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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

vs.

MYRON B. BERMAN,

Respondent.

Supreme Court Case
No. 83,616

The Florida Bar File
No. 92-70,177 (11G)

INITIAL RESPONSE BRIEF OF RESPONDENT

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PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

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The Florida Bar vs. Pahules, 233 So.2d 130 Fla1970.

SYMBOLS AND REFERENCES

The Florida Bar shall be referred to as the Bar, the Respondent shall be referred to as Respondent. Witness shall be referred to by last names.

Transcript items shall be referred to as TR and number and the Referee's Report shall referred to as the Referee's Report.

STATEMENT OF THE CASE

The statement of the case as set forth by the Bar is basically correct with the exception that it failed to set forth that this was the Third Grievance filed upon the same matter , involving the same evidence, the same parties, and the same issues. The Bar's Examiners had previously found no probable cause on the Two previous grievances, and had dismissed the Complaints. Further , this action was commenced either in 1986 or 1987 and has been pending from said dates to the date of the Referee's hearing, to wit: October 13, 1994. In reality , this matter has been pending for approximately seven (7) to eight (8) years.

STATEMENT OF THE FACTS

The Bar is correct in its statement that the Respondent did not share the traditional attorney/client relationship. At no time was this relationship ever established. The Respondent never represented Sally Gabe.

This is an action by an investor in a Business , a foreign corporation, known as Master Craft, N.V.

In 1986, Sally Gabe was approached by Marvin Moskowitz for an investment in a Aruban corporation known as Master Craft N.V. Mr. Moskowitz had been in the jewelry business for over twenty-five (25) years. He was an expert gemologist and precious metal dealer with a full and complete working knowledge of all facets of the jewelry business. Mrs. Gabe had know Mr. Moskowitz for a long period of time having worked for him in the jewelry business both in New York and Palm Beach, Florida. Mrs. Gabe was familiar with the operations of a jewelry business. The Respondent is and has been a practicing attorney for approximately thirty-two (32) years. That the Respondent has no knowledge of the jewelry business.

At the one meeting that the Respondent attended, Mr. Moskowitz and Mrs. Gabe agreed to all terms and conditions of Mrs. Gabe's investment in this corporation. Mr. Moskowitz dictated and Mrs. Gabe agreed that Mrs. Gabe would invest \$40,000.00 in said Business. That Mrs. Gabe was to receive an immediate re-payment of \$10,000.00 as six months prepaid interest

on her investment in the corporation.

That the principal amount of the note was made out for \$100,000.00 although the corporation received only \$40,000.00. When queried about this Mr. Moskowitz advised that this was for the \$40,000.00 investment in the corporation and for monies that Mr. Moskowitz owed Mrs. Gabe.

That upon advising Mr. Moskowitz that the interest on said note was to have been 10% which would be \$5,000.00 and not \$10,000.00, Mr. Moskowitz advised that this was what he wanted and this was what the Parties agreed to.

That all terms and conditions of this note and the agreement to the investment were made between Mr. Moskowitz and Mrs. Gabe.

That the Respondent did visit the bank of Mrs. Gabe. That in accordance with the promissory note, Mrs. Gabe had two checks drawn, one in the amount of \$10,000.00 and one in the amount of \$40,000.00. In accordance with the terms of the promissory note, and as prepaid interest, the \$10,000.00 draft was given to Mrs. Gabe. There were no inducements nor representations relative to this being a good faith inducement for her investment. At the time of receipt of these drafts, the Respondent gave Mrs. Gabe the promissory note and the corporate minutes setting forth the terms of her investment including the fact that Mrs. Gabe was to receive a 5% share of the profit of said corporation for her investment.

Good faith was never mentioned, and the payment of monies to Mrs. Gabe was made in conformity to the promissory

note.(TR.398-399).

No representations relative to the operations of Master Craft N.V. were made to Mrs. Gabe by the Respondent. All representations relative to said business were made to Mrs. Gabe by Mr. Moskowitz That both Mr. Moskowitz and Mrs. Gabe were knowledgeable with the practices of the jewelry business with many years of experience, while the Respondent was and is a practicing attorney having been so for approximately thirty-two (32) years.

The diagrams and existing building structures upon the land provided by the Aruban Government were submitted to the referee. These three existing buildings were fully constructed and required that the water and electricity be turned on in order to be fully operational.

That in the late 1986 due to the lack of funds and the Aruban Government's failure to subsidize the corporation's educational and training plans, it became apparent that this project would not become operational. Mrs. Gabe was advised of this.

Carlos J. Ruga, the Bar's auditor, without verification, proof, nor substantiation of any nature determined that all receipts, listings of expenses and Operational cost were not legitimate and did not constitute legitimate documentation of disbursements. That In fact, all disbursements were made for the corporation and the costs of maintaining the same. Had these been checked as to the notary, M.A. Eman, and J.A.F. Spit, the corporate-governmental adviser, and as to the office expenses

and costs, the Bar would have determined that said receipts and documents were legitimate and were valid.

