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IN THE SUPREME COURT OF FLORIDA

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 BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

For the purposes of this Initial Brief on Appeal, The Florida Bar will be referred to as either The Florida Bar or the Bar. Respondent will be referred to as either Respondent, Myron B. Berman, or Berman. Witnesses may be referred to by their surnames only.

References to the transcript of the final hearing before the Referee will be set forth as TR. and page number. References to The Florida Bar's exhibits at final hearing will be set forth as TFB Ex. and number. References to the Report of Referee dated November 15, 1994 will be set forth as R.R. and page number.

STATEMENT OF THE CASE

On April 27, 1994, following a probable cause finding by Grievance Committee "G" of the Eleventh Judicial Circuit, The Florida Bar filed its Complaint in this cause. On May 10, 1994, Respondent filed his Answer, Affirmative Defenses, and a Motion to Dismiss. An Order was entered by the Referee on June 28, 1994 granting Respondent's Motion to Dismiss with leave for The Florida Bar to amend its complaint. The Florida Bar's Amended Complaint was filed on July 12, 1994. Respondent filed his Answer and Affirmative Defenses to the Amended Complaint on July 22, 1994. A second Motion to Dismiss was also filed at that time. On August 5, 1994, an Order was entered denying Respondent's Motion to Dismiss Amended Complaint.

This matter ultimately proceeded to final hearing before the Referee on October 13, October 14, and October 20, 1994. The Referee found Respondent guilty of all rule violations alleged by The Florida Bar including Rules 1-102(A)(4) and (6) (A lawyer shall not (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; nor (6) engage in any other conduct that adversely reflects on his fitness to practice law) of the Code of Professional Responsibility and Rule 4-8.4(d)(A lawyer shall not engage in conduct prejudicial to the administration of justice) of

the Rules of Professional Conduct. On November 15, 1994, the Referee recommended that Respondent be suspended for a period of ninety days.

STATEMENT OF THE FACTS

The Florida Bar's complaint in this cause stems from allegations of misconduct on the part of Respondent, Myron B. Berman, as they pertain to one Sally Gabe. Respondent and Sally Gabe did not share a traditional attorney/client relationship. Rather, they had a business relationship which stemmed from their respective connections to a man by the name of Marvin Moskowitz and a business known as Master Craft, N.V.

In early 1986, Sally Gabe was approached by Marvin Moskowitz with regard to her possible interest in investing in a business venture being organized by Moskowitz (TR. 39). Moskowitz advised Gabe that he was starting a jewelry business in Aruba. The business would have two facets. First, it would operate a school in Aruba to teach the natives jewelry manufacturing. Second, it would actually manufacture jewelry for wholesale purposes. (TR. 40). Gabe had known Moskowitz for several years having previously worked for him in the jewelry business. (TR. 37). Although Moskowitz had become indebted to her during that period of employment, Gabe knew him to be successful in his field. (TR. 38, 40). Gabe agreed to invest in Moskowitz' Aruban jewelry venture. (TR. 41).

Sally Gabe testified that two meetings were scheduled in early

1986 to discuss the venture and investment. She stated that present at the first meeting were herself, Moskowitz, and the Respondent, Myron Berman. (TR. 42). At that meeting, Moskowitz advised Gabe that the business was ready to get off the ground, but that he had to pay for equipment to be shipped to Aruba in order to get the business started. Sally Gabe agreed to put up $50,000.00 in order to obtain the equipment. (TR. 44). Gabe also testified that at that meeting Respondent stated that he was so confident the business would succeed, he was going to obtain a second mortgage on his home in order to invest in it himself. (TR. 46). Respondent denied ever making such a statement and recollected being present at only one meeting prior to the actual funds being tendered by Gabe. (TR. 396). Respondent did, however, act as attorney for Master Craft N.V. and was also a shareholder in the corporation. (TR. 67, 393).

Gabe's recollection was that a second meeting occurred at which time discussion was had by the three participants as to the actual terms of Gabe's investment. Gabe was to put up $50,000.00. In return, she was to receive a promissory note for $100,000.00 paying annual interest of ten percent. The $100,000.00 was to represent both the investment and other monies owed to Gabe by Moskowitz. (TR. 48). No agreements of any kind were signed at

that time. (TR. 49).

