IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellant, v. BRUCE IRA KRAVITZ Respondent-Appellee.	Supreme Court Case Nos. 84,380 & 84,973 The Florida Bar File Nos. 94-50,362(15C) and 95-50,214(15C)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the bar" or "The Florida Bar". Bruce Ira Kravitz, Appellee, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

STATEMENT OF CASE AND FACTS

These two related disciplinary actions arise from a venture in which respondent was part owner of a restaurant and later counsel to that business which found itself in litigation over the use of a particular name for the restaurant. The first action, case number 84,380, was filed by the bar on September 20, 1994 and in its complaint the bar alleged two counts of misrepresentation. In the second complaint, case number 84,973, which was filed on January 4, 1995, the bar alleged an additional count of misrepresentation. Both matters were eventually consolidated for trial before the Honorable J. Leonard Fleet, referee and circuit court judge, and the final hearing was held on September 1, 1995. The referee filed his report with this court on February 2, 1996. The report of referee finds respondent guilty of the misconduct alleged in the bar's complaints, but only recommends that respondent be placed on probation for one year,[1] required to take a refresher course in legal ethics and ordered to pay the bar's costs. The Board of Governors of The Florida Bar, at its March 1996 meeting, considered Judge Fleet's report and has directed that

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[1] The referee's recommendation states this as "supervision for at least one year". RR 19. The bar has interpreted this as a recommendation of probation.

the referee's sanction recommendation be appealed and to request this court to suspend the respondent from the practice of law for ninety-one days.

The referee's findings of fact are masterful. They are complete and full of detail. The bar takes no issue with these factual findings and therefore adopts the referee's factual findings as its statement of the facts of this case. Of necessity, however, a short synopsis follows.

In 1992, Black Moon Investments, Inc. (Black Moon) was sued by Hogan's Heros, Inc. (Hogan's Heros), which lawsuit alleged that Black Moon's restaurant/bar, named "Hogan's" infringed upon a registered service mark held by Hogan's Heros. RR2. The respondent, a fifty percent owner and corporate vice president of Black Moon, represented Black Moon and Jack M. Ross represented Hogan's Heros. RR2. Christopher Austin owned the other fifty percent of Black Moon and was likewise a corporate vice president. There were no other stockholders or corporate officers of Black Moon other than Austin and the respondent. RR2. The day to day operation of Hogan's restaurant and bar was run by William Mahoney and Bernard Kaiserian. RR2.

During the course of the litigation, Circuit Court Judge James L. Tomlinson, the presiding judge, signed an agreed order enjoining

Black Moon from using the name "Hogan's" and that this use must stop by May 15, 1993. RR3. An issue arose later over the continued use of the "Hogan's" sign after May 15, 1993 and Ross sough redress from the court by filing a motion for order to show cause directed against "Black Moon Investments, Inc., ... their officers, directors and managing agents". RR2, para.7. Judge Tomlinson thereupon entered his order of May 20, 1993 wherein he directed Black Moon to appear before him on June 10, 1993 and to show cause why it should not be held in contempt. RR3.

At the show cause hearing, the respondent admitted that the sign had not been removed in contravention of the court's April 8, 1993 order. RR3. Judge Tomlinson then made inquiry of the respondent to establish the person responsible for the violation of his April 8, 1993 order. What specifically was asked by the judge is a crucial component of the respondent's defense. There was no court reporter present for the hearing. The referee found, after hearing the testimony of Judge Tomlinson[2] and Ross, who was present at the show cause hearing, that the judge "specifically asked respondent for the name of the president of Black Moon" and

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[2] Judge Tomlinson testified via a deposition taken before the trial, which deposition was necessitated by the judge's impending radical cancer surgery which potentially threatened his ability to speak. RR6.

"respondent identified William Mahoney as being the President of Black Moon". RR6. Testimony before Judge Tomlinson, by Mahoney and Kaiserian, on September 1, 1993 revealed that respondent's statement was a lie and Judge Tomlinson, sua sponte, found the respondent in contempt for having "intentionally misrepresented a material fact to" the court. RR4. The referee found that "(r)egardless of how the question was actually worded, the evidence is abundantly sufficient to support the conclusion respondent was not candid with Judge Tomlinson". RR17.