The person Sally Gabe filed three (3) separate Florida Bar Grievances in this matter. That all of the issues were the same, all of the facts were the same., all of the evidence was the same, and all of the Parties were the same. That the Bar Grievance Committee found no probable cause on two occasions, and found Probable cause on the last occasion.

In 1989, Sally Gabe instituted civil litigation against the Respondent and Marvin Moskowitz.

That during the course of this litigation, Mrs. Gabe settled this matter for \$10,000.00 to be paid at the rate of \$1,000.00 per month to be paid by Mr. Moskowitz. That unbeknown to the Respondent after making one payment, Mr. Moskowitz defaulted and Mrs. Gabe procured a Judgment against the Respondent and Mr. Moskowitz for \$40,000.00.

During the course of this litigation, the Respondent was Ordered to produce all of the records from the Aruban Bank applicable to the Master Craft N.V. account. That the Respondent attempted to procure these records with letters, faxes, telegrams, telephone calls, being sent and made to the Bank. That all of these efforts failed to produce the documents for the Court within the prescribed time period.

That subsequently, the Respondent's Wife was successful in procuring the records required by the Court from the Aruban Bank.

The Trial Court held the Respondent in civil contempt

of Court and sentenced the Respondent to incarceration in the North Dade Correctional facility. That the Respondent served forty-nine (49) days and nights in the work release program.

That the civil litigation was settled for \$8,000.00 and the civil litigation was dismissed and the contempt charge dismissed and the Respondent was released from jail.

The Report of the Referee is attached to the Bar's brief. The Respondent takes exception to the finds of the Referee in finding that Mrs. Gabe was given the \$10,000.00 as a good faith inducement for investing in the corporation ; that the disbursements were not legitimate expenditures for the furtherance of the corporate purpose and goal; that the receipts were unsatisfactory, and that misrepresentations were Made to Mrs. Gabe by the Respondent.

The Referee recommended a ninety (90) day suspension of the Respondent.

ARGUMENT SUMMARY

I. WHETHER THE REFEREE ERRED IN NOT RECOMMENDING RESPONDENT RECEIVE A THREE YEAR SUSPENSION AS THE RESULT OF HIS FINDINGS THAT RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT AND MISREPRESENTATION, CONDUCT ADVERSELY REFLECTING ON HIS FITNESS TO PRACTICE LAW AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

II. WHETHER THE REFEREE ERRED IN RECOMMENDING A THREE MONTH SUSPENSION AS THE RESULT OF HIS FINDINGS THAT RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT AND MISREPRESENTATION, CONDUCT ADVERSELY REFLECTING ON HIS FITNESS TO PRACTICE LAW AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

The Referee did not err in his recommendation of a suspension of the Respondent for a period of three months rather than three years. The Bar's position of a suspension for a period of three years is tantamount to a destruction of the Respondent's Law Practice, a deprivation of the Respondent's livelihood that he has pursued for thirty-two years and in reality constitutes cruel and unusual treatment.

That the Referee did err in his recommendation of a three month suspension of the Respondent. That this was isolated incident covering a period of 9 to 10 years. That this involved an investor in a corporation who lost her investment. That the Referee failed to consider the consequences to the Respondent who has no other source of income other than his Law Practice, the hardship that will be placed on the Respondent's innumerable clients who will be deprived of his services, the hardships placed upon causes presently in litigation, and the fact that as the result of this action,

the Respondent was incarcerated in the North Dade Correctional facility for a period of 49 days and nights on work release, that the Respondent faced three (3) separate Bar Grievances involving this same matter, that the Respondent has incurred thousands of dollars in legal fees and Court costs, and has in fact settled the civil litigation for \$8,000.00.

That if a punishment is to be Ordered, it is herein requested that the Court consider all of the foregoing, attending circumstances and Order ten (10) day suspension or in the alternative the Court Order a one (1) month suspension.

ARGUMENT

I agree with the Bar's contention that the practice of Law is a privilege.

I also agree that there was no attorney/client relationship in this cause.

This was as set forth by the Bar an investor in a corporation who lost her money, which had been invested in the corporation, and desired some type of recompense. That in fact Sally Gabe did receive her recompense and settled the civil litigation for \$8,000.00. I strongly oppose the proposition that Sally Gabe relied on the representations of the Respondent in order to invest in this corporation. Both Marvin Moskowitz had years of experience in the jewelry business. In Mr. Moskowitz's case this was in excess of twenty-five (25) years, and Mrs. Gabe had relied on representations of Mr. Moskowitz predicated upon her experience in the jewelry field and the fact that she worked for Mr. Moskowitz in the jewelry industry. The Respondent had no knowledge of the jewelry business. The Respondent has been practicing attorney for thirty-two (32) years and to this date has very little knowledge of the operations of a jewelry business.

The Bar must be corrected. The investment of Mrs. Gabe was , in fact, \$40,000.00 and Not \$50,000.00 as stated.

