IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellant,	The Florida Bar File No. 88-50,720 (17E)
v.	
BEN I. FARBSTEIN, Respondent-Appellee.	Supreme Court Case No. 74,290

INITIAL BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CASES AND CITATIONS	ii
STATEMENT OF THE CASE AND OF THE FACTS	1
SUMMARY OF ARGUMENT	15
ARGUMENT	
I. RESPONDENT DID NOT PRESENT EVIDENCE WHICH MITIGATES AGAINST DISBARMENT	16
CONCLUSION	26
CERTIFICATE OF SERVICE	26

TABLE OF CASES AND CITATIONS

CASES	PAGE(S)
The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989)	24
The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989)	17, 23
The Florida Bar v. Hardman, 516 So.2d 262 (Fla. 1987)	18
The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986)	17, 24
The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989)	15, 16
The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986)	17

Rules

Rules Regulating The Florida Bar

Rule 3-4.2	7
Rule 4-1.3	2
Rule 4-1.4(a)	2, 4
Rule 4-1.15(b)	7
Rule 4-1.16(d)	2
Rule 4-3.2	2
Rule 4-8.4(a)	7
Rule 4-8.4(c)	2, 7
Rule 5-1.1	4, 8
Rule 5-1.1(d)	8
Rule 5-1.2	8

Florida Standards for Imposing Lawyer Sanctions

Rule 4-1.1	24
Unnumbered (Drug Standards)	Appendix 1

STATEMENT OF THE CASE AND OF THE FACTS

Upon respondent's waiver of probable cause, the bar commenced this disciplinary proceeding charging respondent with four (4) counts of misconduct ranging fram inadequate attorney-client communication to theft of clients' funds.

At final hearing respondent stipulated on the record (4-14)* regarding various allegations of misconduct and commission of violations which stipulation was accepted and approved by *the* referee and incorporated by him in his report. *As* a result, respondent stands guilty of committing the following acts and violations which are presented in four (4) counts.

COUNT I

1. On or about October 4, 1987, respondent was hired to represent one Kenneth A. Gress and Canam Associates, regarding several landlord-tenant cases and agreed to perform legal services on behalf of *Mr.* Gress.

2. Respondent did not adequately communicate with *Mr.* Gress concerning the several landlord-tenant cases.

3. *Mr.* Gress and his attorney, Norman Leopold, Esquire, had great difficulty in securing *Mr.* Gress' files from respondent which difficulty led attorney Leopold to seek redress fram a court of competent jurisdiction.

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* All references are to page numbers in transcript of final hearing unless otherwise specifically noted.

4. Mr. Gress and Mr. Leopold have alleged that respondent misrepresented, on more than one Occasion, that the file was available to be picked up.

5. Respondent did not diligently pursue all of the matters that Mr. Gress had entrusted to him.

6. Various Rules of Professional Conduct were violated with respect to Count I. By failing to exercise diligence in pursuing the matters entrusted to him by Mr. Gress, respondent violated Rule 4-1.3 which provides that a lawyer shall act with reasonable diligence and promptness in representing a client. By failing properly to communicate with Mr. Gress respondent violated Rule 4-1.4 (a) which provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. By misrepresenting, on more than one Occasion, that the client's files were available to be picked up and by creating difficulty to the client and the client's successor attorney in securing the files, respondent violated Rule 4-1.16(d), Rule 4-3.2 and Rule 4-8.4(c) which provide, respectively, that upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest such as surrendering papers and property to which the client is entitled; that a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client; and that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

COUNT II

7. In or about December, 1986, respondent was hired to represent one Susanna Lallouz and her partner, Robert R. Royce, regarding the collection of certain promissory notes.

8. In its complaint, the bar alleged that respondent failed to keep his clients apprised of the developments in their case, despite requests by the clients for information.

