

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC11-1324

v.

TFB Case No. 2011-51,026(17H)FES

ROBERT W. FRAZIER, JR.,

Respondent.

_____ /

REFEREE'S REPORT AND RECOMMENDATION
TO THE SUPREME COURT OF FLORIDA

THIS CAUSE having come before the Referee pursuant to the Order of the Supreme Court of Florida of April 12, 2011 and the Administrative Order of the Chief Judge of the 15th Judicial in and for Palm Beach County, Florida, Peter D. Blanc of April 12, 2011.

This matter was set for evidentiary hearing by Order of April 21, 2011 and the matter was heard by the Referee on May 3, 2011.

The Florida Bar offered testimony from Alicia Padiar, one of the complainants, her attorney Omar Ortega, and the Florida Bar's Staff Auditor, Carl Totaro. The Florida Bar offered Exhibits 1 through 4 which were received into evidence without objection. Those exhibits include Exhibit #1 "Petition for Emergency Suspension", Exhibit #2 "The Florida Bar Annual Membership Fee",

Exhibit #3 “the Thursday, August 12, 2010 letter from Omar Ortega to Robert W. Frazier, Jr.”, and Exhibit #4 “Portions of the Transcript of the Deposition of Robert W. Frazier, Jr.”. The Florida Bar offered Exhibit #5 “The Florida Bar’s Petition for Contempt and Order to Show Cause”, and the Referee did not accept the exhibit into evidence but made it part of the record for purposes of identification only.

The Respondent, Robert W. Frazier, Jr. offered testimony of Nathan Kalichman, a client of Robert W. Frazier, Jr., Laura Comer, legal secretary who had worked for Mr. Frazier, and Mr. Robert W. Frazier, Jr. testified on his own behalf.

FINDING OF FACT

The evidence shows that Robert W. Frazier, Jr. allowed his Trust Account to become an unregulated, private bank and third-party check clearing house for a long standing important firm client whose name was Nathan Kalichman.

Mr. Kalichman was an investor, developer, and loaner of money to third-parties. Mr. Kalichman was a major and regular client who maintained over 100 files in Mr. Frazier’s office. Mr. Frazier’s secretary testified that she had spoken with Mr. Kalichman more than 1,000 times. Mr. Kalichman was allowed to walk

into the office at any time, bypass the receptionist and secretaries and go directly to Mr. Frazier's office. Mr. Kalichman would routinely deliver checks to Mr. Frazier, sometimes as many as 10 times a week for deposit into his Trust Account. Often times the checks received were third-party checks which Mr. Kalichman had. There was no requirement that checks be made payable to the trust account.

The evidence shows that prior to the event giving rise to Ms. Padiar's complaint against Mr. Frazier, Mr. Kalichman had business involvements with a man named Mr. Berdugo. Mr. Frazier knew who Mr. Berdugo was, and also knew that Mr. Berdugo had been represented by the Kodsi Law Firm. As a result of some business dealings between Mr. Berdugo and Mr. Kalichman, it happened that in December 2007 Mr. Berdugo owed Mr. Kalichman some amount of money. Mr. Kalichman wanted to be paid. The evidence is clear that Mr. Kalichman did not know Mr. Padiar, and Mr. Frazier did not know Ms. Padiar. But each was aware that Mr. Berdugo had been involved in developing a project known as Promenade At Doral II.

Promenade At Doral II was a project that had been proposed for development. In 2006 Alicia Padiar and Mariann Meyer entered into a contract to buy a Promenade At Doral II condominium pre-construction. They executed a

contract and delivered a down payment of \$32,716.00 which was deposited into the Promenade At Doral II, LLC Kodsi Law Firm, P.A. as Escrow Agent Account. For Ms. Padial and Ms. Meyer, this money was their mother's money. It was the money their mother had left to them when she had passed away.

By late 2007 the construction of the condominium project had not progressed and Ms. Padial demanded a return of the deposit.

On December 14, 2007, the Kodsi Law Firm, as escrow agent wrote check #1114 payable to Alicia Padial in the amount of \$32,716.00. The check, in two locations, shows that the payee is Alicia Padial, the memo shows "II Doral – Meyer/Padial 12-226". This check was good funds and represented the return of the deposit owed to Ms. Padial and Ms. Meyer. However, Ms. Padial never saw the check; instead the check came into the possession of Mr. Berdugo. Mr. Berdugo had no right to the check or the monies represented by the check, and yet in order to pay a debt that Mr. Berdugo owed to Mr. Kalichman, he turned the check over to Mr. Kalichman.

The evidence reflects that the check was never endorsed by Ms. Padial, as she had never seen the check. The check was not endorsed by Mr. Berdugo. Mr.

Kalichman had a history with Mr. Frazier of bringing checks to Mr. Frazier's office because all transactions went through Mr. Frazier's office, and he had gotten many checks over the years.

Mr. Kalichman gave the check to Mr. Frazier, and Mr. Kalichman believes that he is the one who endorsed the back of the check. Mr. Kalichman remembers asking Mr. Frazier if this check is good for me. Mr. Kalichman thought that Mr. Frazier knew what was going on relative to receiving this check in payment of a debt owed to Mr. Kalichman.

