrated on creditors, and that it would not be a party to that fraud by issuing a release of the mortgage lien.

¶16. Respondent testified that he does not recall using the terms "create debt" in the phone conversation with Hunter. His version of the conversation is that he repeatedly asked Hunter whether Lemke owed Ag Credit any money and that Hunter admitted that she did not. When Hunter still declined to release the mortgage Respondent said he felt like he was being subjected to some kind of "April Fools Joke." He told the panel that he was simply "dumbfounded" by Hunter's position. (Tr. 424-428)

¶17. At this point Respondent decided that his only course of action was to file a quiet title or declaratory judgment action to get the title to the properties cleared. However, Lemke informed him that she could not wait for a legal proceeding of this type to run its course. She told him that she had outstanding obligations that needed to be paid and that she needed the American General loan to be completed immediately. Respondent, then, drafted and signed a release of Ag Credit's mortgage and had Lemke take it to the Marion County Recorder and file it. Apparently this document satisfied the individual doing the title work for American General, because the loan was eventually consummated.

¶18. Hunter, at his client's behest, ultimately complained of Respondent's actions to the Office of Disciplinary Counsel and these proceedings followed. Relator alleges that the

execution and recording of the mortgages and the execution and recording of the "release" constitute unethical conduct. Because the panel views these two events as being different in character they will be dealt with separately.

CONCLUSIONS OF LAW

MORTGAGE

¶19. Relator has alleged in its complaint that the filing of the mortgage on December 28, 2001,³ was a violation of DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation]. Relator contends that Respondent engaged in conduct designed to deceive creditors by having his client execute and then record a document whose purpose was to make creditors think that the real estate owned by Lemke Sales was encumbered by multiple mortgages when in fact the tracts were not. In support of this conclusion Relator points to the following:

a. Lemke Sales owed nothing to Ag Credit and no new loan had been transacted despite recitations in the documents that would indicate otherwise.⁴ Thus, says counsel for Relator, the mortgages were not supported by any consideration.

b. The mortgage was illegal because the mortgage was never requested by Ag Credit, was never delivered to Ag Credit and they were otherwise completely ignorant of the document's existence until 2007 when a release was requested by Lemke.

c. Respondent admitted in his phone conversation to Hunter that the purpose of the mortgage was to make it look like the properties were encumbered. Though Respondent says he

³ The complaint incorrectly alleges that it was filed in March 2001.

⁴ The mortgage recites that it is being given "for new consideration to secure the outstanding obligations of Mortgagor". The mortgage later provides that it is being given "as additional collateral security for the Obligation and any other obligations of Mortgagor to Mortgagee in any form or fashion..." (Rel. Ex. 1)

does not recall making this statement, Hunter's version of the conversation is supported by an email to Lemke and her consulting firm in the early stages of his representation of her in 2001. (Ex. 3 and M) In that communication that Respondent admits he authored, he sets forth a proposed strategic plan for his new client that included getting the secured creditors to take their equipment back in full satisfaction of their debt. He goes on to tell Lemke that in order to accomplish this "... they must perceive that they will not otherwise collect from the company." He further added that they needed to "... eliminate the potential for equity in the real estate being made available for general unsecured creditors of the company..." Id.

¶20. Respondent and his three expert witnesses understandably have a different perspective. They feel that the mortgages were legal because Lemke was personally in debt to Ag Credit, Bank One, and Marion Bank. Since much, if not all, of the borrowed funds owed to these banks went to keep Lemke Sales afloat the mortgages were legally given to these banks to provide additional security for Lemke's loans. They conclude that while one may disagree with the strategy of gratuitously using company property as collateral to secure the personal obligations of the company's sole shareholder, there is certainly nothing unethical in doing so.

¶21. Respondent also argues that placing the mortgages of record was indispensable to an orderly liquidation of the company's assets. It was Lemke's intention from the beginning to see that all of her creditors got paid. Indeed, for the secured creditors this was critical since she was obligated personally on those loans. Had the creditors gone into panic mode when the liquidation was announced and started racing to the courthouse to get a head start on obtaining a judgment, the liquidation would have been much more difficult, if not impossible. The mortgages were meant to discourage creditors from bolting and moving against the property outside the liquidation process.