9. The testimony of Susanna Lallouz and Robert Royce was submitted by affidavit and consisted of the following:

> The affiants are the sole shareholders, directors and office holders of Robert Royce, Inc.
>
> By and through their attorney, Michael A. Kramer, the affiants filed a canplaint with The Florida Bar regarding respondent, the former attorney for Robert Royce, Inc.
>
> Since the time of filing the canplaint with the bar, the affiants have resolved all of their differences, misunderstandings and/or complaints with respondent to everyone's mutual satisfaction.
>
> Affiants have had an opportunity to review the case file on the problem matter and are satisfied that the case was handled properly, except as to the issue of attorney/client communication, which issue has now been resolved.
>
> Affiants desire that all proceedings or actions brought by The Florida Bar in their name involving respondent be terminated.

10. With respect to Count 11, in light of the affidavit received in evidence from the original complainants to the bar, the only violation of the Rules of Professional Conduct is Rule 4-1.4(a) which provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

COUNT III

11. In or about January, 1987, respondent was hired to represent one Robert Nelson Owen regarding a personal injury claim.

12. Respondent received a settlement check in connection with Mr. Nelson's claim, which check was not disbursed to Mr. Nelson until August 30, 1988.

13. When respondent finally sent the funds in question to his client, respondent failed to secure the general release, in advance, but transmitted both the check and the release to his client at the same time, in violation of respondent's escrow agreement with the insurance company.

14. By transmitting both the settlement check and release to his client at the same time in violation of his escrow agreement with the insurance canpany respondent violated Rule 5-1.1, Rules Regulating Trust Accounts which provides that money entrusted to an attorney for a specific purpose may only be applied for that purpose.

COUNT IV

15. Carlos J. Ruga, branch auditor of The Florida Bar, conducted an audit of respondent's trust account.

16. The trust accounts examined were the following:

(A) Ben I. Farbstein trust account, maintained at Regent Bank, account #10200082200, for the period January 1, 1987 to April 5, 1988, the date on which it was closed. It should be noted that this is an interest bearing account and during the period examined earned one hundred sixty-nine dollars and ninety-one cents ($169.91) in interest.

(B) Ben I. Farbstein trust account, maintained at Seminole National Bank, account #12500-0621-2, for the period April 14, 1987 to April 22, 1988.

(C) Ben I. Farbstein trust account, maintained at Sun Bank, account #0385-007040290, for the period May 20 to August 31, 1988.

17. The audit revealed that on May 30, 1988, the respondent had closed the account maintained at Seminole Bank and had opened the Sun Bank trust account.

18. The balance in the account as of May 30, 1988 was two thousand four hundred dollars and no cents ($2,400.00) and his liability to clients as of this date was twenty-three thousand five hundred twenty-eight dollars and sixty-two cents ($23,528.62), reflecting a shortage in his trust account of twenty-one thousand one hundred twenty-eight dollars and sixty-two cents ($21,128.62).

19. In the following mnths, the respondent's pattern was to utilize recent deposits to pay obligations incurred in previous mnths.

20. Also on or about July 15, 1988, the respondent deposited eight thousand five hundred dollars and no cents ($8,500.00) from a loan he obtained from his father.

21. These funds helped in reducing his liability to clients. On August 30, 1988, the balance in the trust account was three thousand seven hundred three dollars and eighty-five cents ($3,703.85) and his client liability was sixteen thousand eight hundred forty-seven dollars and twenty-nine cents ($16,847.29) reflecting a shortage of thirteen thousand one hundred forty-three dollars and forty-four cents ($13,143.44).

22. On or about April 22, 1988, respondent deposited in the trust account maintained at Seminole Bank, account #1250006212, a check in the amount of six thousand dollars and no cents ($6,000.00) payable to Robert Nelson and Marion Nelson, individually and as husband and wife and Ben I. Farbstein, as their attorney.

23. The balance in the trust account at the *end* of April, 1988 was five thousand nine hundred four dollars and thirty-six cents ($5,904.36).

24. The following month, the respondent issued three (3) checks to himself for the total amount in the trust account and by May 19, 1988 closed the account.

25. The respondent's liability to clients at this date was at least twenty-four thousand five hundred twenty-eight dollars and sixty-two cents ($24,528.62).