A few days later, Gabe met Respondent at her bank where she was to cash in her certificate of deposit in order to obtain the money for the investment. (TR. 50). Gabe testified that Respondent brought with him an agreement regarding the previously discussed terms of her investment. Gabe reviewed the document, but was not satisfied as she felt it did not accurately reflect their agreement. (TR. 51-54). She refused to sign it and returned it to Respondent stating she would deliver the funds when she received a revised agreement. (TR. 54). Gabe then testified that Respondent suggested she obtain two cashier's checks, one for $40,000.00 and one for $10,000.00. In order to show his good faith and intent to amend the agreement in accord with her wishes, Respondent would endorse Gabe's $10,000.00 check right back to her as prepaid interest. (TR. 55; TFB Ex. "A" and "B"). Respondent's testimony coincided with Gabe's to the extent of the meeting at Gabe's bank and her delivery of two separate cashier's checks totaling $50,000.00. (TR. 397). He denied a conversation regarding the good faith prepayment of $10,000.00 and denied producing an unsatisfactory agreement. (TR. 397). Gabe further stated that she never received a revised agreement from Respondent (TR. 72).

The Florida Bar Exhibit "C" consists of a promissory note

dated March 17, 1986. It was Gabe's testimony that she did not receive that promissory note on March 17, 1986 and that she saw it for the very first time subsequent to the filing of her complaint with The Florida Bar. (TR. 57). The terms reflected on the promissory note provide that initial payment upon the note shall commence six months from the date of the note, that the loan shall be amortized over a fifteen year period and balloon in five years, and that the note may be prepaid without penalty at any time. The note further provides that there shall be an immediate payment of $10,000.00 to Gabe which shall represent the prepayment of six months interest on the loan and that the note shall pay interest at the rate of ten percent annually. Interestingly enough, it should be noted that six months interest on a $100,000.00 note paying ten percent interest per year would be $5000.00 and not $10,000.00. Respondent testified that he endorsed the $10,000.00 check back to Gabe in accord with the terms of the promissory note and that the original documents were delivered to her at that time. (TR. 398-399).

Subsequent to tendering her money to Respondent, Gabe expressed interest in traveling to Aruba to see the business. She gave Moskowitz $3000.00 to purchase tickets. (TR. 75). Gabe, Respondent, Moskowitz, and Moskowitz' wife and baby traveled to

Aruba together. (TR. 76). Gabe testified that once in Aruba, the group traveled to the site of Master Craft, the jewelry business in which she had invested her money. She described it as "a big empty lot" without a building. "No walls, no roof, no floor." (TR. 78-79). She stated that upon inquiry, Respondent told her the building would be completed in a couple of months. She was not taken to see any operational office of Master Craft. (TR. 79-80).

In fact, to Gabe's knowledge, Master Craft never became operational. (TR. 81). In response to Gabe's subsequent inquiries regarding the whereabouts of her money, Respondent advised her it had been spent. (TR. 83). Gabe's testimony in this regard is in accord with Respondent who testified that by the latter part of 1986, he became aware that Master Craft would not become operational and that Gabe's money had been used to pay bills incurred prior to the time of her investment. (TR. 445).

Carlos J. Ruga, The Florida Bar Branch Staff Auditor, was called as an expert witness in the field of accountancy. He testified as to his review of financial records involved in the Master Craft venture. In particular, Ruga testified as to what his review disclosed regarding the $40,000.00 cashier's check tendered to Respondent by Gabe on March 17, 1986. He stated that Gabe's check had been deposited in Respondent's trust account. (TR. 211-

212). Twenty-thousand dollars ($20,000.00) was then transferred to a bank account in Aruba. Of the remaining $20,000.00 in Respondent's trust account, $14,300.00 was disbursed to Marvin Moskowitz, $1000.00 to Sally Gabe, $2496.80 to a Dr. Eman, $1000.00 to J.A.F. Spit, and $1273.20 disbursed on miscellaneous expenses. (TR. 214). Ruga testified that his review of the documentation contained in the file disclosed no apparent reason for Respondent's disbursement of almost $15,000.00 to Moskowitz. (TR. 214). With regard to the $20,000.00 transferred to the bank account in Aruba, Ruga testified that Respondent issued five checks from that account to either himself or cash in the sum total of $19,000.00. (TR. 215). A review of The Florida Bar Exhibit "E" indicates that the checks made payable to cash were in fact cashed by the Respondent.