¶22. The panel feels that the arguments of Respondent regarding the legality of these instruments are questionable. Further, the panel does not conclude that the mortgages were given because of a concern that Lemke's creditors needed additional protection. Simply put, it believes that the mortgages were given for the reasons articulated by in his email: to create the appearance of debt.

¶23. The panel also believes that the mortgages were of doubtful legality. Mortgages and the provisions contained in them have generally been construed in accordance with contract principles. See *Bank One v. Wilborn*, 121 Ohio St.3d 546, 2009-Ohio-306. Since Ag Credit was not a party to the issuance and execution of this mortgage thus there clearly was no contractual agreement underlying the document. Furthermore, it is generally held that a mortgage is not effective until there has been delivery and acceptance by the mortgagee. *Alaska Seaboard Partners v. Godwin* (2002), 4th App Dist No 02 CA5, citing *Sidle v. Maxwell* (1854), 4 Ohio St. 236.

¶24. Notwithstanding this conclusion, the panel feels that the legality of the mortgage is not the real issue in this case. At the worst these transfers were fraudulent transfers subject to being set aside by the creditor under R.C. §1336.07. Given the fact that the evidence in this case shows that Lemke Sales & Service was solvent, that it was meeting its obligations and paying its bills, that no creditor had attempted to repossess its collateral and no creditor had filed suit, there appears to be no legal obstacle to the company creating the "appearance of debt" as Ricketts described it. Lemke's right to pursue this course of action is further buttressed by the fact that from the beginning it was her intention to pay her creditors both for moral reasons and the practical reason that she was personally obligated on a great majority of these obligations.

¶25. Thus, the panel has concluded that if, under these circumstances, Respondent decides to attempt to give Lemke's personal creditors a mortgage, there appears to be no reason why he could not carry out this plan. Lemke was not under any contractual, statutory, or other restriction preventing her from alienating her property in any manner she deemed fit. One might call the conduct "sharp practice" but in the panel's opinion it falls within the Supreme Court's admonition in *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-120 that [l]awyers are permitted to advance claims and defenses for which "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." *Rust*, at 312 ¶42. In this same decision, the Supreme Court points to the following language in the comment to Prof. Cond. R. 3.1 saying: "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." *Id* at 313 ¶44.

¶26. Respondent in this case wanted to employ the best means possible to maintain order in the liquidation of Lemke Sales. While granting Lemke's personal creditors a mortgage that they did not solicit may be of questionable legality, in the panel's opinion the conduct comes within "the proper scope of advocacy." The panel therefore recommends that the allegation that Respondent violated DR 1-102(A)(4) be dismissed.

RELEASE

¶27. The Relator has alleged in its complaint that the drafting and recording of the mortgage release is in violation of Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation] and 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law]. The panel agrees with Relator.

¶28. Respondent argues that once the underlying obligation supporting the mortgage is satisfied the mortgage is discharged.⁵ *Jennings v. Wood*, 20 Ohio 261 (1851). See 69 Ohio Jur. 3d Mortgages § 200.

¶29. While it may be true that the mortgage is "discharged" once the loan it secures is satisfied, the law clearly does not give the mortgagor the option of making that determination and discharging his own mortgage. R.C. §5301.34 states that a mortgage is to be released of record when the recorder is presented with "a certificate executed by the mortgagee ... certifying that the mortgage has been paid and satisfied." The case law on the subject also supports the proposition that the mortgagor is the proper party to release a mortgage. See *Upjohn v. Ewin*, 2 Ohio St. 13 (1853); *Bostian v. Cholley*, 47 Ohio App. 295 (1933).