26. On or about August 30, 1988, the respondent finally paid the Nelsons.

27. On that date, he obtained a cashier check from Sun Bank in the amount of three thousand eight hundred thirty-two dollars and fifty cents ($3,832.50) and delivered same to the Nelsons.

28. The respondent used other client funds to satisfy this liability.

29. At that date, the respondent's liability to clients was sixteen thousand eight hundred forty-seven dollars and twenty-nine cents ($16,847.29).

30. As a result of the numerous trust account misappropriations and lack of compliance with trust accounts procedures the following violations occurred:

(A) Rule 3-4.2, Rules of Discipline, which provides that an attorney shall not engage in conduct contrary to honesty or justice;

(B) Rule 4-1.15(b), Rules of Professional Conduct, which provides that upon receiving funds in which a client or third person has an interest, a lawyer shall promptly notify the client or third person, shall pranptly deliver to the client or third person any funds or property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly tender a full accounting regarding such property.

(C) Rule 4-8.4(a), Rules of Professional Conduct, which provides that an attorney shall not violate a disciplinary rule.

(D) Rule 4-8.4(c), Rules of Professional Conduct, which provides that an attorney shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(E) Rule 5-1.1, Rules Regulating Trust Accounts, which provides that funds entrusted to an attorney for a specific purpose must be held in trust for the purpose of the entrustment.

(F) Rules 5-1.1(d) and 5-1.2, Rules Regulating Trust Accounts, which provide the standards for maintaining an interest bearing trust account and for maintaining the minimum trust accounting records.

(G) Respondent also failed to maintain the minimum trust account proceedings as set forth in Rules Regulating Trust Accounts.

Having approved the parties' stipulation regarding the above recited facts and violations, the referee proceeded to conduct a hearing directed to mitigation and sanctions (14). Respondent attempted to present evidence to establish, in the words of his counsel, "the length and the depth and breadth of (respondent's) substance abuse problem involving cocaine and polydrug addiction, what he did to combat it, where he is today, not only personally and chemically, but in the practice of law" (20).

The evidence adduced by respondent established that at the time of his misconduct he was a drug addict. Testimony from the physician/director of Anon-Anew, where respondent voluntarily admitted himself after the bar instituted its investigation, portrayed respondent as addicted to a myriad of illegal substances. The director testified:

> Q. Tell the Court what kind of shape he was in.
>
> A. Ben's urine tested positive for very high levels of cannabinoids, which is marijuana, levels so high that the machine used to test it, the gas chromatograph, could only say greater than a certain number. So it was really an indefinable number.

The same urine specimen tested positive for benzodiazepines, which are sedative, hypnotic type of pills; again at high levels.

The urine also tested positive for not only cocaine metabolytes, which are breakdown products of cocaine, but it also tested positive for what we call a cocaine parent compound.

That is important, inasmuch as it suggests that the individual has recently been ingesting so much cocaine that the amount of cocaine ingested has overwhelmed the body's ability to metabolize it.

Therefore, the individual is spilling, so to speak, free cocaine or pure cocaine into the urinary tract.

So there were a mixture of drugs in the urine, all in high levels (27, 28).

Fran treating respondent and fran monitoring respondent's post discharge aftercare, the director opined:

Q. What is the prognosis, Doctor?

A. I think if Ben continues to do what he is doing now -- here we are a little over a year into his sobriety -- if Ben continues to do what he is doing now and achieves another year or two of sobriety, I think his long term prognosis will be excellent.

Q. Do you see anything at all -- and you have dealt with several lawyers, I take it, at Anon-Anew -- is there anything at all that would indicate to you today or after he left, for instance, the in-patient program at Anon-Anew, that would indicate to you that he is a danger to himself, that he is a danger to other individuals or that he is a severe relapse candidate -- anything of that nature that may affect his ability to practice law?