The next misrepresentation concerned the bar's allegation that the respondent mislead Kaiserian that he would be held in contempt and incarcerated for failing to remove the Hogan's sign unless $4,000.00 was delivered to respondent to settle the contempt matter with Hogan's Heros. The crucial document regarding this count of misconduct was respondent's July 8, 1993 memorandum that he sent to Kaiserian. RR5. In pertinent part the memo reads:

> I will need $4,000.00 by the beginning of next week at the latest. The judge made it very clear that if this was not paid that the manager operator would spend time in lockup for the failure to obey his order to change the name.

Prior to sending this memorandum, Judge Tomlinson had advised the respondent and Ross that, if the parties were able to reach a

settlement, there would be no need to continue with the contempt proceedings over the sign and therefore the respondent and Ross had one or more discussions over the dollar amount of such a settlement, which dollar amount was to be used to settle Ross' claim for attorney's fees for having to pursue the contempt proceeding. RR8-9. However, there was no firm agreement on a settlement amount and therefore the demand to pay $4,000.00 or face jail time for contempt was inaccurate. But the serious misrepresentation was the statement that "if this was not paid that the manager operator would spend time in lockup". This was not true because Judge Tomlinson had announced that he wanted to hold the president of Black Moon in contempt because he "specifically asked respondent for the name of the president of Black Moon" during the contempt hearing. RR6. The referee found that "(i)n no fashion could such offer from the bench be fairly construed in the manner respondent presented the issue to Mr. Kaiserian.

The last misrepresentation occurred later on in the litigation. The respondent, with the assistance of another lawyer, was able to effectuate a settlement of the litigation with Ross. On July 20, 1994 the respondent submitted to Circuit Court Judge

W.O. Beauchamp[3] two proposed orders. The first order was entitled "Order granting Bruce Kravitz's motion for rehearing" and the second order was entitled "Order vacating contempt as to Bruce Kravitz only". RR5. In his transmittal letter the respondent stated that "(o)pposing counsel Mr. Jack Ross does not oppose the entry of the enclosed proposed orders". RR5. Judge Beauchamp executed the orders in question based upon the respondent's representations. RR5-6. Upon being informed by Ross, through Ross's motion to vacate, that Ross had not agreed to the entry of said orders or had even seen the proposed orders prior to their submission to the court, Judge Beauchamp vacated both orders. RR5-6. The referee found that the respondent did not have Ross's agreement to submit the two proposed orders and thus found respondent's statement to the contrary to be a misrepresentation. RR18.

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[3] Judge Tomlinson recused himself after entering his order of contempt against the respondent.

SUMMARY OF ARGUMENT

The referee, in his analysis of the case, stated the following:

> Crucial to the successful functioning of the American judicial system is the indispensable need for judges and attorneys to trust each other. Trust is one of the most difficult attribute for one to obtain from others and, simultaneously, is one of the easiest attributes to lose. In the highly mobile world in which we live, members of the Bar frequently appear before judge's to whom the attorneys are strangers. Lacking the insight based upon frequent professional and personal contact with a particular attorney, judges are left with no alternative but to assume a licensed attorney will be candid and responsible when dealing with the court. Absent such trust, the interests of the principals to the litigation are likely to suffer. It is the underlying premise which most certainly is the basis upon which the Rules of Professional Responsibility are predicated. In the instant matter, there appears to have been a substantial departure from accepted professional conduct on the part of Respondent." RR16-17.

The referee clearly understood the serious nature of the respondent's unethical acts and how these unethical acts would impact the trust between the bench and the bar. However, the referee's sanction recommendation that the respondent (1) be placed on probation for one year; (2) required to take a refresher course in legal ethics and (3) ordered to pay the bar's costs is too

lenient for respondent's misrepresentations to the court and to his client/business associate. In the bar's view, the only appropriate sanction is a ninety-one day rehabilitative suspension.

ARGUMENT

I. A LAWYER WHO MADE MISREPRESENTATIONS TO TWO DIFFERENT JUDGES AND A CLIENT/BUSINESS ASSOCIATE SHOULD BE SUSPENDED FROM THE PRACTICE OF LAW FOR NINETY-ONE DAYS.