In response to inquiry by Bar counsel, Ruga stated that he reviewed certain receipts and a listing of expenses which had been furnished by Respondent. (TR. 216). In particular, he reviewed The Florida Bar Exhibit "G" which appears to be a listing of expenses. However, the listing contained no indication of when it was prepared or by whom. Neither does it indicate what entity it was prepared for. (TR. 217; TFB Ex."G"). The Bar's auditor testified that it was his expert opinion that the listing did not constitute an acceptable expense receipt because it had no source

document back-up, i.e. a bill, invoice, etc. In short, it was "just a listing of some expenses of some entity" without a verifiable receipt. (TR. 218-219). Ruga did review some receipts which in his expert opinion he did consider to be valid and legitimate. They consisted of receipts and invoices from Sample Road Travel, Aruba Bank, and one M.A. Eman, Notary. Testimony provided by Allan Sherr, the Certified Public Accountant called by Respondent as his expert witness, established that those receipts were, at least in good part, for services rendered prior to the time Sally Gabe entrusted her $40,000.00 to Respondent. (TR. 311-316). Ruga also aptly pointed out that the $20,000.00 deposited into the Aruban bank account was in U.S. dollars and not converted to the local currency which is customary when doing business in a foreign country. (TR. 222).

Allan Sherr, Respondent's expert witness, testified as to the difference between audits and reviews and when he believed the necessity for verification of receipts would arise. (TR. 284-289).

In 1989, Sally Gabe instituted a lawsuit against Respondent and Marvin Moskowitz as a result of the loss of her $40,000.00 invested in Master Craft. (TR. 84). During the course of Gabe's attempts to recover the judgment eventually obtained by her in that litigation, Respondent was ordered on numerous occasions by the

presiding Judge, the Honorable Maria Korvick, to produce bank statements, bank checks, deposit slips, check stubs, etc., from the Master Craft account in Aruba. Respondent failed to comply with the Court's orders. Ultimately, on September 4, 1991, an Order was entered granting Plaintiff's Motion for Order Sentencing the Defendant to Jail as a result of his failure to produce. (TFB Ex. "M"). The Third District Court of Appeals quashed the Order on the grounds that it did not contain a purge provision conditioned only upon the production of the documents in question. The Order, however, was quashed without prejudice to further appropriate proceedings for civil or criminal contempt, or both (TFB Ex."N").

Subsequently, on January 6, 1992, Judge Korvick entered another Finding of Civil Contempt and Order of Commitment whereby Respondent was ordered confined to the Dade County Department of Corrections for a period of six months with the provision that he be considered for the work release program. (TFB Ex. "O"). Respondent ultimately was incarcerated as a result of that contempt order.

Respondent's wife, Raquel Berman, testified that her husband attempted to obtain bank documents from Aruba, but was not successful. (TR. 332). She then attempted to assist him. (TR 333). After many months, the bank in Aruba did forward the

records. (TR. 334). Amazingly, the Aruba bank faxed the bank records to Mrs. Berman at the very time her husband, the Respondent, was appearing before Judge Korvick at his contempt hearing. (TR. 350). Mrs. Berman testified that she raced to the courthouse, but when she arrived her husband was already being escorted out by two sheriffs. (TR. 335).

Testimony by Mrs. Gabe established that she initially settled her civil claims against Respondent and Moskowitz for $10,000.00 to be paid at the rate of $1000.00 per month. (TR. 87). In the event payment was not made, she was entitled to a final judgment in the amount of $40,000.00. (TR. 88). Payments were not made in accord with the settlement agreement and a $40,000.00 judgment was obtained. (TR. 90). Ultimately, the $40,000.00 judgment was settled for $8000.00. (TR. 170).

The Bar alleged and the Referee concluded that Respondent's actions as set forth about constituted violations of Disciplinary Rules 1-102(A)(4) and (6) (A lawyer shall not: (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; nor (6) engage in any other conduct that adversely reflects on his fitness to practice law) of the Code of Professional Responsibility and Rule 4-8.4(d) (A lawyer shall not engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct. Specifically, the Referee found that Sally

