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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant, : The Florida Bar File No. 88-50,720 (17E)

vs.

BEN IRA FARBSTEIN,

Supreme Court Case NO. 74,290

Respondent/Appellee.

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ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS AND CASE

The Appellee, BEN IRA FARBSTEIN, accepts pages one (1) through nine (9) of the Appellant's "Statement of the Facts and Case". However, pages ten (10) through thirteen (13) of this section appear to be argumentative, and therefore, the Appellee submits the following substitutions, and additions:

The Appellee presented several witnesses who testified that he was consistent and aggressive in his efforts towards rehabilitation. William Kilby, counsel for the Florida Lawyers Assistance Program (F.L.A.), testified that the Appellee had done a "remarkable job" in developing his own recovery program, and had shown a "complete change in attitude" (R. **94**). Kilby noted that this recovery program included regular attendance at F.L.A., Alcoholics Anonymous and Narcotics Anonymous (R. 95). Kilby testified that the Appellee took these programs "very seriously". Kilby testified:

> Q: Besides being staff counsel, Bill, you are also recovering, aren't you?
>
> **A:** Yes, I am.
>
> Q: How long have you been sober?
>
> A: It will be fourteen years this month.
>
> Q: Would it be a fair statement that with respect to the things that you have been able to observe about people you have dealt with on both sides of sobriety, that you consider yourself to be somewhat able to identify genuine remorse, genuine sincerity and genuine hard work, as opposed to someone who is faking it?
>
> A: I believe *so.* I have taken over 200

hours in substance abuse training and rehabilitation. I have been teaching in the Court alcohol and substance abuse programs in Broward County for nine years.

I have seen a lot and I think I can identify those things.

Q: Of all of the 500 lawyers or *so* that you have had dealings with over the past several years, in terms of outlook and mental attitude, where would Mr. Farbstein fall?

A: Definitely near the top.

Q: What does that mean to you as far as his prospects for continuing to be recovering?

A: I think they are very good. (emphasis added)

(R. **96-97)**

Howard Finkelstein, an attorney and former substance abuser, testified that he was instrumental in having the Appellee initially enter a treatment facility (R. 111-112). Finkelstein stated that he had closely monitored the Appellee's progress, had observed a major personality change in the Appellee, after he had completed treatment (R. 112) and also testified that based on the Appellee's progress, he had allowed him to "run" several after-care meetings (R. 113).

Dr. Fred Frick is the physician and director of ANON-ANEW, and specializes in the treatment of addictive illnesses (R. 23). Frick testified that he had closely monitored the Appellee's progress, both on an in-patient, and out-patient basis (R. 26, 35). Frick stated that the Appellee had completed the in-patient program "successfully" (R. 26). Frick also noted that the Appellee had demonstrated a sincere commitment to the after-care

program, and had an excellent prognosis (R. 35-36) Frick stated:

> Again, I can't say anything with absolute certainty. But I can say if Ben continues to do what he had done in the past year, his chances for experiencing ongoing sobriety are excellent.

(R. 44)

In the section entitled "Recommendations as to Disciplinary Measures To Be Applied", the Referee specifically noted in his Report that there was "special circumstances" which "should temper the sanction to be imposed". (See attached Exhibit I, page 9). The Referee noted that the "defalcations" were the direct result of "severe polysubstance abuse" (Exhibit I, page 9). The Referee emphasized that the Appellee's substance abuse, rehabilitation, and resulting remorse, cooperation, and restitution, were all taken into consideration in determining the final recommendation of suspension, followed by probation (Exhibit I, pages 9-12). The Appellant's Petition for Review followed the Referee's Report.

SUMMARY OF THE ARGUMENT

It is well settled that a Referee's findings should be upheld unless clearly erroneous, or completely lacking in evidentiary support. The Florida Bar v. Aaron, 529 So.2d 685 (Fla. 1988). There is substantial competent evidence to support the Referee's well reasoned recommendation of suspension, followed by a period of probation.