The referee in his report noted that he was tasked with answering three questions. They were:

> 1. Did respondent deliberately make a false representation to Judge Tomlinson when the judge inquired of him as to the identity of the president of Black Moon Investments, Inc.?
>
> 2. Did respondent, in his letter of July 8, 1993, make a false representation to Bernard Kaiserian advising him Judge Tomlinson required $4,000.00 to be paid by him by a time certain or the manager of the business known as "Bernie's Corner Pocket" would be incarcerated?
>
> 3. Did respondent make a false representation to Judge Beauchamp concerning the agreement of attorney Jack Ross to the entry of an order vacating contempt as to respondent? RR1-2.

The referee after hearing all of the evidence answered each of these questions in the affirmative and found the respondent guilty of all counts of the bar's complaints. The referee discussed how these misrepresentations went to the heart of our system of justice

because these types of violations violated the trust placed by the bench in members of the bar. Notwithstanding the referee's findings of serious misconduct he only recommended, as a sanction, that the respondent (1) be placed on probation for one year; (2) required to take a refresher course in legal ethics and (3) ordered to pay the bar's costs. In this appeal the bar only takes issue as to this sanction recommendation and urges this court to impose a ninety-one day rehabilitative suspension for the respondent's acts of misrepresentations.

The Florida Standards for Imposing Lawyer Sanctions are very helpful in the analysis of the appropriate sanction on this case. Standard 6.12 reads as follows:

> Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is being improperly withheld, and takes no remedial action.

and Standard 6.13 states:

> Public reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld.

In applying the Standards to this case it is important to make a distinction on the level of scienter in this case because the Standards call for a higher sanction when the lawyer intentionally

imparts false information and a lesser sanction when the false information is provided negligently. It is clear that the respondent's misstatements were not made in negligent error. The referee even speculated that the misrepresentations may have been caused because the respondent "had a vested interest in the success of the business which militated against the maintenance of professional detachment and objectivity." RR19. In any event, it is evident that the respondent's acts were intentional misrepresentations and that they originally had the desired effect as Judge Tomlinson looked to hold Kaiserian in contempt and Judge Beauchamp granted the orders in question. Thus a suspension is warranted and the question presented becomes how long should that suspension be.

In Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960), the court noted that:

> No breach of professional ethics, of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest of penalty.

The lawyer in Dodd was disbarred for advising several individuals, inclusive of his clients, to give false testimony in two personal injury cases. This court has consistently held that: "When a

lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment." The Florida Bar v. O'Malley, 534 So. 2d 1159, 1162 (Fla. 1988).

The respondent's misrepresentations, while serious, are not under oath and therefore disbarment appears to be too severe a sanction for the instant case. However, in The Florida Bar v. Swickle, 589 So. 2d 901 (Fla. 1991), the court disbarred the lawyer for lying to a judge to secure a reduced bond for a client and for informing third parties that he had the ability to bribe that same judge. The lie to the judge included the omission that the lawyer had been informed that once the client got bond, the client would be fleeing the country to avoid further prosecution. The second charge, stating the ability to bribe a judge, strikes right to the core of the public's ability to trust the purity and fairness of our courts. Standing alone this second charge would have been sufficient to sustain the disbarment recommendation. The respondent's misconduct, while still serious, pales in comparison to Swickle's. Disbarment, therefore, would be too stiff a punishment for the respondent.

Some of the longer suspension cases also seem to be too harsh when compared to the facts of this case. For example in The Florida Bar v. Rood, 569 So. 2d 750 (Fla. 1990), the court imposed

a one year suspension from the practice of law. Rood's misconduct includes having his clients commit perjury by signing answers to interrogatories that falsely failed to disclose a related lawsuit in a different state and by purposefully failing to disclose certain health care providers in a personal injury case. In addition, Rood had one of the health care providers "purge" his file of correspondence between the doctor's office and the lawyer's office and the doctor took such action at Rood's request. Id. At 751. The court also found several serious aggravating factors and several mitigating factors in reaching its disciplinary sanction.