Gabe gave Respondent $50,000.00 payable to his trust account for investment in Master Craft. Of that sum, Respondent endorsed $10,000.00 back to Sally Gabe as good faith to induce her to invest in Master Craft. Forty-thousand dollars ($40,000.00) was deposited in Respondent's trust account. Of that $40,000.00, Respondent disbursed $14,300.00 to Marvin Moskowitz. The Referee specifically found that Respondent's explanation that Moskowitz needed the money to "further the corporate goal" (TR. 402), was not acceptable as a basis for disbursement. Twenty-thousand dollars ($20,000.00) was then transferred by Respondent to a bank in Aruba in the name of Master Craft. Of that $20,000.00, $19,000.00 was disbursed to Respondent and/or cash. The Referee specifically found that Respondent made the $19,000.00 in disbursements without satisfactory receipts or expenses to prove the funds were used in furtherance of Master Craft business and further, that Sally Gabe's funds were not used for their intended purpose nor disbursed in accordance with representations made to her. Additionally, Respondent was found to have misrepresented to Gabe the purpose for which her funds would be used. By virtue of the civil court's contempt findings, the Referee found that Respondent engaged in conduct prejudicial to the administration of justice. The Referee recommended that Respondent be suspended for ninety (90) days as a result of his misconduct. (Appendix "A").

SUMMARY OF ARGUMENT

The license to practice law is not a right, but a privilege. Those who enjoy the privilege are subject to certain standards. The Supreme Court of Florida has ruled on more than one occasion that those standards apply both within the attorney/client relationship and outside of it.

In the instant matter, the Respondent's misconduct did not occur within the strict confines of the attorney/client relationship. Rather, it occurred in the course of the Respondent's role as attorney for and shareholder in a corporation in which The Florida Bar's main witness invested her money. After hearing the testimony and reviewing the evidence, the Referee concluded that Respondent's conduct in that regard had violated his ethical obligations and recommended that he receive a ninety (90) suspension.

Attorneys are obligated to be especially circumspect when dealing with other people's money. They are additionally expected not to show contempt for orders entered by a court of law. Where a Respondent engages in conduct which involves fraud, dishonesty, deceit, or misrepresentation, adversely reflects on his fitness to practice law, and is prejudicial to the administration of justice, the appropriate sanction is a three year suspension.

ARGUMENT

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, OR MISREPRESENTATION, CONDUCT ADVERSELY REFLECTING ON HIS FITNESS TO PRACTICE LAW, AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

A license to practice law confers no vested right to the holder thereof, but is a conditional privilege revocable for cause. Rule 3-1.1, Rules of Discipline. Accordingly, the Supreme Court of Florida has the inherent power and duty to prescribe standards of conduct for lawyers, to determine what constitutes grounds for discipline of lawyers, and to discipline attorneys for cause. Rule 3-1.2, Rules of Discipline. In this regard, the Court's prescribed standards of conduct for attorneys has extended beyond the scope of the attorney/client relationship to include conduct not within the attorney/client relationship.

In the instant matter, the Respondent was both attorney for the business known as Master Craft N.V. and a shareholder in said business. (TR. 67, 393). Sally Gabe was essentially an investor in that business. (TR. 50-60). In this regard, although Gabe's money was deposited by Respondent into his trust account (TFB Ex. "A"), the typical attorney/client relationship did not exist.

Testimony by Gabe, however, established that Respondent's role in the matter and the fact that he was an attorney was an influential factor in her decision to invest fifty thousand dollars ($50,000.00) in Master Craft. (TR. 46). After hearing the testimony and reviewing the evidence, the Referee concluded that Respondent failed to utilize Gabe's funds for the purpose intended, failed to disburse in accordance with the representations made to Gabe, misrepresented to Gabe the purpose for which her funds would be utilized, wrongfully disbursed a portion of her funds, and disbursed the balance of her funds without satisfactory proof that the funds were used in furtherance of their intended purpose. (RR. 2-3).

Even when not acting in an attorney role, unethical conduct can subject an attorney to disciplinary proceedings. The Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968). Even in personal transactions, an attorney is held accountable to the standards imposed upon the members of his profession. The Florida Bar v. Hooper, 507 So. 2d 1078 (Fla. 1987). As stated in The Florida Bar v. Bennett, 276 So. 2d 481 (Fla. 1973):

> Some may consider it "unfortunate" that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not be held responsible under the high standards of

> our profession. It is not often, if ever, that this is the case. In a sense, "an attorney is an attorney is an attorney", much as the military officer remains "an officer and a gentleman" at all times. We do not mean to say that lawyers are to be deprived of business opportunities; in fact, we have expressly said to the contrary on occasions; but we do point out that the requirement of remaining above suspicion, as Caesar's wife, is a fact of life for attorneys. They must be on guard and act accordingly, to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing. Bennett at 482.