A. No (36, 37).

Upon further examination the director stated that although respondent's prognosis for continuing sobriety is excellent, there is no certainty in such prognosis **(37, 42, 44)**. In the following colloquy the director appeared to qualify his opinion regarding the potential for hann to the public in the event of respondent's relapse:

> *Q.* Attorneys, of course, are entrusted by members of the public with money and property to be dealt with in trust.
>
> You understand that?
>
> A. Yes.
>
> *Q.* With a cannabinoid user who has been under medical treatment for a year and a couple of months, as you previously stated, it's just too early to be able to state with any medical certainty that tomorrow won't bring with it some type of relapse?
>
> A. I think I recall saying that I am unable to say with absolute certainty. I can say that if we have a group of individuals who have achieved over one year of sobriety, their chances of ongoing sobriety are much greater than individuals who, say, have just finished treatment.
>
> *Q.* If there were to be a relapse on the part of *Mr.* Farbstein, would it be reasonable to expect that all of the consequences that were suffered by him and others through him could recur?
>
> A. I think it would be reasonable to expect the return of some of the behavior that the individual had while using drugs **(41, 42)**.

Although attributing his embarkation upon a path of substance abuse to a hand disfigurement suffered as a 12 year old youth **(181)**, respondent conceded that he was not forced into substance abuse **(184)**. While respondent attempted to establish that his addiction was not voluntary, by his own admission he explained that the addiction did not occur until he "got to a certain point from some recreational use" **(184)** at which point "I was like sucked in" **(184)**. The director of Anon-Anew testified:

> Q. Is there anything that you know of that would indicate to you that Mr. Farbstein's introduction to and continuance as an addict was anything but a voluntary act on his part?
>
> A. Well, all people, initially when they elect to use a drug or alcohol, initiate and do so voluntarily (38).

Respondent presented numerous other witnesses who testified that respondent appeared sober and rehabilitated. One of the witnesses, an attorney, Mark London, was a past vice-chairman of a grievance committee (59). Another attorney-witness, Roger Stanway, is currently serving as chairman of a grievance committee (69). Both witnesses opined upon direct examination that respondent posed no danger to clients, to the bar or to the community (65, 78). Upon cross examination, hawever, Mr. London agreed that his opinion would be different if the assumption upon which it was predicated were invalid.

> Q. So, of course, if the assumption is wrong that the addiction created the dishonest propensity, and if it were the other way around, I would assume your opinion regarding Mr. Farbstein's relationship with the public would be different?
>
> A. If that were the case, yes (87).

Mr. Stanway likewise agreed that his opinion was predicated upon the assumption that the addiction created the dishonest propensity rather than the dishonest propensity existing independent of the addiction. Mr. Stanway went on to explain, hawever, that so long as an individual adhered to the tenets of Alcoholics Anonymous there could be no dishonesty as a fundamental AA standard mandated honesty (80, 81). Mr. Stanway agreed that, applying his view in a bar disciplinary milieu, the rehabilitated substance abuser-thief stood in a favored position vis a vis sanction.

Q. As you know, in your capacity working with a Grievance Committee, the non-addict or the non-alcoholic who steals from clients is frequently disbarred, is that correct?

A. Well, I understand that.

Q. If I understand you correctly, it might be possible to take a dishonest person who commits himself or herself to the steps -- if a person who is dishonest but not an addict of any sort, committed himself or herself to the steps, then it would be unusual for that person to become dishonest.

A. The steps in Alcoholics Anonymus are a format for living, so I have to agree with you.

Q. So it would be inconsistent then for that thief who has committed himself to the steps to then turn around and become a thief again?

A. Right. But where you have a benefit in the situation that you are dealing with now -- you don't have that benefit with just a thief.

You have the barmeter, if you would like to call it that, of Alcoholics Anonymous to provide that barmeter to you with a person that is going to act dishonest, because if a person in Alcoholics Anonymus is acting dishonest, more than likely, he will be drunk. There is your barmeter. Whereas you may not have that barmeter normally with a person who is just a thief. You have to catch him.

Q. But the steps, this commitment by the member to abide by the steps and to live his life by, through and under the steps would render it inconsistent to be dishonest or engage in anything other than the straight and narrow life?