¶30. Respondent argues that the document that he filed contains no incorrect statement of fact or law. This may be a correct statement, however, the document was clearly meant to mislead the recorder, the public and specifically American General Finance. It is headed with the words "RELEASE OF REAL ESTATE MORTGAGE IN FAVOR OF AG CREDIT". The body of the release recites that the mortgage "has been satisfied and is hereby fully released and discharged" – statements normally coming from the creditor that had extended the credit. Taking the document as a whole, the inescapable impression is that Respondent is releasing the mortgage on behalf of Ag Credit; an impression that he clearly intended to create. (Ex. 2)

⁵ In this case Lemke's personal obligation to Ag Credit was paid off in 2005 when she sold her farm.

¶31. None of Respondent's experts who opined that there was no law preventing a mortgagor from releasing a mortgage could remember ever seeing it done. Respondent himself implicitly acknowledged the fact that the power to release the mortgage was held by Ag Credit when he called the company seeking the release. Had Respondent really believed that Lemke held the authority to release the company's mortgage he would never have phoned Ag Credit in the first place and requested a release. Furthermore, the evidence showed that had Lemke not impressed upon Respondent the urgency of getting something done, Respondent would have sought a resolution of the matter with legal action.

¶32. Respondent's conduct was intended to mislead, and the panel believes that Relator has proven by clear and convincing evidence that in preparing and recording the release of mortgage, Respondent violated Prof. Cond. R. 8.4(c) and 8.4(h) as alleged.

RECOMMENDED SANCTION

¶33. The panel has reviewed the guidelines for imposing lawyer sanctions found in BCGD Proc. Reg. 11 and makes the following findings:

¶34. Aggravating Facts The only aggravating fact that the panel finds present in this case is that Respondent steadfastly clings to his belief that what he did was both legal and ethical. To this extent he has refused to acknowledge the wrongful nature of his conduct. However, given the fact that three qualified lawyers that practice in this area agreed with him on this subject, the panel declines to put a great deal of weight on this fact.

¶35. Mitigating Facts. There are a great many mitigating facts to be considered:

- a. Respondent has practiced law 24 years with no disciplinary action against him.
- b. The drafting of the release was not the product of a selfish motive on his part. He impetuously filed the document in response to his client's need to conclude a loan with her bank.

c. There is no indication that Respondent was less than cooperative with Disciplinary Counsel. Relator admits in its post trial brief that Respondent cooperated, and counsel for the Respondent complained during the hearing and in his post trial brief that Relator did not include Respondent enough in the preliminary investigation that took place before the complaint was filed.

d. The panel was extremely impressed by Respondent's reputation not only in the legal community within which he practices, but also the community in which he lives. He has lectured at well over a hundred seminars dealing with farm property and debtor/creditor law and has testified as an expert witness in both state and federal cases. From all appearances he has a successful law practice and is well respected by his peers. Outside of his professional life he is active in community organizations, including his church. Furthermore he is involved with the activities of his family, and he volunteers many hours of his time to charitable organizations.

¶36. Respondent asks that the charges against him be dismissed, but that if an ethical violation is found that he receive no actual time off from the practice of law.

¶37. Relator asks that Respondent be suspended from the practice of law for six months. Noting that this is a fact situation without precedent in Ohio, Disciplinary Counsel cites a number of cases (all from jurisdictions outside of Ohio) noting that similar conduct has received a public reprimand to disbarment. In *Iowa State Bar v. O'Donohoe*, 426 N.W.2d 166 (1988), the Supreme Court of Iowa recommended a public reprimand for a lawyer that drafted and then back dated a deed for clients against whom a summary judgment was about to be entered for a substantial amount of money. The deed was executed to complete a transaction between the client and the corporation they had formed for their farming operations some five months earlier. As part of the incorporation process the client and his wife were to transfer land

to the company in exchange for stock certificates. For some reason the transfer had never been completed so the respondent used this transaction as a justification for moving the land out of the clients' names. The respondent dated the deed not the date it was executed, but the date of the formation of the company. The Iowa Supreme Court agreed with the characterization of the respondent's conduct as "an isolated incident in an otherwise exemplary career." *Id.* at 168. The same characterization could be used in this Respondent's case.