All representations made to Mrs. Gabe were made by Mr.. Moskowitz. He was the expert in the jewelry field, and not the Respondent,. The Respondent could not make representations

relative to something that he knew nothing about.

The Respondent in this cause was a shareholder and director of the Aruban corporation. He was the attorney for the corporation, and conducted business relative to the corporation in his capacity as an attorney. All Parties involved herein were fully advised that the Respondent acted in his capacity as attorney for the corporation. The Respondent did make disbursements from the corporate account and his Trust account as the attorney for this corporation, The Respondent maintained an active role in the corporation, and made disbursements for the corporate benefit and for the futherance of the corporate purpose, and under the instructions of Mr. Moskowitz.

Yes, the charges and findings of the Referee are probably the most Important findings of the Respondent's career.

The Bar in all of its case citations, has endeavored to place this matter in the status of a felony matter. The cases involve changing a Judge's Order, failing to reveal the true facts concerning real estate transactions, deliberate withholding of discovery material, converting all of client's proceed to the attorney's own benefit. None of these cases cited by the Bar are applicable to the present situation.

The one case that the Bar cited, **The Florida Bar vs. Pahules**, 233 So.2d 130 Fla 1970), is applicable:

First, the Judgment must be fair to society both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified attorney as the result of undue hardship

imposing a penalty. Second, the Judgment must be fair to the Respondent being sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation. Third, the Judgment must be severe enough to deter others who may be prone or tempted to become involved in like violations. **Pahules at 132.**

This case sets the standards to be applied herein. The first condition is that the Judgment must be fair to society both in terms of protecting the public from unethical conduct and at the same time not denying the public of the services of a qualified attorney.

The Respondent has been subjected to the following:

- a. 49 days and nights served in the North Dade Correctional facility for civil contempt.
- b. The expenditure of thousands of dollars for attorney's fees and costs.
- c. The payment by the Respondent to Sally Gabe of \$8,000.00 for the settlement of this case.

Obviously the conditions imposed upon the Respondent meet the requirements of being fair to society.

The second phase of this condition is that Judgment not deny the public the services of a qualified attorney as a result of undue harshness in imposing a penalty. The Respondent represents innumerable clients both presently in litigation in matters presently before the Courts, in business matters,

has been pending for approximately Ten (10) years. The Respondent has lived under this Sword of Damocles for this ten year period.

c. The Respondent has expended thousands of dollars for attorney's fees and costs in this matter.

d. The settlement of the civil litigation with Sally Gabe for the sum of \$8,000.00.

The Respondent submits that all of the foregoing have met the requirements of punishment, and exceed the factor of harshness.

This is a one time occurrence and neither reformation nor rehabilitation are required herein.

Certainly, the imposition of the foregoing will constitute a deterrent to any and all persons examining this matter.

The Bar once again endeavors to insert the relationship of attorney/client into this cause. Be assured that this never occurred. The attempt to impose a three year suspension in this cause by the Bar, is a case of overkill. This will very effectively destroy the Respondent's Legal Practice, which he has maintained for thirty-two years. The imposition of a three month suspension as recommended by the Referee is very harsh, and will result in the injury of not only the Respondent but to the Respondent's clients'.

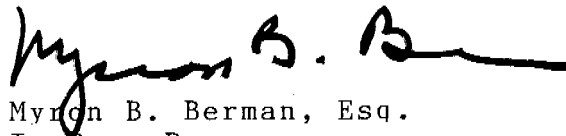
The respondent respectfully request that this Court consider

all of the foregoing, and that if a suspension be Ordered that the same be for a period of ten (10) days or at the maximum, thirty (30) days.

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CONCLUSION

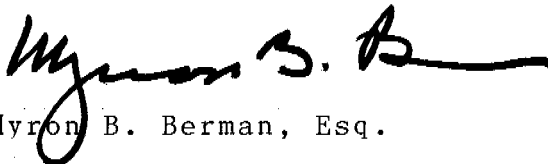
In accordance with the argument and cases cited herein, the Respondent, Myron B. Berman, Esq. respectfully requests that this Court reject the Referee's decision and impose either a ten (10) day suspension or in the alternative a thirty (30) day suspension in this cause.

A handwritten signature in black ink, appearing to read "Myron B. Berman", with a long horizontal flourish extending to the right.

Myron B. Berman, Esq.
In Pro. Per.
Respondent
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the original and seven copies of the Response Brief were mailed to Hon. Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Bldg, 500 South Duval Street, Tallahassee, FL 32399, and a true copy to Arlene K. Sankel Esq. Bar Counsel, The Florida Bar, 444 Brickell Avenue, Ste M-100, Miami, FL 33131 and John T. Berry Esq. Staff Counsel, 650 Apalachee Parkway, Tallahassee, FL 32399 and John F. Harkness, Jr. Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399 this 14th day of April, 1995.


Myron B. Berman, Esq.