Additionally, the Supreme Court has consistently recognized that disbarment is an extreme sanction, and should only be imposed where rehabilitation is highly improbable. The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988). This Court has also taken into consideration that loss of control due to substance abuse, remorse, cooperation, and prompt restitution are all mitigating circumstances to offset any sanction to be imposed.

ARGUMENT

POINT I

RESPONDENT/APPELLEE PRESENTED SUBSTANTIAL COMPETENT EVIDENCE TO MITIGATE AGAINST DISBARMENT AND TO SUPPORT THE REFEREE'S REPORT AND RECOMMENDATION

It is well-settled that a Referee's findings should not be overturned unless clearly erroneous, or lacking in evidentiary support. The Florida Bar v. Aaron, 529 So.2d 685, 686 (Fla. 1988); The Florida Bar v. Neely, 502 So.2d 1237, 1238 (Fla. 1987). Rule 3-7.5(k)(7) of the Rules Regulating The Florida Bar provides that the Referee's findings of fact as to items of misconduct charged, "shall enjoy the same presumption of correctness as the judgement of the trier of fact in a civil proceeding." The presumption of correctness of the judgment of a trier of fact in a civil proceeding prohibits the appellate court from reweighing the evidence and substituting its judgment for that of the trier of fact. The Florida Bar v. Hooper, 509 So.2d 289, 291 (Fla. 1987). Therefore, while the Referee must be presented with clear and convincing evidence in order to make findings of misconduct, on review such findings and resulting recommendations must be sustained if they are supported by competent and substantial evidence. Id.

It is evident that after reviewing both the Referee's Report and the record, that substantial competent evidence supports the Referee's findings of fact and the corresponding recommendations. These findings were not reached erroneously, and

should be upheld. The Referee explicitly stated that although the instant case involved extremely serious trust fund misappropriations, there were special circumstances to mitigate the sanction to be imposed. After an extensive evidentiary hearing, the Referee also made it clear that the "defalcations" which the Appellee admitted were a direct and proximate result of severe polysubstance abuse. The Referee specifically recommended:

> Although the findings I have recommended in this report encompass extremely serious trust fund misappropriation which I regard as among the most serious offenses that can be committed by an attorney and which ordinarily warrants disbarment, I find special circumstances which, in my opinion, should temper the sanction to be imposed. After evidentiary hearing in this matter, the Referee finds that the defalcations herein admitted, and found, were the direct and proximate result of severe, polysubstance abuse for which respondent has voluntarily, and prior to these Bar proceedings, successfully sought psychological and medical assistance at ANON-ANEW and Alcoholics and Narcotics Anonymous. He has demonstrated his exemplary adherence to the principles thereof and the Referee has heard and accepted the several testimonies of Dr. Fred Frick of ANON-ANEW, William Kilby, Esq., counsel for F.L.A. and various other witnesses in testament thereof, including uncontroverted testimony that counsel's ability to practice law is not affected or dismissed currently. I find that respondent, from a very early age (13 years) as a result of an accident in which one of his hands was mangled and almost blown away, developed a severe lack of self esteem which led him on a road to alcohol and drug addiction. Respondent has made remarkable strides in attaining a recovery from his many addictions, has provided complete restitution to all victims of his trust account misappropriations and has retained the services of a certified public accountant who has implemented procedures to

> insure respondent's strict adherence to and compliance with sound trust accounting procedures in accordance with the Rules Regulating Trust Accounts.
>
> Not only has respondent attained a recovered status, but he has demonstrated his rehabilitation by extending a helping hand to attorneys and other parties who suffered similar addiction problems. (emphasis added)

(Exhibit I)

This Court ~~has~~ recognized loss of control due to drug or alcohol addiction as a mitigating circumstance in various situations involving trust fund violations and addiction problems. These cases appear to support a more lenient sanction than disbarment. In The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988), the Referee recommended that the respondent be found guilty of various trust fund violations. These violations included: commingling, failure to preserve the identity of funds of a client, failure to promptly pay client funds, failure to comply with trust fund requirements, and lack of required trust account balance reconciliations.

