

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary
Action against BENJAMIN S. HOUGE,
a Minnesota Attorney,
Registration No. 47387.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

At the direction of a Lawyers Professional Responsibility Board Panel, the Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition.

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on September 16, 1974. Respondent currently practices law in Oak Park Heights, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

COUNT ONE

Testifying Falsely, Submitting False Evidence, Failing to Correct False Testimony, Making Other False Statements, Assisting in Violations of Court Orders, Failing to Supervise Non-Lawyer Assistant - von Behren Matter

1. In or about November 2000 respondent began to represent Thomas von Behren in multiple legal matters.
2. Before von Behren retained respondent, von Behren had been convicted twice for crimes involving theft and dishonesty.
 - On or about January 19, 1999, von Behren was sentenced to five months in prison followed by three years of supervised release and ordered to pay

\$80,954.01 in restitution after he was convicted in federal court of bank fraud.

- On or about April 13, 1999, von Behren was sentenced to 13 months in prison and ordered to pay \$46,956 in restitution after he was convicted in state court of theft by swindle. Execution of the sentence was stayed and von Behren was placed on probation for four (4) years.

Respondent was aware of von Behren's criminal record.

3. On June 6, 2002, respondent and von Behren entered into an independent contractor agreement. This agreement established an independent contractor relationship, whereby von Behren would provide services to respondent in exchange for \$750 per week credit against von Behren's outstanding bill to respondent. The agreement stated that at this rate, the bill would be paid off by January 2003. However, von Behren continued to work for respondent after January 2003 on a barter basis, and respondent continued to represent von Behren on one or more additional matters. The agreement also provided:

It is the parties [sic] intentions that [von Behren] shall have an independent contractor status and not be an employee for any purposes, including, but not limited to, the application of the Federal Insurance Contribution Act, the Social Security Act, the Federal Unemployment Tax Act, the provisions of the Internal Revenue Code, the State Revenue and Taxation Code relating to income tax withholding at source of income

4. On October 30, 2002, respondent wrote a To Whom It May Concern letter outlining von Behren's duties and responsibilities. Respondent stated that von Behren was performing tasks such as title research, lien searches, abstracting services and negotiating with lenders, judgment creditors and lien holders.

5. At this time, von Behren was scheduled to be sentenced on November 1, 2002, after he was again convicted in state court of theft by swindle. This was von Behren's third felony conviction. Respondent prepared the October 30 letter to help von Behren receive work release privileges while in jail.

6. Respondent's October 30 letter did not state that at that time von Behren was operating as an independent contractor engaging in real estate transactions, did not identify von Behren's compensation, did not state that von Behren would negotiate or otherwise communicate with homeowners and did not state that von Behren was assisting respondent with an Internet publishing business.

7. On November 1, 2002, von Behren was sentenced to 17 months in prison. Execution of the sentence was stayed for two years. Von Behren was required to serve 365 days in the Hennepin County Adult Corrections Facility ("Workhouse"). Von Behren was allowed work release privileges, on the condition that he not engage in self-employment in the real estate or mortgage financial fields without court or probation department authorization.

8. Respondent knew shortly after von Behren's sentencing that a condition of work release was that von Behren could not be self-employed in the real estate or mortgage fields.

9. As set forth in detail below, respondent and von Behren created a sham employment relationship that permitted von Behren to engage in real estate and financial transactions in violation of the judge's sentencing order. To hide this sham, respondent among other things testified falsely, submitted false documents, and allowed von Behren to testify falsely.

10. On November 5, 2002, five (5) days after sentencing, respondent entered into an employment agreement with von Behren and Clarice von Behren.

11. Thomas and Clarice von Behren are legally divorced. However, the von Behrens resided together when von Behren was not incarcerated. Ms. von Behren received proceeds from von Behren's financial transactions. All of their income and assets were placed in Ms. von Behren's name, including the home they lived in together and vehicles they drove.