A. That's correct. It's a basic tenet of Alcoholics Anonymus that you be honest. You basically try to be an honest person.

Q. So, Roger, it's almost a situation where if you are a lawyer and you steal from your clients, you are better off being an addict than a non-addict when it comes time to deal with the Bar?

A. Well, I think the Bar has, being on —

Q. Do you see where I'm coming from?

A. Well, being on a Grievance Committee and seeing what haps and also being in Alcoholics Anonymous -- that's why I said -- frm what your statement said, that may be true, but the Bar also has more built-in benefits or a built-in barometer as to whether a person who is in Alcoholics Anonymous is going to do anything like that.

Really, the first instinct for a person who is doing that is to go out and get drunk, because they can't live honestly in the program.

Q. I think we are just saying the same thing over again, Roger **(81, 83)**.

While restitution was made to the various victims of respondent's misappropriation, such restitution was made through funds borrowed by respondent frm his father **(178).** Although conceding the accuracy of the bar auditor's report establishing the various misappropriations and stipulating to the violations flowing therefran, respondent, upon testifying in an attempt to establish mitigation, steadfastly refused to admit that the misappropriation constituted a theft of funds **(171, 178).**

Having stipulated to a violation regarding his representation of one Susanna Lallouz (see page 3 of this statement) respondent nonetheless felt compelled to defame Ms. Lallouz in his testimony. He revealed that he had intimate relations with Ms. Lallouz in high school and charged her with substance abuse **(147).** When cross examined as to what possible relevance the disclosure of intimacies and drug abuse had to his conceded lack of communications with Ms. Lallouz respondent merely continued to heap abuse upon his client characterizing her as "a lady with no scruples" **(176).**

The referee, acknowledging that respondent's violations "encompassed extremely serious trust fund misappropriation which ... ordinarily warrants disbarment" (report of referee, page 9) recommended a 90 day suspension plus a period of probation finding it mitigating that respondent attained a recovery from his m y addictions, provided complete restitution to victims of his thefts, implemented procedures to insure future compliance with trust account regulations and extended a helping hand to others suffering addiction problems (report of referee, page 10).

Upon review of the referee's report at its March, 1990 meeting, the Board of Governors of The Florida Bar directed bar counsel to petition for review and seek the sanction of disbarment.

SUMMARY OF ARGUMENT

In The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), this court determined that in bar disciplinary cases involving attorney theft of client funds, there is a presumption of disbarment which presumption may be rebutted by various acts of mitigation.

The issue to be determined in this appeal is whether an attorney-thief's recovery from a drug addiction which addiction was brought about by the attorney-theif's sober, voluntary, premeditated, continuous and felonious course of purchasing, possessing and using cocaine and other illegal substances, constitutes mitigation to save an attorney from imposition of a sanction that would otherwise issue had the acts of theft been perpetrated by a non-addict.

Simply stated, the bar's position is that the court should disbar respondent and not afford special treatment to attorneys whose felonious drug possession, use and consequent client betrayal defiles the attorney's unique position as a fiduciary and officer of the court.

POINT I

RESPONDENT DID NOT PRESENT EVIDENCE WHICH MITIGATES AGAINST DISBARMENT.

This is a theft case. Between January 1, 1987 and August 31, 1988, respondent stole thousands of dollars of trust funds. On May 19, 1988, when he closed one of his trust accounts, respondent was indebted to clients to the extent of $24,528.62 (report of referee, pages 4 - 8)

It is axiomatic that theft of client funds creates a presumption of disbarment. The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989). In the bar's view, there is but one issue before the court, viz., whether respondent produced evidence of mitigation to rebut such presumption. The bar suggests that he did not.

A reading of the report of referee can leave no doubt that the referee focused upon respondent's drug addiction and apparent recovery and rehabilitation therefran as mitigating to such a degree to warrant recommendation of a minimum sanction. The referee expressed his view that it is "incongruous for the bar to recognize the problem [addiction], attempt to correct it and then, having successfully caused an attorney to enter a FLA program, to seek the sanction of disbarment" (report of referee, page 11). It is respectfully submitted that the referee's focus is misplaced and his perception regarding the bar's position vis a vis drug addiction is unfounded.