The Bar argued that the respondent be disbarred. The Referee in Hartman recommended suspension and a concurrent period of supervised probation. The Referee noted that the respondent's violations were extensive. However, the Referee also noted that the violations were primarily attributable to emotional instability resulting from marital difficulties, and the concomitant use of drugs and alcohol. This Court in Hartman was in agreement with the Referee's findings, and stated:

> In the instant case, the Referee found the violations were without intent, occurred during a one and half year period of

> emotional instability, and were due in part to drug and alcohol addiction. This Court has in the past recognized loss of control due to drug or alcohol addiction as a mitigating circumstance. The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986); The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982). The Referee also found respondent "has made steady progress" toward rehabilitation and has maintained his law practice without complaint since the last violation almost three years ago. The "extreme sanction of disbarment is to be imposed only 'in those rare cases where rehabilitation is highly improbable'". Rosen. 495 So.2d at 181-82 (quoting The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978)). We therefore conclude that disbarment would not serve the purposes of discipline in this case. (emphasis added)

Hartman at 608.

Similarly, in The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986), the respondent was found guilty of numerous trust violations, which included misappropriation of funds, and failure to promptly deliver property to a client. This Court found that disbarment was not an appropriate sanction. The Supreme Court also noted that the respondent's cooperation with the Bar, his remorse, restitution to clients, and the effect of his alcoholism, all constituted mitigating factors to offset the sanction to be imposed. See also The Florida Bar v. Blalock, 325 So.2d 401 (Fla. 1976).

Additionally, in the The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986), the respondent was adjudicated guilty of federal felony charges and intentionally possessing cocaine with intent to distribute. The Referee recommended suspension, and the Bar argued that due to the serious nature of the felony

conviction, disbarment was required. This Court agreed with the conclusion of the Referee, and stated:

> [T]he Referee found that "it affirmatively appears that since the time of his arrest and conviction in early 1983, Mr. Rosen has overcome his addiction, and no longer engages in illegal drug use." Because the extreme sanction of disbarment is to be imposed only "in those rare cases where rehabilitation ins highly improbable," The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978), and the finding has been made that "[Rosen] has an excellent chance of being a great asset to the bar of this state," we, with the Referee, "must reject the recommendation of The Florida Bar that he be disbarred, since such a punishment appears not only too harsh in the circumstances, but may well deprive the legal community of the benefit of Mr. Rosen's participation as an attorney in the future, should he be found rehabilitated and reinstated after the suspension period.

Rosen at 181.

In a recent opinion by this court, the respondent in The Florida Bar v. Fertig, 551 So.2d 1213 (Fla. 1989) plead no contest to a serious felony, Racketeering. The Bar did not seek disbarment despite the fact that the RICO plea had directly affected his practice. The Supreme Court placed the respondent on a ninety (90) day suspension, and cited his cooperation with authorities, his youth in the practice, and the length of time which had elapsed since the criminal acts as mitigating factors.

It is apparent that this Court recognizes that disbarment is an extreme sanction, and should only be imposed where rehabilitation is not a realistic likelihood. There are striking similarities between the mitigating factors discussed in the aforementioned authority, and those present in the instant

case. First, as in Hartman, there was substantial competent evidence to support the Referee's findings that the respondent has made remarkable strides towards attaining a recovery from his severe drug and alcohol addictions. Numerous professionals testified as to the severity of the Appellant's addictions, and how this abuse played an active role in severely impairing his judgment, and daily functioning as an attorney. Additionally, as in Hartman, there was testimony from fellow attorneys regarding the Appellee's self-awareness of facing up to his illness, the resulting consequences and the aggressive strides he has taken in pursuing rehabilitation.