As expressed by this Court in the Bennett case and others, an attorney must take special care to avoid an active role if he does not wish to be held accountable under ethical rules governing our profession. Clearly, the fact that the Respondent in the instant matter did not act within the confines of the attorney/client relationship does not insulate him from being held professionally accountable for his acts. Rather than taking special care to avoid an active role as set forth in Bennett, the Respondent subjudice assumed the most active role by using his trust account as the recipient of Sally Gabe's funds, as well as by being the party who directed subsequent disbursements of those funds. The fact that he may have done so without benefit of an attorney/client relationship with Sally Gabe cannot insulate him from accountability. The mere fact that attorneys may wear different hats at different times does

not mean that professional ethics can be checked at the door or that unethical conduct by an attorney can or will be tolerated. The Florida Bar v. Della-Donna, 583 So. 2d 307(Fla. 1989).

The conduct which the Referee determined Respondent to be guilty of is most serious in nature. The Referee's findings of fact include wrongful disbursement of funds by Respondent, Respondent's failure to disburse in accordance with representations made to Sally Gabe, and misrepresentations by Respondent to Sally Gabe as to the purpose for which those funds would be used. (RR. 3). As a result of his factual findings, the Referee recommended that Respondent be found guilty of violating rules prohibiting attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, as well as any other conduct adversely reflecting on fitness to practice law. Disciplinary Rules 1-102(A)(4) and (6), Code of Professional Responsibility. (RR. 4).

The Florida Bar v. Ruskin, 232 So. 2d 13 (Fla. 1970) involved a situation resulting in the Respondent's permanent resignation from the Bar as a result of a fact situation analogous to the one at hand. Ruskin knowingly represented a corporation which made false representations to investors regarding the financial standing of the corporation and its officers. As a result of Respondent's

misconduct and that of his associates, many innocent people lost their money. In accepting Respondent's resignation, the court held that such conduct could not be condoned. "Lawyers owe a special duty to be circumspect in their conduct when handling funds belonging to others". Ruskin, at 14.

In the Bennett case, supra, the respondent received a one year suspension for failing to promptly pay taxes which principals in business transactions sent him money to pay at a time when he was acting as trustee for the group. Additionally, Bennett was found to have misrepresented to principals in the group the true facts surrounding a real estate transaction. While Bennett contended that his involvement was limited to participant in a business transaction and not attorney, the court concluded that he had mixed interests. At the least, the Court found that he placed himself in such a position that as an attorney, his associates in the venture reasonably looked to him as an attorney who would be informed in the matter and sometimes relied on him in this respect. The Referee previously had found that Bennett's profession had unquestionably caused the other investors to repose greater confidence in him than they otherwise might have. Respondent was found to have violated the rule in effect at the time which prohibited attorneys from engaging in actions contrary to honesty

and justice and committed in the course of his fiduciary capacity. Accordingly, he received a one year suspension.

In The Florida Bar v. Golden, 544 So. 2d 1003 (Fla. 1989), the respondent received a three year suspension having been found guilty of conduct involving moral turpitude, engaging in conduct involving dishonesty, deceit, fraud, or misrepresentation, and the commission of a felony. Golden's misconduct consisted of a single isolated incident whereby he deleted one line from a treating physician's report and sent it, along with a demand letter, to his client's insurance carrier. Based on the altered report and demand letter, he settled his client's personal injury claim. Although Golden's misconduct occurred within the attorney/client relationship, it was not directed toward the client. Like the respondent in the present matter, the misconduct consisted of an isolated instance and consisted of conduct involving dishonesty, fraud, deceit, or misrepresentation. This Court determined that a three year suspension was the appropriate sanction for such misconduct. In reaching this conclusion the Court concluded that the public has a right to expect that a lawyer is honest, his representations truthful, and that he can be trusted.