Firstly, the misconduct underlying respondent's prosecution by the bar is not his addiction, but rather his theft of clients' funds, abuse of an escrow agreement with an insurance company, inadequate client communication, failure properly to take steps to protect a client's interest upon termination of representation and failure to maintain trust account records as prescribed by the Rules Regulating Trust Accounts. In such circumstances this court has recognized that addiction or alcoholism underlying other misconduct may act as an explanation for such misconduct but does not constitute an excuse. Thus, in The Florida Bar V. Golub, **550** So.2d **455** (Fla. **1989)** the court rejected respondent's view that his alcoholism, as well as other mitigating circumstances, warranted imposition of a sanction less than disbarment where respondent stole substantial sums of mney. The court stated:

> In this case, we agree with The Florida Bar. While alcoholism explains the respondent's conduct, it does not excuse it. As we stated in The Florida Bar v. Tunsil, **503** So.2d **1230, 1231** (Fla. **1986), "**[i]n the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list." Although we may consider such factors as alcoholism and cooperation in mitigation, we must also determine the extent and weight of such mitigating circumstances when balanced against the seriousness of the misconduct **(456).**

In The Florida Bar v. Knowles, **500** So.2d **140** (Fla. **1986)** the court entered an order of disbarment notwithstanding the fact that the respondent was clearly under the influence of alcoholism at the time his thefts occurred, voluntarily entered an alcohol rehabilitation center and achieved a successful rehabilitation, promptly made restitution and had no prior disciplinary record. The court observed:

> Although we recognize that alcoholism was the underlying cause of respondent's misconduct, it cannot constitute a mitigating factor sufficient to reverse the referee's recommendation to disbar under the facts in this case (142).

In The Florida Bar v. Hardman, 516 So.2d 262 (Fla. 1987) this court entered an order of disbarment notwithstanding that the underlying cause for respondent's misconduct was a chemical dependency.

There is no incongruity in the bar's position as the referee suggests. The bar does not seek disbarment because respondent was an addict. It *seeks* disbarment because respondent committed the most egregious of all violations, viz., theft of clients' funds. The bar's position in non-client related cases where the only misconduct involved is possession and use of drugs to foster an addiction is contained in drug standards adopted by the Board of Governors of The Florida Bar, at its March, 1990 meeting, for incorporation in Florida Standards for Imposing Lawyer Sanctions. A copy of such drug standards is attached hereto as the bar's appendix 1.

Respondent's addiction was of his own manufacture. He embarked upon a recreational use and eventually was "sucked in" (184). His medical expert agreed that "all people, initially when they elect to use a drug or alcohol, initiate and do so voluntarily" (38). It would constitute an anomaly and, indeed, an injustice, if an attorney were permitted voluntarily to embark upon a course of criminal misconduct involving the possession and use of illegal drugs and by virtue of becoming addicted thereto was thereby considered to be less responsible for theft and other misconduct than a sober counterpart. If drug use

and resultant chemical dependency is somehow mitigating then it would behoove every attorney locking horns with the bar in a disciplinary milieu to ingest as much cocaine as necessary to produce a blood or urine trace thereby permitting him to escape the consequences of his other misconduct due to an alleged chemical dependency.

While clearly seizing upon respondent's addiction and recovery process as the basis for his sanction recommendation, the referee did specify restitution, cooperation and remorse as other mitigating circumstances. In the bar's view, respondent did not establish such factors sufficiently as to constitute a rebuttal of the presumption of disbarment. The additional factors will be considered in inverse order.

If anything, respondent demnstrated a disturbing lack of remrse. The entire gravamen of Count II of respondent's stipulation consisted of an admission that in respondent's representation of one Susanna Lallouz, respondent did not adequately communicate with his client. When addressed by his own counsel, respondent conceded that he did not adequately communicate with Ms. Lallouz.

> Q. When Ms. Lallouz filed her complaint with the Bar, you were not adequately communicating with her, were you?
>
> A. I guess not. I would have to admit that I don't really recall those items (149).