Another lawyer was suspended for one year for engaging in a continuing pattern of ex parte hearings and motions and for lying to a judge. The Florida Bar v. Broida, 574 So. 2d 83 (Fla. 1991). The lies to the court in Broida included a misstatements that matters were still pending before the Broward County Court and that this prevented a transfer of the particular litigation to a Dade County Court as well as a claim that opposing counsel had agreed to a proposed agreed order when this was not true. While upset with the misrepresentations, this court seemed to pay more attention to the flagrant "continuing pattern and course of conduct in engaging in ex parte communications with the courts". Id. at 87. In the case at bar, the respondent presented two proposed orders (at one

time) and represented them as agreed orders without providing same to opposing counsel or securing his agreement to the orders. Since this was not a continuing pattern of misconduct the Broida case is more egregious than the circumstances at hand.

In the last relevant one year suspension case the lawyer stood convicted of having neglected a client's case and then upon withdrawing from the litigation, falsely informing the trial judge that his clients had requested him to withdraw. The Florida Bar v. Winderman, 614 So. 2d 485 (Fla. 1993). The misrepresentation eventually led to the client's case being dismissed with prejudice and the defense counsel's costs and attorney's fees being assessed against the clients. But once again, while the misrepresentation was serious, the attendant misconduct causes the court to enter the one year suspension recommendation.

There is one case that is close to the facts of the respondent's misconduct. The Florida Bar v. Myers, 581 So. 2d 128 (Fla. 1991). In Myers, the lawyer submitted a property settlement agreement to the court in a divorce case without informing the court that the wife had retained counsel and that the property settlement agreement he was using had been renegotiated between the parties such that the agreement used was totally contrary to the soon to be divorced couple's most recent agreements. In particular

the filed agreement gave the husband, the lawyer's client, custody and the more recent agreement gave custody to the wife. There was an unbelievable amount of mitigation present in this case. Id. at 129-130. It seems that the lawyer had a personal tragedy in the family that was akin to the problem faced by the client. Both client and lawyer had a spouse who fled the jurisdiction with a minor child and the spouse had refused to allow visitation or divulge the location of the child. The court after considering the misconduct and the mitigation imposed a ninety day suspension.

In the case at hand three misrepresentations were made by the respondent. All three misrepresentations were made to either keep the respondent out of trouble with the court or to try and get him out of trouble. Thus, the respondent's actions, taken as a whole, were more egregious than that found in Myers.

The difficulty in the search for the appropriate sanction in this case is that this respondent's conduct falls somewhere in between the misconduct found in the Myers ninety day suspension and the one year suspension cases referenced above. Accordingly, the bar is requesting that this court impose a ninety-one day suspension which would require the respondent to prove rehabilitation in order to be reinstated to the practice of law. In the bar's view, the step up to a ninety-one day rehabilitative

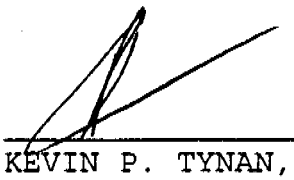
suspension from the Myers' ninety day suspension is significant and would be an appropriate sanction for this case.

CONCLUSION

The referee was right in finding that the respondent committed three serious misrepresentations. However, the referee failed to provide an adequate sanction recommendation to this court in that a one year probation and a refresher course in legal ethics is an insufficient sanction for misrepresentation. This court has repeatedly stated that the three purposes for lawyer discipline are: (1) it must protect the public; (2) it must be fair to the respondent and (3) it must deter others from engaging in like conduct. The Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983). In the bar's view the ninety-one day suspension meets these precepts.

WHEREFORE, The Florida Bar respectfully request this court to accept the referee's findings of fact and of guilt but reject the referee's sanction recommendation and instead impose a ninety-one days suspension from the practice of law.

Respectfully submitted,



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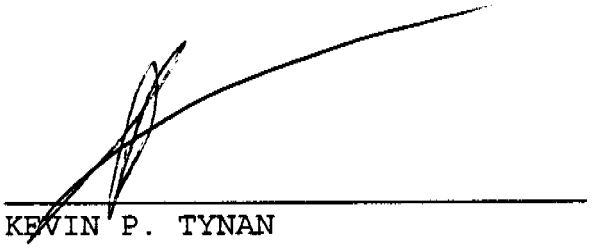
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing initial brief of The Florida Bar have been furnished via regular U.S. to Daniel N. Brodersen, attorney for respondent, at 1031 W. Morse Blvd., Suite 200, Winter Park, FL 32789; and to John A. Boggs, Director of Lawyer Regulation, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 8th day of April, 1996.



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