Dr. Fred Frick is a physician who specializes in the treatment of addictive illnesses (R. 23). He is currently the medical director of ANON-ANEW, an in-patient and out-patient treatment facility in Boca Raton, Florida (R. 23). Frick testified that the Appellee's chemical dependency had been chronic and severe, but that he had completed the in-patient program successfully (R. 32, 33). Frick also stated that the Appellee continued to attend the after-care program at ANON-ANEW, and was an active regular participant in the Alcoholics Anonymous meetings and/or Narcotics Anonymous meetings (R. 35).

In testifying as to the severity and effect of the Appellee's addictions and the role these addictions played in clouding his judgment, Frick testified:

> BY MR. BOGENSCHUTZ:
> Q: Doctor, cocaine and these levels of cannabinoids, they just kind of gobble you up inside, don't they?

A: Yes. They profoundly alter the chemical balance of the brain.

Q: And they make you do things that but for that kind of a level, a lot of people never would have thought of doing? Is that fair?

A: Yes.

Q: Mr. Barnovitz asked you about one day at a time.

Have you ever heard the statement, "You do the drugs and then the drugs do you"? Have you ever heard that?

A: Yes, I have.

Q: Is that what happened to Ben Farbstein?

A: In my opinion, it must have happened because of the severity and the chronicity of his drug use.

We see in the paper, for example, a woman selling her baby. That should give you an idea how profoundly a person's thought pattern is altered with this drug.

Q: One last question. What you have seen him do and the method that you have seen him take, the industriousness with which he has attacked this program and done what he has to do afterward -- do you see any indication that if he continues on that path, that he will not have any type of relapse that would cause the specter that Mr. Barnovitz suggested?

A: Again, I can't say anything with absolute certainty. But I can say that if Ben continues to do what he has done in the past year, his chances for experiencing ongoing sobriety are excellent. (emphasis added)

(R. 42-44)

Howard Finkelstein, a fellow attorney and former substance abuser testified that he was instrumental in initially encouraging the Appellee to seek treatment (R. 111).

Finkelstein testified to the marked personality change in the Appellee since treatment, and the steady progress he has shown in his recovery (R. 112). Finkelstein testified to his regular attendance at ANON-ANEW , lawyer support meetings, Alcoholics Anonymous, and Narcotics Anonymous meetings (R. 112-114).

Finkelstein also testified that the Appellee has demonstrated his rehabilitation by extending a helping hand to other parties who have suffered similar addiction problems:

> Q: Do you know anything that he has been doing in the community with respect to AA, NA, Anon-Anew or any of the other programs?
>
> A: He has donated his care and concern to helping other lawyers. I know that.
>
> I know that when I am unable to attend the after-care meeting that I run, I ask Ben to run it. And understand that I take that role and responsibility very, very seriously. I wouldn't ask that of him unless I believed that he was capable of handling and functioning in that role.
>
> I know that there is a gentleman here in this courtroom today that he helped get into treatment Because he recognized the substance abuse problem on his part. I have seen him do it with other people.
>
> What he is doing is passing on what he has learned.
>
> A lot of times, we can't necessary (sic) change the consequences of our own addiction and the people that suffered as a result of it. All we can do is try to remedy the situation by giving unto others and trying to improve the quality of their life, and hopefully, through the passing on of that, there is kind of a repayment, a making of amends for all of the ills that we did. (emphasis added)

(R. 113-114).

The Appellee also testified in length as to his remorse and attempts to regain his physical, mental, and emotional health. The Appellee emphasized that his continuing recovery was "the most important thing in his life", and that it was an ongoing daily process (R. 161, 165). The Appellee also made it quite clear that he understood the critical importance of consistently attending various meetings for his continued recovery (R. 160-165). As to his specific misconduct and the realization of how his substance abuse affected his judgment, the Appellee testified:

> Q: How much recollection do you have of how the trust accounting problem began and where it went?
>
> A: Honestly, very little.
>
> Q: As a result of that, have you taken any action to make sure that if there is any other difficulty with things that either you don't know about or that have not come to light -- and I don't mean since the time you are out of treatment. I mean prior to treatment.
>
> Have you done anything to insure that that is being taken care of?
>
> A: Yes.
>
> Q: Explain to the Court what that is. What did you do?
>
> A: I reviewed almost every single file in my office for quite some time back. I still have an ongoing practice and it continues to grow.
>
> So to make sure that if somebody was going to say there was a problem with a dollar, ten dollars, a hundred dollars or a

thousand dollars -- I borrowed $20,000 and I put it into a special account to cover anything.