As set forth in the Statement of Facts contained herein, subsequent to the loss of her money, Sally Gabe instituted a civil

action against the Respondent and Marvin Moskowitz. (TR. 84). She ultimately obtained a judgment against Respondent for $40,000.00. (TR. 90). During the course of Gabe's efforts to collect on the judgment, the Honorable Maria Korvick, presiding judge in the litigation, ordered Respondent to produce assorted financial records pertaining to the Master Craft account in Aruba. Respondent failed to comply with those orders and was ultimately held in contempt on September 4, 1991. (TFB Ex. "M"). That contempt order was subsequently quashed by the Third District Court of Appeals on technical grounds. (TFB Ex. "N"). On January 6, 1992, another order of contempt was entered and Respondent was ordered incarcerated. (TFB Ex. "O"). The Referee concluded that as a result of Respondent's contempt of court, he had engaged in conduct prejudicial to the administration of justice and recommended that he be found guilty of violating Rule 4-8.4(d) of the Rules of Professional Conduct (R.R. 4).

In The Florida Bar v. Bloom, 632 So. 2d 1016 (Fla. 1994), the respondent was suspended for period of ninety-one days as the direct result of his failure to comply with proper discovery requests by the opposing party. Bloom was the defendant in a civil action who failed to comply with discovery requests in aid of execution of the judgment against him. This court concluded that

respondent's actions were such that a showing of rehabilitation was necessary prior to his being reinstated to the practice of law. Additionally, the respondent was required to show satisfaction of the judgment against him. In the present matter, the Respondent has already settled the judgment against him for $8000.00 and satisfied same. In The Florida Bar v. Jones, 403 So. 2d 1340 (Fla. 1981), a six month suspension was deemed the appropriate sanction where a respondent engaged in conduct prejudicial to the administration of justice.

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not, will not, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal professional properly. Florida Standards for Imposing Lawyer Sanctions serves as a system for determining sanctions appropriate to particular cases of lawyer misconduct.

Section 6.12 of the Sanctions provides that suspension is the appropriate sanction when a lawyer knows that material information is improperly being withheld from the court and fails to take remedial action. Section 6.22 provides that suspension is appropriate when a lawyer knowingly violates a court order and causes injury to a party or causes interference or potential

interference with a legal proceeding. Section 7.1 of the Sanctions provides for suspension when a lawyer engages in conduct which is a violation of a duty owed as a professional thereby causing injury to a client, the public, or the legal system.

This court has set forth on numerous occasions the threefold purpose which lawyer discipline must satisfy. The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992); The Florida Bar v. Pahules, 233 So. 2d 130(Fla. 1970).

> 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 lawyer as a result of undue harshness in 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 might be prone or tempted to become involved in like violations. Neu at 269; Pahules at 132.

The Respondent in the present matter has been found guilty of serious misconduct. The Referee has concluded that the evidence presented by The Florida Bar clearly and convincingly establishes that Respondent has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and which adversely reflects on his fitness to practice law. Additionally, the Referee has found that Respondent has engaged in conduct prejudicial to the administration

of justice. The seriousness of Respondent's violations requires a three year suspension if the discipline is to satisfy the three prong test set forth in Pahules and Neu.

In order to satisfy the first prong, the Bar maintains that a rehabilitative suspension is in order. After all, part of the first prong requirement is to protect the public from unethical conduct. This protection can only be accomplished by requiring Respondent to prove he has satisfied the elements of rehabilitation. Secondly, the judgment must punish while at the same time encourage rehabilitation. Again, a rehabilitative suspension would accomplish both these requirements. Finally, the judgment must be severe enough to deter others tempted to become involved in similar violations. It is in this regard particularly that a three year suspension is in order. The misconduct engaged in by Respondent was outrageous and offensive. He engaged in misrepresentations with regard to another's funds and failed to disburse in accordance with the purpose for which the funds were intended. When called to task for his actions in a court of law, he failed to comply with court orders requiring production of records and ultimately was incarcerated as a result of his failure to comply. If the suspension imposed as a result of those acts is to serve as a deterrent to others, it should be for a period of

three years. As evidenced in The Florida Bar v. Golden, supra, a three year suspension is in order where the conduct involves dishonesty, fraud, deceit, or misrepresentation. In the instant matter, not only was conduct involving misrepresentation present, but so was conduct prejudicial to the administration of justice and conduct adversely reflecting on one's fitness to practice law.

