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IN THE SUPREME COURT OF FLORIDA  
BEFORE A REFEREE

FILED

SID J. WHITE

FEB 1 1990

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk  
74,290

THE FLORIDA BAR,  
Complainant,

Supreme Court Case No.:

v.  
BEN IRA FARBSTEIN,  
Respondent.

The Florida Bar File Nos:  
88-50,720 (17E), 88-51,210 (17E),  
89-51,317 (17E) and 89-51,408 (17E) .

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The undersigned was appointed as referee to preside in the above disciplinary action by order of this court dated June 20, 1989. The pleadings, stipulations, transcripts and all other papers filed with the undersigned which are forwarded to the court with this report, constitute the entire record record in this case.

Respondent appeared in person and by J. David Bogenschutz, Esquire. The bar was represented by Kevin P. Tynan, bar counsel with David M. Barnovitz, assistant staff counsel appearing at the final hearing.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

Based upon a stipulation entered into by the parties and recited on the record, I find as follows:

A. With respect to each and every count alleged by the bar, I find that respondent is, and at all times hereinafter mentioned, was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

#### **COUNT I**

B. 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.

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

D. 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 from a court of competent jurisdiction.

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

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

#### **COUNT II**

G. 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.

H. 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.

I. 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 complaint with The Florida Bar regarding respondent, the former attorney for Robert Royce, Inc.

Since the time of filing the complaint 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.

### **COUNT III**

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

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

L. 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.

#### COUNT IV

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

N. The trust accounts examined were the following:

(1) 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.

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

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

O. 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.

P. 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).

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

R. 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.

S. 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).

T. 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.

U. 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).



## COUNT I

1. 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 to properly 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

1. 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**

1. By transmitting both the settlement check and release to his client at the same time in violation of his escrow agreement with the insurance company I find that 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**

1. As a result of the numerous trust accounts misappropriations and lack of compliance with trust accounts procedures I make the following recommendations with respect to the violations charged by the bar:

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 promptly 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 render 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.

#### IV. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED:

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, poly-substance 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.

The Florida Bar has recognized the problems of various forms of addiction by sponsoring Florida Lawyers' Assistance, Inc. which the bar and the court embrace as the official source

of advice, expertise and monitoring of attorneys attempting to deal with their addictions. It seems to me incongruous for the bar to recognize the problem, attempt to correct it and then, having successfully caused an attorney to enter an FLA program, to seek the sanction of disbarment. Further, the Referee has observed the testimony of the respondent and finds in that testimony and the testimonies of other witnesses, substantial credible evidence that respondent has demonstrated honest and significant remorse in a desire to continue his rehabilitation. There is no reason to believe that he will not do so.

In light of the special circumstances hereinabove enumerated and respondent's rehabilitation and recovery I recommend that respondent receive a ninety (90) day suspension to be followed by a period of probation for a period of three (3) years. I recommend that during the period of suspension and probation respondent, at his sole cost and expense, be monitored by FLA, Inc. regarding his continued rehabilitation and recovery and be subjected to random drug testing in the discretion of FLA, Inc. with respondent to execute any and all contracts as FLA, Inc. shall require. I further recommend that during the period of suspension and probation, respondent, at his sole cost and expense, employ the services of a certified public accountant licensed by the State of Florida who shall, on a quarterly basis, render reports to The Florida Bar certifying respondent's complete compliance with the

Rules Regulating Trust Accounts. Finally, I recommend that during the period of suspension and probation respondent perform thirty (30) hours of community service per month in drug and alcohol programs such community service to be certified to The Florida Bar by the program or programs for which the services were rendered.

V. **PERSONAL HISTORY:**

Respondent is 34 years of age and was admitted to The Florida Bar on December 30, 1982.

VI. **STATEMENT AS TO PAST DISCIPLINE:**

Respondent has no past discipline history.

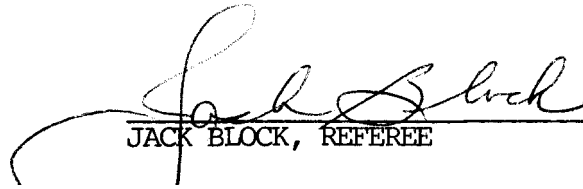
VII. **STATEMENT OF COSTS OF THE PROCEEDING AND RECOMMENDATIONS:**

The costs of these proceedings were as follows:

Administrative Costs (Rule 3-7.5(k)(5)) ---\$	500.00
Grievance Committee Transcript -----	53.25
Referee Transcript -----	818.40
Investigator Costs -----	132.82
Witness Fees -----	27.80
Auditor Costs -----	2,399.40
Bank Records (Regent Bank) -----	102.75
Bank Records (Seminole) -----	537.20
Bank Records (Sun Bank) -----	24.65
<u>TOTAL</u> -----	\$4,596.27

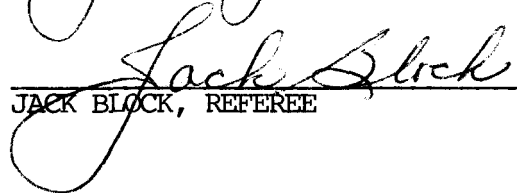
I recommend that such costs be taxed against respondent.

RENDERED this 30<sup>th</sup> day of January, 1990 at Dade County, Miami, FL.

  
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JACK BLOCK, REFEREE

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I HEREBY CERTIFY that a true copy of the foregoing report of referee was furnished to Kevin P. Tynan, bar counsel, Florida at 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309 and to J. David Bogenschutz, an attorney for record, Suite 4F, Trial Lawyers 1 633 E. Th: Avenue, Ft. Lauderdale, FL 33301 by regular mail on the 30<sup>th</sup> day of January, 1990.

  
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JACK BLOCK, REFEREE