¶38. In a New Jersey case cited by Relator⁶ two attorneys were publicly reprimanded for engaging in the transfer of a clients' property to one of the client's uncles. In this transaction the pair engaged in creating sham documentation that the uncle had actually paid something for the properties. Further, the transfers were made when the clients were unquestionably in default of obligations owed on a business that had recently acquired.

¶39. Relator cited only one case that resulted in a sanction involving actual time off from the practice of law. *In the Matter of Breen*, 113 N.J.522 (1989), the respondent was disbarred for putting multiple mortgages on his property to avoid a judgment creditor. The panel finds this case clearly distinguishable for a number of reasons. First, the respondent was not only guilty of putting these mortgage against his property, he was disciplined for multiple other offenses involving neglect and dishonesty. The opinion also indicates that he was less than cooperative in the disciplinary process. Second, the respondent was clearly insolvent and on the verge of losing the home when he made the transfers.

¶40. The panel is mindful that the presumptive sanction for a lawyer found guilty of dishonesty, fraud or deceit is an actual suspension. *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 1995-Ohio-261; *Disciplinary Counsel v. Greene*, 74 Ohio St.3d 13, 1995-Ohio-97. On the other hand there have been instances where the Supreme Court found a violation of

⁶ *In re De Pamphilis*, 30 N.J. 470 (1959)

DR 1-102(A)(4) and imposed a stayed suspension or a public reprimand. *Lake County Bar Assn. v. Ezzone*, 102 Ohio St.3d 79, 2004-Ohio-1774; *Cleveland Bar Assn. v. Russell*, 114 Ohio St.3d 171, 2002-Ohio-3603.

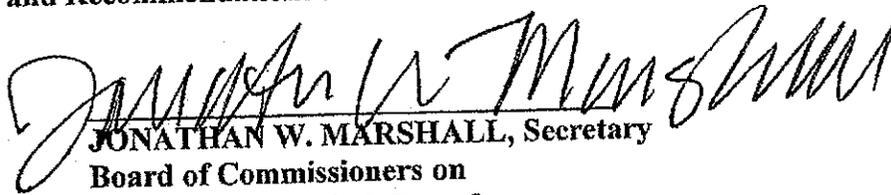
¶41. The panel has found that Respondent's misconduct consists of his releasing a mortgage that was of questionable legality to begin with. Further, Ag Credit, Lemke Sales's creditors, and the public have sustained no harm. And while it is true that Respondent has failed to acknowledge that his conduct was wrong, this lack of remorse derives more from a difference of opinion than an inherent character flaw. Finally, the overwhelming mitigating factors, including character evidence, convince the panel that a public reprimand is the appropriate sanction.

¶42. The panel therefore recommends that Respondent, Richard Todd Ricketts, be publicly reprimanded.

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 April 9, 2010. The Board adopted the Findings of Fact, and Conclusions of Law of the Panel except that it found that Respondent violated DR 1-102(A)(4) in executing the mortgages. In light of this finding, the Board recommends that Respondent, Richard Todd Ricketts, be suspended from the practice of law in the State of Ohio for six months with the entire six months stayed. The Board further recommends that the cost of these proceedings be taxed to 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

**RELEASE OF REAL ESTATE MORTGAGE
IN FAVOR OF AG CREDIT**

KNOW ALL MEN BY THESE PRESENTS: That for good and valuable consideration, the mortgage in favor of ^XAG Credit as against ^XLEMKE SALES & SERVICE, an Ohio corporation, which Mortgage is recorded in Official Record Volume 594, Page 752, in the Recorder's Office of Marion County, Ohio has been satisfied and is hereby fully released and discharged.

IN WITNESS WHEREOF, the undersigned has executed this Release of Real Estate Mortgage this 1st day of August, 2007.

By: *Richard T. Ricketts*
Name: Richard T. Ricketts

Sworn to and subscribed before me this 1st day of August, 2007.

Richard T. Ricketts

Amy L. Slane
Notary Public

AMY L. SLANE
Notary Public, State of Ohio
My Commission Expires
9.27.09



THIS INSTRUMENT PREPARED BY:
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