This court has frequently stated that misuse of client funds is one of the most serious offenses a lawyer can commit and that it warrants disbarment. The Florida Bar v. Hamilton, 240 So. 2d 151 (Fla. 1970); The Florida Bar v. Nagel, 440 So. 2d 1287) (Fla. 1983); The Florida Bar v. Prevatt, 609 So. 2d 37 (Fla. 1992). Admittedly, the instant matter does not involve client funds and the Bar does not seek disbarment. The facts of this case, however, do involve misuse of funds and ultimately, the loss of those funds, as well as contempt for orders issued by a court of law. Clearly, this too is an extremely serious offense and a three year suspension is the appropriate sanction under the circumstances.

CONCLUSION

In accordance with the authority and argument set forth herein, The Florida Bar respectfully requests that this Honorable Court reject the Referee's recommendation with regard to disciplinary sanctions and instead order Respondent suspended for a period of three (3) years.

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JOHN F. HARKNESS, JR.
Executive Director
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Initial Brief of The Florida Bar was sent via Airborne Express, airbill number 3369996022, to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was sent via regular and certified mail, return receipt requested (Z 044 345 134) to Myron B. Berman, Respondent, Post Office Box 60-1113, North Miami Beach, Florida 33160, and via regular mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this 3RD day of April, 1995.

Arlene K. Sankel

ARLENE K. SANKEL, Bar Counsel

APPENDIX

A. Report of Referee dated November 15, 1994.

THE FLORIDA BAR
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IN THE SUPREME COURT OF FLORIDA
(BEFORE A REFEREE)

THE FLORIDA BAR,

Complainant,

vs.

MYRON B. BERMAN,

Respondent.
_____/

Supreme Court Case No. 83,616

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

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

October 13, 1994 - 3:20 p.m. - 8:00 p.m.
October 14, 1994 - 2:20 p.m. - 5:45 p.m.
October 20, 1994 - 1:45 p.m. - 5:00 p.m.

The following attorneys appeared as counsel for the parties:

For the Florida Bar, Arlene Sankel, Esquire
For the Respondent, Michael Lechtman, Esquire.

II. FINDINGS OF FACT: AFTER CONSIDERING ALL THE PLEADINGS AND EVIDENCE PRESENTED, I FIND:

AS TO COUNT I

1. Myron B. Berman is and was at all times material to the complaint a member of the Florida Bar.

2. That in early 1986, Sally Gabe agreed to invest in a business venture known as Master Craft N.V. located in Aruba. (Hearing Record Vol. I, Pages 41-50).

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3. That Myron B. Berman acted as the attorney for Master Craft N.V. and was also a shareholder in the corporation. (R. Vol. I, Page 67) (R. Vol. III, Page 393).

4. That on March 17, 1986, Sally Gabe gave Myron B. Berman a cashier's check in the amount of $40,000 payable to his Trust Account (R. Vol. I, Pages 50-60). (R. Vol. III, Page 398)

5. That Sally Gabe gave said funds to Myron B. Berman for investment in Master Craft N.V. (R. Vol. I, Pages 50-60).

6. That on March 17, 1986, Sally Gabe gave Myron B. Berman a cashier's check in the amount of $10,000 payable to his Trust Account (R. Vol. I, Pages 50-60). (R. Vol. III, Page 398)

7. That Sally Gabe gave Myron B. Berman said funds for investment in Master Craft N.V. (R. Vol. I, Pages 50-60).

8. That Myron B. Berman deposited the cashier's check in the amount of $40,000 into his Trust Account at Intercontinental Bank. (Florida Bar's Exhibit A).

9. That Myron B. Berman endorsed the $10,000 cashier's check back to Sally Gabe as good faith to induce her to invest in Master Craft N.V. (R. Vol. I, Page 56).

10. That Myron B. Berman disbursed $14,300 to Marvin Moskowitz from the $40,000 deposited in his Trust Account (R. Vol. III, Page 402).

11. That Myron B. Berman wrongfully disbursed said funds to Marvin Moskowitz. Mr. Berman's explanation that Mr. Moskowitz needed the money to "further the corporate goal" is not acceptable to provide a basis for disbursement. (R. Vol. III, Page 402)

12. That Myron B. Berman disbursed $20,000 of the $40,000

deposited in his Trust Account, into Aruba Bank N.V. in the name of Master Craft N.V. (R. Vol. III, Page 401).