Q: Where is that account now?

A: It's still existing at Sun Bank. I call it a special trust account. It's not a trust account like a lawyer's trust account. It's my personal special trust account for the office.

It hasn't been used. No funds have been taken out of it. It's just to make sure. It's non-interest bearing. I just put the $20,000 there. I just want to make sure.

Q: Was it ever your intent to steal anything from a client?

A: **No.**

Q: Why do you think these trust account problems happened?

A: Because I was messed up on drugs. I learned that I was a drug addict. (emphasis added)

(R. 170-171)

On cross examination, the Appellee also emphasized that the trust violations were without intent, and were not "calculated shortages", but were unequivocally due to his addiction:

Q: Insofar as the intent aspect is concerned, that, you lay solely and exclusively at the feet of addiction?

A: I am not a dishonest person. Yes, it is unequivocally, without question, due to my drug addiction, my use of cocaine. (emphasis added)

(R. 179)

As to this issue, the Appellee also stated:

> Q: My question to you is -- and I think you answered it, but I want to make sure that we are addressing the same issue -- it is your testimony today that in no instance of diverting trust funds did you then have any appreciation that you were using something that didn't belong to you?
>
> A: No, sir.
>
> Q: No, you didn't have any appreciation?
>
> A: I can't tell you, really, what I was thinking back then.
>
> I never had any intent nor desire, nor willingness, nor would use client funds. I believed that from before I started using, during my use and especially now.
>
> I can't tell you what mental processes I was going through, except that it was all befogged during that period of time. (emphasis added)

(R. 182-183)

It should be noted here, that the extensive testimony of this Appellee was presented, in a courtroom procedure, before a learned and experienced Dade County Judge, acting *as* Referee. It is beyond question that this Referee has presided over hundreds and perhaps thousands, of evidentiary hearings and jury and non-jury trials in his long and illustrious career as a member of the judiciary of the Eleventh Judicial Circuit of Florida. In each of those multitude of hearings he has had to make credibility judgments concerning witnesses appearing before him. The Referee was in a unique, and solitary position to adjudge the sincerity, credibility, remorse, candor and reactions

of the Appellee during his testimony. Without equivocation, he assessed it, in his vast experience and during its testing in the crucible of cross-examination, as impressive -- and he so reported. That finding should not be disturbed, despite the apparent adversarial observances of Appellant to the contrary. In fact, although a genteel record is silent, one time during his testimony, when discussing his addiction, and the profound effects that rehabilitation was having on his practice, his personal and emotional well being, and upon an interpersonal relationship with his new-found fiancee and his soon to be step-child, he wept. Such a reaction, spontaneous and genuine, was surely not lost on the Referee. Indeed, there existed one witness, and one witness only, Carlos Ruga, who testified as to the mechanics of the trust fund violations, but, as demonstrated below, became Appellee's own witness on cross examination. That testimony was the sole basis upon which the Bar seeks the ultimate sanction of disbarment.

In Tunsil, Hartman, and Rosen, this Court has recognized the appropriateness of considering cooperation and restitution as well as the loss of control due to substance addictions as mitigating circumstances. Besides the issue of addiction and rehabilitation, there is also substantial evidence to support the Referee's findings of the Appellee's cooperation in the instant case. Carlos Ruga, the Certified Public Accountant (CPA) and auditor for The Florida Bar emphasized the Appellee's cooperation in reviewing the various trust accounts

(R. 194-1961, and in so doing, became that witness for Appellee as above noted. Mr. Ruga testified:

> Q: Is there anything that you requested or anything that you suggested to Mr. Farbstein that he do to assist you, that wasn't done promptly or as completely as you would expect?
>
> A: No. Re did whatever I requested. He pulled all the files I requested and answered whatever questions I had.
>
> Q: In fact, in your report to the Bar of January 31, 1989, did you not say: "It should be noted that the Respondent has cooperated fully with this investigation and has produced all of his trust records and assisted me in identifying all of the client fund."
>
> A: That's correct. (emphasis added)

(R. 200-201)

There was also testimony to substantiate the fact that the Appellee had retained the services of a CPA who had implemented procedures to insure the Appellee's strict adherence to trust accounting procedures (R. 166-167, 200).