12. The November 5 agreement provided in pertinent part:

- Clarice von Behren is respondent's client.
- von Behren's outstanding legal bill to respondent would be reduced at the rate of \$750 per week;
- von Behren transferred all his interest in pending real estate deals to Clarice von Behren.
- von Behren would work on real estate transactions as respondent's employee but for the benefit for Clarice von Behren.
- Clarice von Behren would pay respondent a percentage of the profits on all successful deals for supervising Mr. von Behren in his work on those deals for Clarice von Behren.

13. At least three transactions were completed pursuant to the November 5, 2002, agreement.

14. Respondent provided Forms 1099-B to von Behren for 2002 and 2003. Each of the Forms 1099-B states that respondent paid no cash to von Behren and no withholding was made for federal individual income taxes. Respondent subsequently testified, under oath, that he did not pay cash wages to von Behren during 2003 and did not make any withholdings.

15. During 2003, respondent prepared and signed two (2) time sheets and provided them to von Behren to provide to the Workhouse as evidence of his gainful employment by respondent. These time sheets stated that respondent paid cash wages to von Behren and that respondent withheld funds from von Behren's pay for federal and state individual income taxes, FICA and Medicare. These time sheets were false. Respondent did not pay any cash wages to von Behren. Von Behren did not receive cash income, and there were no withholdings.

16. On February 18, 2003, a hearing was held in a civil matter titled *Lohr v. von Behren*. Respondent represented von Behren during that hearing. Respondent identified himself on the record as counsel for von Behren.

17. During that hearing, von Behren testified that he was meeting with homeowners and doing real estate work.

18. Also, during that February 18 hearing, von Behren testified that respondent paid him \$750 per week gross pay, von Behren's net pay was approximately \$600 per week because he paid \$153 of his gross pay to the Workhouse, and von Behren was willing to give his net pay, minus some money for gasoline, to Lohr.

19. Von Behren's testimony was false. Respondent did not pay cash to von Behren, von Behren did not remit any of his pay to the Workhouse, there were no withholdings, and he did not receive net pay after withholdings.

20. Respondent knew von Behren's testimony was false. Nevertheless, respondent failed to take reasonable remedial measures.

21. Von Behren also testified that he was to receive a commission of \$15,000 to \$18,000 out of an upcoming closing on a real estate transaction, and that he could receive commissions in two (2) other real estate matters on which he was working.

22. On or about March 28, 2003, Philip Rosar wrote a letter to the court which had sentenced von Behren in November 2002. Rosar's letter alleged that von Behren's employment with respondent was a sham designed to create an appearance of legality when, in fact, von Behren was continuing to engage in prohibited transactions in the real estate and mortgage fields.

23. On April 17, 2003, respondent signed an affidavit in response to Rosar's letter. Respondent submitted his affidavit to the court in *State v. von Behren*. In that affidavit, respondent stated that he had originally hired von Behren in June 2002 and under that agreement von Behren provided certain services to respondent in exchange for a reduction of the legal fees von Behren owed to respondent. Respondent's affidavit failed to disclose respondent's November 5, 2002, agreement with von Behren and Clarice von Behren. Respondent's affidavit did not disclose that von Behren's duties included work on transactions in the real estate and mortgage fields or contacts and

negotiations with homeowners even though von Behren was doing that work at this time. Respondent's affidavit also failed to disclose that von Behren was also expecting to receive commissions from work in this field.

24. Also on April 17, 2003, a hearing was conducted in *State v. von Behren*. At the beginning of the hearing, respondent identified himself as counsel for von Behren. Respondent discussed von Behren's employment for him. However, respondent failed to disclose the November 5 agreement between respondent, von Behren and Clarice von Behren, and failed to disclose all of von Behren's actions as respondent's employee regarding real estate transactions and deals.

25. During this hearing, von Behren testified that he received the same amount of pay from respondent each week and that he told the Workhouse that his check from respondent was the same every week. These statements were false. Von Behren received no pay from respondent; Mr. von Behren did not receive a check from respondent.

