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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
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THE FLORIDA BAR,

Complainant,

Supreme Court Case
No. 83,616

vs.

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

MYRON B. BERMAN,

Respondent.

_____ /

REPLY BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

For the purposes of this Reply Brief, The Florida Bar will be referred to as either The Florida Bar or the Bar. Respondent will be referred to as either Respondent or Myron B. 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 Initial Brief of The Florida Bar will be set forth as TFB's Brief and page number. References to Initial Response Brief of Respondent will be set forth as R's Answer Brief and page number.

STATEMENT OF THE CASE

To the extent set forth below, The Florida Bar materially disagrees with statements set forth by Respondent in the Statement of the Case portion of his Answer Brief.

By way of background, two grievances were filed against the Respondent. The first grievance was filed by Sally Gabe and was closed by staff. The second grievance was filed by Sally Gabe's former attorney and initially resulted in a finding of no probable cause by the grievance committee. This file was subsequently reopened pursuant to Rule 3-7.4(j), Rules of Discipline. Respondent was properly furnished with an opportunity to readdress the matter prior to its being referred to a grievance committee. Respondent was also furnished with an opportunity to present his position, in writing, to the grievance committee at the time it proceeded with a paper hearing on the complaint. Rule 3-7.4(h), Rules of Discipline. Respondent availed himself of this opportunity both times.

Subsequent to hearing on the matter, Grievance Committee "G" of the Eleventh Judicial Circuit found probable cause to believe that a violation of the following rules had occurred: 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) and Rule 4-8.4(d) (A lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Respondent brought these matters before the Referee via his Affirmative Defenses and was unsuccessful.

STATEMENT OF THE FACTS

The Florida Bar reiterates its Statement of Facts as set forth in its Initial Brief and sets forth the following additional facts in response to statements contained in Respondent's Answer Brief.

In his Statement of the Facts, Respondent states that he delivered both the promissory note and corporate minutes to Sally Gabe during their meeting at her bank. (R's Answer Brief, p. 3). Respondent's testimony in this regard is in direct conflict with the testimony of Sally Gabe. Gabe testified that while Respondent did produce an agreement setting forth proposed terms of the investment when they met at her bank, she refused to sign or accept it as it did not accurately reflect the terms of the agreement. (TR. 51-54, TFB's Brief p. 5). Gabe further testified that it was at that meeting that Respondent offered to prepay her \$10,000.00 in interest in order to show his good faith and intent to amend the agreement in accordance with her directions. (TR. 55, TFB's Brief p. 5).

Similarly, Sally Gabe's and Respondent's testimony are in conflict regarding the building structure allegedly intended to house the Master Craft facility in Aruba. Mrs. Gabe testified that when in Aruba she traveled to the building site and found an empty lot without a building. She further testified that Respondent

advised her the building would be completed in a couple of months. (TR. 78-80, TFB's Brief p. 7).

Also contrary to the assertion contained in Respondent's Statement of Facts, The Florida Bar Auditor, Carlos J. Ruga, did not determine that all receipts and listings of expenses and operational costs constituted illegitimate documentation of disbursements. Mr. Ruga did testify that in his expert opinion the listing of expenses furnished by Respondent and identified as TFB Exhibit "G" did not constitute an acceptable business receipt as it had no source document back-up, i.e., a bill, invoice, etc. (TR. 218-219). However, Ruga also testified that he reviewed some receipts which in his expert opinion were legitimate. These consisted of receipts and invoices from Sample Road Travel, Aruba Bank, and M.A. Eman, Notary.

As previously explained in the Statement of Case set forth herein, Sally Gabe did not file three separate Florida Bar grievances in this matter. Two grievances were filed. The first was by Sally Gabe and closed at staff level. The second grievance was filed by Mrs. Gabe's attorney and initially resulted in a no probable cause finding. The matter was subsequently re-opened by the Bar at the request of Mrs. Gabe who continued to furnish documentation regarding the matter. A probable cause finding

subsequently resulted. This was brought to the Referee's attention via Respondent's Affirmative Defenses.

Sally Gabe instituted civil litigation against Respondent and Marvin Moskowitz in 1989. That litigation was ultimately settled for \$10,000.00 to be paid at the rate of \$1000.00 per month. Payments stopped after one payment and Mrs. Gabe obtained a judgment against Respondent and Moskowitz for \$40,000.00. During the course of litigation brought against Respondent to collect on her judgment, Respondent was ordered to produce certain financial records. Failing to timely produce the records so ordered, Respondent was eventually found in contempt of court and ordered jailed. Respondent is believed to have served forty-nine (49) days in a work release program.

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 Referee's findings of fact are presumed to be correct and will be upheld unless found to be clearly erroneous or lacking in evidentiary support. The Florida Bar v. Coclough, 561 So. 2d 1147 (Fla. 1990); The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993).

The Referee in the instant matter specifically found that having received Sally Gabe's funds in trust for the purpose of investment in Master Craft N.V., that Respondent then failed to utilize and disburse the funds in accordance with their intended purpose. Further, that Respondent misrepresented to Mrs. Gabe the purpose for which her funds would be used. The Referee also found that Respondent had engaged in conduct prejudicial to the administration of justice by virtue of his contempt of court in civil litigation resulting from the failed Master Craft investment.

Respondent has not challenged the court's findings of fact. Having ample support in the record, those finding are presumed to

be correct and should be upheld. The issue is simply one of what is appropriate discipline for those findings of fact and resulting rule violations as set forth by the Referee in his Report.

The Referee has determined that Respondent engaged in conduct involving fraud, dishonesty, deceit, or misrepresentation, conduct adversely reflecting on his fitness to practice law, and conduct prejudicial to the administration of justice. This court has repeatedly held that attorneys will be held professionally accountable for misconduct even when it occurs outside the attorney-client relationship. The Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968); The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989). As set forth more fully in The Florida Bar's Initial Brief on Appeal, a review of this court's decisions for analogous misconduct ranges from resignation to varying lengths of rehabilitative suspensions. The Florida Bar v. Ruskin, 232 So. 2d 13 (Fla. 1970); The Florida Bar v. Bennett, 276 So. 2d 481 (Fla. 1973); The Florida Bar v. Golden, 544 So. 2d 1003 (Fla. 1989). This court has also imposed shorter term rehabilitative suspensions on attorneys who engaged solely in actions constituting conduct prejudicial to the administration of justice. The Florida Bar v. Bloom, 632 So. 2d 1016 (Fla. 1994); The Florida Bar v. Jones, 403 So. 2d 1340 (Fla. 1981).

In light of the Referee's findings, the Bar maintains that a more serious sanction is warranted and respectfully urges this Court to impose a three year suspension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Reply Brief of The Florida Bar was sent via Airborne Express, airbill number 3369994821, 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 044 345 336) 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 25th day of April, 1995.

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