The Appellee testified:

> Q: What have you done to correct that [trust accounting procedures]?
>
> A: I engaged David Kofsky, an accountant -- actually, I have done more than that.
>
> Q: Let's take Mr. Kofsky first.
>
> Looking at the submission to the Court, Exhibit 8 also submitted to the Bar in response to request for admissions -- is that the same Mr. Kofsky who made that particular affidavit?
>
> A: Yes, sir.

Q: Is Mr. Kofsky a CPA?

A: Yes, sir.

Q: Has he to date taken care of reconciling your accounts and making sure that whatever the Bar requires as far as trust accounting and interest reporting is done?

A: Yes, sir.

Q: With the exception of looking at it to make sure it is accurate, you have completely delegated that to him?

A: That is correct. He sends me a pretty big bill for it each month.
(emphasis added)

(R. **167-168)**

Lastly, the record supports that the Appellee has provided complete restitution to all clients who were effected by his trust account misappropriations (R. 178, 197-199). It should also be noted that there have been no deficiencies or repeat losses since restitution was commenced.

As noted by the Supreme Court in Hooper, this Court's review of a Referee's findings of fact is not in the nature of a trial de novo in which the Court must be satisfied that the evidence is clear and convincing. Rather, the responsibility for finding facts and resolving conflicts in the evidence is placed with the Referee Id. A review of the aforementioned precedents, and the record itself, clearly supports, and dictates that the Referee's recommendation of suspension, followed by probation, was supported by competent, substantial evidence, and should be upheld.

But just as importantly, the Referee's report stands as a lighthouse and beacon to those brothers and sisters at the Bar whose lives are infected and careening aimlessly because of the insidious effects of substance abuse that they tried initially to control, but now control them. What the Referee's well reasoned and sound report stands for, in a larger sense, is a recognition that where our brothers and sisters recognize the dire straits that such devastation is plunging them into, the Bar will assist, help, stand by and comfort them -- especially where their actions to rid themselves of the disease are voluntary and sincere, and they demonstrate the same without being forced to do *so* by discipline. The Bar should welcome and encourage such voluntary acts, not seek to penalize the abuse and its results with its ultimate sanction. Otherwise, why else exists the Bar's own right arm, F.L.A.? Because if it is the Bar's position that, while seeking and encouraging revelation and treatment, it then, after that occurs, seeks to disbar, the hundreds of attorneys who are experiencing such disabilities will be driven underground with no reasonable hope to rescue their lives and careers without ostracism from their chosen profession. That simply cannot be where we are headed in these enlightened times. The Record is replete with legal, ethical, moral and compassionate confluences which compel the heart and mind to accept the learned Referee's Report under these unique circumstances. The Bar's own chosen group, F.L.A., the witnesses who appeared, the testimony and evidence received and this Court's appointed Referee all

conclude, with substantial rationale, that this Report is appropriate. Appellant respectfully urges this Honorable Court's acceptance of it, and in so accepting it, to send a clear message to all of those previously secret and agonizing brother:; and sisters of the Bar, that with candor, sincerity, honesty, industriousness and courage, each can, indeed, go home again.

CONCLUSION

Therefore, the Appellee FARBSTEIN respectfully submits that the Referee's findings of fact and recommendations were not reached erroneously, and should be UPHELD.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to David M. Barnovitz, Esq., Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, FL 33309; John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300; and John F. Harkness, Jr., Esq., The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 30th day of April, 1990.

J. David Bogenschutz