13. That Myron B. Berman disbursed $19,000 of the funds deposited in the Aruba Bank N.V. account to cash and/or Myron B. Berman. (R. Vol. III, Pages 404-407)

14. That Myron B. Berman disbursed the aforementioned $19,000 cash without satisfactory receipts or expenses to prove the funds were used in furtherance of Master Craft N.V. business. (R. Vol. II, Pages 215-218)

15. That based on the evidence presented Myron B. Berman did not utilize the funds from Sally Gabe for the purpose for which they were intended. That said funds were not disbursed in accordance with the representations given to Sally Gabe. (R. Vol. I, Pages 44-45)

16. That Myron B. Berman misrepresented to Sally Gabe the purpose for which her funds would be used.

AS TO COUNT II:

17. That Myron B. Berman is and was at all times material a member of the Florida Bar.

18. That Myron B. Berman was held in contempt by Judge Maria Korvick for non-compliance with a court order in Sally Gabe vs. Myron B. Berman and Marvin Moskowitz, Case No. 89-15009 in the Circuit Court of the Eleventh Judicial Circuit. (R. Florida Bar Exhibit O)

19. That said order was entered on January 6, 1992, following a reversal of a previous order by the Third District Court of Appeal. (R. Florida Bar Exhibits M and N)

20. That Myron B. Berman was sentenced to detention in the Dade County Department of Corrections. (Florida Bar Exhibit O)

21. That Myron B. Berman purged himself of the contempt order as reflected in the ORDER RATIFYING AND APPROVING SETTLEMENT STIPULATION (Respondent's Exhibit No. 16).

22. That by reason of his contempt, Myron B. Berman had engaged in conduct that is prejudicial to the administration of justice.

III. AS TO EACH COUNT OF THE COMPLAINT I MAKE THE FOLLOWING RECOMMENDATION AS TO GUILT OR INNOCENCE.

AS TO COUNT I

I recommend that Myron B. Berman be found guilty and specifically that he be found guilty of the following violations of the Code of Professional Responsibility, to wit: Rules 1-102 (A) (4) and (6). A lawyer shall not : (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; nor (6) engage in any other conduct that adversely reflects on his fitness to practice law.

AS TO COUNT II

I recommend that Myron B. Berman be found guilty and specifically that he be found guilty of the following violations of the Rules of Professional Conduct, to wit: Rule 4-8.4 (d), A lawyer shall not engage in conduct that is prejudicial to the administration of justice.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that Respondent be suspended from the practice of law for a period of 90 days with automatic reinstatement as provided in Rule 3-5.1 (e), Rules of Discipline.

V. HISTORY

Date admitted to Bar: June, 1963

Prior disciplinary convictions and disciplinary measures imposed therein: None

Other personal data: Respondent has previously satisfied the $8,000 judgment obtained by Sally Gabe in her civil lawsuit. (R. Vol. III, Page 431). Respondent was confined to Dade County Jail for 49 nights on work release as a result of the contempt of court. (R. Vol. III, Page 30)

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

I find the following costs were reasonable incurred by the Florida Bar. (R. Florida Bar Affidavit of Costs)

Administrative costs Rule 3-7.6(k) (1)	$ 500.00
Court reporter appearance fee and cost of transcript (plus postage) for hearing held on June 28, 1994	$ 166.26
Court reporter appearance fee for hearing held on August 2, 1994	$ 50.00
Court reporter appearance fee and cost of transcript for hearing held on September 30, 1994	$ 277.80
Cost for copies of transcripts of depositions of Glenn Holzberg, Louis Thaler, Carlos Ruga and Sally Gabe held on October 3, 4, and 6, 1994	$ 550.00
Court reporter appearance fee and cost of transcript for deposition of Myron Berman on October 6, 1994	$ 522.82
Court reporter appearance fee and cost of transcript for final hearing held on October 13, 1994	$ 795.00

Court Reporter appearance fee and cost of transcript for continuation of final hearing held on October 14 and 20, 1994	$ 1,365.80
Audit	$ 1,046.84
Service of subpoena	$ 12.00
Total itemized costs	$ 5,286.52

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent.

Dated this 15th day of November, 1994.

Joel H. Brown
Referee

cc: Arlene K. Sankel, Esquire,
Assistant Staff Counsel

Michael Lechtman, Esquire,
Attorney for Respondent

Certificate of Service

I hereby certify that a copy of the above report of referee has been served on Arlene K. Sankel at the Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida, 33131, Michael Lechtman at 17001 N.E. 6th Avenue, North Miami Beach, Florida, 33162 and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 15th day of November, 1994.

Joel H. Brown