Thus, respondent, again, fortified the admission that was stipulated to at the outset of the proceeding, viz., that he did not adequately communicate with his client. Nonetheless, respondent regarded it as important that he defame Ms. Lallouz and defile her reputation. Making

reference to matters clearly beyond the res gestae of the Lallouz grievance, respondent felt compelled to volunteer that he engaged in intimacies with the client and became involved in the use of drugs together (147). When asked on cross examination why he regarded it as necessary to slander his client when he had conceded the only violation at issue, viz., lack of adequate communication, respondent continued in his assault. It is respectfully submitted that the following colloquy is demonstrative of arrqance, not remorse.

> *Q.* Mr. Farbstein, you understand this is a public proceeding, don't you?
>
> A. Absolutely.
>
> *Q.* You understand that this stenographic report will be filed as a public record?
>
> A. Yes sir.
>
> *Q.* Do you consider that you may have gone beyond propriety with reference to a client of yours, Susanna Lallouz, when you made open reference today in your testimony to having prior intimate relations with her and alluding to a cocaine problem on her behalf?
>
> A. Do I feel --
>
> *Q.* Do you think that was appropriate? What purpose did that have in your testimony?
>
> A. I had been advised by counsel, not by David Bogenschutz, but by counsel, that I am entitled to defend myself in a proceeding.
>
> *Q.* I understand that, and there is an exception in revealing client confidences to protect yourself against charges brought against you.
>
> I was just wondering what the relevance of your intimate relations with this lady and her revelation of cocaine abuse had to do with the complaint that has been filed and the stipulation that was entered into, whereby you agreed to lack of communication.
>
> A. There is relevance. There is a lot of relevance.

My relationship with Susan Kramer, thereafter known as Susanna Kramer and now Susanna Lallouz, began on a personal basis. I can distinguish a personal communication with that of an attorney/client communication.

My communication with Susanna Lallouz -- when I was sitting in the chair, mst of *my* communications with her, as *my* haircutter, were a mix between attorney/client and *my* doing her a favor in doing a next to impossible unliquidated speculative claim, where I had better things to do, but I would do it for her.

She expected it of me. I did it for her.

She is a lady with no scruples.

She ran into some mney problems with her partner and started putting the blame on, and she expected these funds to come in, where there was never a guarantee of funds to come in on this.

Lisa Stevens is just a teenager or in her early twenties -- on probation with no source of income, and expecting to collect $10,000 frm her.

She is telling her partner, "That's where we are going to be just fine."

She called me up and said, "We have a problem."

I said, "What is the problem?"

She said, "Robert Royce needs the mney," always putting it off on him.

The lady is not a good person. She is a user of people. She is a user of drugs. I don't suggest that she is now still using drugs, frm my last communication.

The Court knowing all this, I think is relevant to the type of person that filed a complaint.

Q. To which you have agreed you have committed a violation?

A. Borderline, yes (175 - 177).

Nor did respondent show remorse regarding his theft of clients' funds. He exhibited total denial to his counsel and to the bar upon cross examination when the subject of his misappropriations was discussed. Notwithstanding that respondent's accounts clearly established the diversion of substantial sums to his own use and purposes, respondent persisted in insisting that no thefts occurred. When queried by his counsel he stated:

> Q. Why do you think these trust account problem happened?
>
> A. Because I was messed up on drugs. I learned that I was a drug addict.
>
> My family raised me on the nice side of the tracks, with a yacht in the back yard, and never having to do without. If I needed something, I would go to my dad or I would earn it.
>
> I didn't need the clients' funds. I couldn't take clients' funds. I didn't steal clients' funds.
>
> Any reference that they were stolen is only that person's opinion, because in fact, it was not stolen (171).

The cooperation made reference to is, in the bar's view, illusory. While respondent certainly did cooperate with the bar's auditor, such cooperation took place only after the bar's investigation was well under way. By the time the auditor met with respondent and/or respondent's counsel, he (the auditor) had prepared records and journals (194). It was necessary that the auditor subpoena bank records (195). It somehow does not seem heroic for an attorney-thief to confirm that his trust account is empty. As the bar's auditor explained, the results are the same.