26. Respondent knew these statements were false. Nevertheless, respondent failed to take reasonable remedial measures.

27. During April 17 hearing, respondent, the judge and the prosecutor had a discussion in chambers. During that conversation, respondent stated that von Behren did document work for respondent; respondent failed to disclose that von Behren was working on real estate transactions and deals.

28. At the conclusion of the April 17 hearing, the court determined that there was insufficient evidence to institute a formal probation revocation proceeding at that time.

29. The court reaffirmed in respondent's presence that von Behren was not allowed to be self-employed in the real estate or other financial areas without court approval, stated that von Behren needed to receive a salary for his work, and stated that von Behren needed to do document and title review work. The court specifically stated

that von Behren was prohibited from doing freelance work even if it was described as work for respondent.

30. In respondent's presence, the judge told von Behren:

[Y]ou need to be working under the, you know, supervision of someone, working for them, getting a salary and not be involved in the kinds of deals and problems that have existed in the past.

* * *

[W]hat I want to make clear to you, the idea behind the conditions of probation in allowing you work release with a job was -- my understanding of the job was that you had skills in the area of document review and titles and that kind of thing and that there were specific projects where [respondent] was employed that you were working for him and assisting him. And if it turns out that other things are going on beyond that where you are freelancing or, even with [respondent's] supervision, in essence working for yourself but calling it work for [respondent], that is not within the conditions of probation that were envisioned at the time of sentencing.

31. On April 23, 2003, respondent helped to establish Fitek, Inc. Respondent was a fifty percent (50%) owner of Fitek, one of two members of the board of governors, and drafted the incorporation documents. Fitek's registered office was respondent's office address at that time. Respondent paid no money for his shares of Fitek. On or about May 6, 2003, respondent transferred his shares in Fitek to Charles Johnson, a resident of Liberia. Respondent received no money for transferring his shares to Johnson. On or about June 3, 2003, respondent ceased to be a governor of Fitek.

32. Von Behren then ceased working for respondent and began to work for Fitek. Von Behren was supervised by Bruce Livingood, the other fifty percent (50%) owner of Fitek.

33. Respondent received compensation from Fitek for legal services rendered.

34. During the time that respondent "employed" von Behren, von Behren engaged in real estate and financial transactions in violation of the terms of von Behren's probation.

35. In November 2004, a probation revocation hearing was conducted in *State v. von Behren*.

36. At the conclusion of the probation revocation hearing, the judge found:

And, it's my conclusion from the evidence here that Mr. Houge was not supervising in any significant way in spite of his testimony to the contrary, which I do not find credible. I don't think Mr. Houge was supervising in any significant or credible way Mr. von Behren, and this was a ruse to get work release when he otherwise wouldn't have qualified; and secondly, to allow him to be self-employed.

* * *

[I]t was a fraud on the court, by both Mr. Houge and Mr. von Behren.

* * *

I believe they were, at least for purposes of this probation violation and the fraud on the court, in it together, and, uh, while I'm using a legal term of co-conspirators, I'm using that in a more general term, that they were collaborating together on this and were equally responsible

* * *

I believe that the employment arrangement, as it were, with Fiteck (sp.) was a sham and a fraud and was not a proper business arrangement.

* * *

[M]y analysis and my view [is] that while Mr. Houge's behavior is, in my view -- professional view as a judge, I find it shocking and outrageous, that it is not a defense to the probation violation hearing because of Mr. von Behren's independent role and co-partner with Mr. Houge, uh, that to use less precise legal terms, I think they were both 'in it up to their eyeballs together' is what the evidence appears to me on this matter

37. Respondent's conduct violated Rules 1.2(c), 3.3(a)(1), 3.3(a)(4), 4.1, 5.3, and 8.4(c) and (d), Minnesota Rules of Professional Conduct (MRPC), as in effect before October 1, 2005.

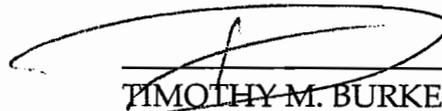
WHEREFORE, the Director respectfully prays for an order of this Court disbarring or suspending respondent from the practice of law or imposing otherwise appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: November 30, 2007.



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