It was clear that the check was not properly endorsed by Ms. Padiar, or for that matter Mr. Berdugo. It was unrelated to any legal matter being handled by Mr. Frazier at the time. But notwithstanding, Mr. Frazier allowed the check to be endorsed with his law firm's trust account deposit endorsement and deposited into the Frazier Hotten Associates, P.A. Florida Bar Foundation IOTA Trust Account. The deposit slip prepared December 28, 2007 shows the check being posted to the firm's file #9722451.51, which was 1 of more than 100 files that Mr. Kalichman had in the office. On the same day, December 28, 2007, Mr. Frazier wrote several checks out of the trust account posted against the #9722451.51 file,

which included a check to Nathan Kalichman in the amount of \$31,780.33 which contained the description which reads as follows:

“12/28/2007 Nathan Kalichman our file #9722451.51 (balance of funds deposited – 12/28/2007) lrl”

From December 2007 until approximately April 2010, Mr. Frazier didn't think about the check, but Ms. Padial did. Ms. Padial didn't know that her check had actually been written or that it had been taken by Mr. Berdugo. She didn't know Mr. Berdugo; she didn't know that he had turned the check over to Mr. Kalichman in payment of a debt. Nor did she know Mr. Frazier or that Mr. Frazier allowed his law firm to deposit this check into his trust account. She did not know that Mr. Frazier turned the money which belonged to Ms. Padial over to Mr. Kalichman.

What Ms. Padial did know was that she had lost the money that had been left to her by her deceased mother. She was ashamed to tell her sisters, she was depressed, she worried, she couldn't sleep, and she had lost her mother's money. She also knew that she had paid two lawyers in excess of \$11,500.00 to try to get her mother's money back without success. She also knew that she had been unemployed since 2009 and had used her credit cards to pay lawyers to help her solve a problem that a privileged member of the Florida Bar had caused.

It is a violation of Florida Bar Rule 4-8.4(c) for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Pursuant to Rule 4-1.15, "Safekeeping Property," Mr. Frazier had the responsibility of compliance with the Trust Accounting Rules which included Rule 5-1.1(e) that upon receiving funds or other property which a client or other person has an interest, the lawyer is to promptly notify the client or third person.

Mr. Frazier allowed and actively participated in assisting Mr. Kalichman in the use of the firm's trust account as a facility to cash third-party and multi-party checks and then to distribute the proceeds to Mr. Kalichman. Mr. Frazier, when presented with Ms. Padias's check knew from the surrounding circumstances that Ms. Padias was not involved in any business transaction being handled by Mr. Frazier. He knew that the check had not been endorsed by Ms. Padias. He knew that the check was from the Kodosi Escrow Account and related to a project that Mr. Frazier nor his client had any involvement in. As an attorney, he knew that Mr. Kalichman could not by himself cash the check without Ms. Padias's endorsement. He also knew that the bank would accept the check and pay the check if it was placed in his firm's trust account.

Because Mr. Frazier knew that the check belonged to Ms. Padial, he had a responsibility to notify Ms. Padial of the receipt of the check immediately, which he did not do.

Mr. Frazier allowed the bank to process Ms. Padial's check and he distributed her money to Mr. Kalichman on the very same day he received the check. The submission of the check to the bank for deposit was a misrepresentation, was dishonest and deceitful, and done with the intention to use the stature and integrity of a lawyer's trust account to receive payment on a check that Mr. Frazier knew was not properly endorsed and one that his client, on his own, could not have cashed. The actions of Mr. Frazier directly impacted and harmed an innocent member of the public and deprived her of her property.

Therefore the Referee finds that Mr. Frazier is in violation of Rule 4-8.4, Misconduct (c) for engaging in conduct involving dishonesty, deceit, and misrepresentation as well as Rule 4-1.15, failing to safeguard the property of Ms. Padial, and Rule 5-1.1(e), failing to notify Ms. Padial upon receipt of her property into his trust account.

The Referee recommends that Robert W. Frazier, Jr. continue to be suspended from the practice of law pending:

1. A complete audit of the trust account to determine whether the event involving Ms. Padial is an isolated instance or whether it is a pattern of conduct which may have caused injury to other persons.

2. That Ms. Padial receive full and complete restitution, including the amount of \$32,716.00 together with interest thereon from December 28, 2007 through the date of payment. That, restitution further to include all her attorney's fees and costs with interest thereon.

DATED this ____ day of May, 2011.

JACK SCHRAMM COX, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to The Honorable Thomas D. Hall, Clerk, Supreme court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927, and that copies were mailed by regular mail to the following: Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300; Randi Klayman Lazarus Bar Counsel, The Florida Bar, Lakeshore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323; and J. David Bogenschutz, attorney for respondent, Bogenschutz, Dutko & Kroll, 600 S. Andrews Avenue, Suite 500, Fort Lauderdale, Florida 33301 on this _____ day of May, 2011.

JACK SCRAMM COX Referee