> Q. As one of the Bar's auditors, for at least this area, have you had occasion to run into lawyers who just either didn't cooperate at all or cooperated to less than the full extent?
>
> A. I have had many cases when I haven't even seen the lawyer. I never met them. They were disbarred without my seeing them (201).

Finally, the bar does not regard the borrowing by an attorney of funds to make restitution to the victims of his thefts as particularly mitigating when such borrowings are from a respondent's wealthy father. Here, the testimony established that restitution was made by respondent's father (85, 183). As respondent explained, if he ran a shortage, he could always "have gone to my father or sold one of my boats" (183). One must speculate as to the equal application of sanctions in bar disciplinary matters if the severity of sanction is based upon the respective wealth of an attorney-thief's family. Would Mr. Golub have been disbarred had he an affluent daddy? He, like the respondent in the instant case, "cooperated", was the product of substance abuse and had no prior disciplinary history. In addition, he had engaged in a voluntary self-imposed suspension for approximately three (3) years prior to the issuance of the court's order of disbarment. He apparently had no ready source to restore the approximate $23,000.00* that he misappropriated. The Florida Bar v. Golub, supra. It might well be legitimate for the court to consider whether an attorney-thief who makes restitution through borrowings from his parents has merely effected a transference in victims. It is respectfully submitted that the application of sanction should not be related to the affluence of one's relatives.

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* The shortages in Golub and the case at bar are virtually identical.

Respondent's thefts were substantial and extended over a considerable period of time. It is difficult to distinguish between respondent's defalcations and those which occurred in The Florida Bar v. Knuwles, supra. There, respondent was disbarred notwithstanding the fact that he was under the influence of alcohol at the time of his thefts. Like respondent, Mr. Knuwles had voluntarily entered an alcohol rehabilitation center, achieved a successful rehabilitation, promptly made restitution and had no prior disciplinary record.

Rule 4.11 of Florida Standards for Imposing Lawyer Sanctions provides for disbarment "when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." The court had an opportunity to address this rule and others in The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989) where it had been established that for several years respondent had changed his lifestyle and the field in which he practiced law and had become a reliable and dependable attorney with the best interests of his clients foremost at all times. The court nonetheless regarded it as imperative that a disbarment order issue to "deter others who might be prone or tempted to become involved in like violations" (605, 606). The bar would urge that a similar imperative exists in the instant proceeding. Our nation's drug abuse problem has reached such epidemic proportions as to preoccupy government at every level. A resounding message must be delivered that misconduct attributed to self induced drug abuse cannot and will not be tolerated. The clarion call must be to summon those engaging in illegal drug activity to come forth, be rehabilitated and resume the practice of

law before client involvement and victimization. Those who do not heed the call with resultant client involvement must know without hesitation or equivocation that upon discovery they will be prosecuted and upon prosecution they will be disbarred regardless of rehabilitation and sobriety.

CONCLUSION

As seen from the drug standards attached as appendix 1, the bar does not seek draconian punishments for ''simple"drug possession and use cases. A balance has been struck to permit those attorney addicts and users to come forth, seek and receive help and proceed with their lives and their professions. To those who heed the call, a firm but forgiving hand is extended. To those attorneys, however, whose felonious possession, use and resultant addiction have produced victims, the response must be different. Deterrence mandates disbarment in such cases lest others hesitate to attain sobriety until they, too, add more clients to the pyres of cocaine.

Respondent should be disbarred and directed to pay the bar's costs in this proceeding.

All of which is respectfully submitted.

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OF

I HEREBY CERTIFY that a true and correct copy of the ›re(l brief . The 'lorida Bar was furnished t(J. David Bogenschutz Esquire, attorney for spondent te 4F 1 Lawyers Building, 633 South i Avenue, Ft. auderda , , 330 by regul mail · this 11 day of i 1990.

David M. Barnovitz

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