IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant

v.

GARY H. NEELY

Respondent

Case No. 65,522
(07A83C43)
(07A84C29)

FILED
SID J. WHITE
OCT 7 1985
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "The Bar", Respondent, Gary H. Neely, will be referred to as "Mr. Neely", Ms. Nancy Gardner will be referred to as "Ms. Gardner". The following symbols will be used:

R for the record of November 29, 1984
REF for the Referee's Report

STATEMENT OF THE CASE

Complainant adopts respondent's Statement of the Case.

STATEMENT OF THE FACTS

Ms. Gardner retained Mr. Neely in 1982 to represent her in a personal injury claim. In August, 1983, Ms. Gardner became dissatisfied with Mr. Neely's representation and retained Larry Sands, P.A., to finalize her claim (R-14). The firm determined that certain of Ms. Gardner's health care providers had not yet been paid from the periodic disbursements of the insurance carrier and contacted Mr. Neely about funds which he had in his trust account for Ms. Gardner. Mr. Neely sent the firm a check for $2,948.51 drawn upon his trust account in early September, 1983. This was the amount of the latest disbursement from the insurance carrier of early July, 1983 (R-16). Upon receiving Mr. Neely's trust account check, Mr. Larry Sands' office contacted Mr. Neely's bank and was advised that there were not sufficient funds in the account to cover the check, but to present the check anyway. The bank notified Mr. Neely of the overdraft and he covered both the overdraft and the bank's overdraft charge so that the check was honored that same day (R-16-17). The referee noted that the trust account record reflects that the account did not contain sufficient funds to honor the check for extended periods

between its deposit on July 27, 1983, and its payment on September 9, 1983 (REF-3).

Mr. Neely attributed this situation to embezzlement by one of his employees (R-57). However, as the trier of fact indicated, Mr. Neely failed to report this theft to law enforcement authorities and never even determined the exact amount allegedly stolen (R-57). The referee noted several insufficiencies in the account, including at least one caused by the respondent's transferring funds to himself which would have been noted had Mr. Neely paid attention to his trust account (REF-3).

There was conflicting testimony as to whether Mr. Neely had any authority to sign Ms. Gardner's name to the check when he deposited it into his trust account. Ms. Gardner stated that Mr. Neely never advised her of his receipt of the check, did not have power of attorney to sign her name, and was therefore not authorized to deposit the check (R-30-31, 35). Mr. Neely's defense, supported by his secretary, Mrs. Crabtree, was that he informed Ms. Gardner of his receipt of the check over the telephone after he had held onto the check for about two (2) weeks, and she advised him that she would not be in his office in the near future, told him to sign her name to the check and deposit it into

his trust account but not to pay any outstanding medical bills (R-51 and 62). In signing Ms. Gardner's name to the check, Mr. Neely did not indicate he was doing so by her authority (R-62-63). The referee questioned the moral conduct of the respondent in subscribing his client's name to the check and then failing to advance funds from the check, which he received in early July, to either his client or to her medical providers from the period from July 27 until September 7, 1983. (REF 3-4)

A further conflict arises regarding the extent of the personal relationship which existed between Ms. Gardner and the respondent. While Ms. Gardner stated it was a very brief affair which ended in 1982 (R-26 and 37-38), Mr. Neely maintains it was a long and serious relationship (R-17, 53-54). The referee also questioned Mr. Neely's moral conduct in engaging in such a relationship with a client (page 3-4).

SUMMARY OF ARGUMENT

It is well settled that the Florida Supreme Court will not overturn a referee's findings of fact and/or conclusions unless they are clearly erroneous or without support in the record. It is not the province of the court to retry the issues, but merely to review the referee's report, and record, and unless his finding of guilt is erroneous or contrary to the evidence, impose an appropriate discipline. Thus, it is inappropriate for the respondent to attempt to retry his case in this forum by bringing up the conflicts in the evidence which were already decided by the referee.

The referee made a finding of a violation of 9-102(B)(1) where the respondent either entirely failed to notify his client of his receipt of an insurance disbursement check, or did not do so for over two weeks. The evidence on this point was conflicting, yet even in respondent's testimony it is undisputed that he did not allege any attempts to notify his client of the check a period of 15 days, and only then notified her when she contacted him.

The referee found that 9-102(B)(4) was violated by failing to promptly pay or deliver property or funds to the client which she was properly entitled to where the

respondent held on to his client's insurance check from early July until early September without transferring funds to either his client or her medical providers. The client notified the respondent of his termination in the case in August, yet did not receive the funds until September 9.

Regarding 1-102(A)(4), the finding of conduct involving dishonesty, fraud, deceit, or misrepresentation by the referee was not stated specifically. However, the abundance of directly conflicting evidence, particularly in regard to the client's signature which the respondent subscribed to her insurance disbursement check, which the referee found morally questionable, supports this finding made by the referee.

The violations of Fla. Bar Integr. art. XI, Rule 11.02(4) are noted throughout the record and the referee's report. The inaccuracies and insufficiencies of the trust account were so numerous and obvious that the referee concluded that even if the respondent's employee was responsible for the shortages, the attorney would have noticed the discrepancies had he paid due attention to his trust account.

The six month suspension and subsequent probation recommended by the referee is appropriate discipline in this

case involving trust account violations if the purposes of attorney discipline are to be served, particularly where the respondent has been disciplined twice previously.

ARGUMENT

POINT I

RESPONDENT CANNOT ATTACK THE REFEREE'S FINDINGS ON REVIEW IF THEY ARE NOT CLEARLY ERRONEOUS AND ARE SUPPORTED BY THE EVIDENCE.

It is well settled that a referee's findings of fact will be upheld unless they are clearly erroneous or without support in the evidence. The Fla. Bar Integr. art. XI, Rule 11.06(9)(a) establishes that a referee's finding shall have the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. In The Florida Bar v. Hirsch, 359 So. 2d 856 (Fla 1978), the court addressed the standard of review of a referee's fact finding where conflicting testimony had been presented at trial concerning whether or not the respondent had practiced law during his period of suspension. The court upheld the referee's finding of fact, noting that such a determination was the referee's responsibility and would not be overturned unless it was clearly erroneous or without supporting evidence.

> "We have carefully reviewed the evidence and find that the reports of both referees are supported by competent and substantial evidence which clearly and convincingly shows that Hirsch has violated the Code of Professional Responsibility in the respects charged. We approve the findings of fact and conclusions filed by the referees.", at 857.

In The Florida Bar v. Hoffer, 383 So. 2d 639 (Fla 1980), the court held similarly where, as in the case at hand, there was conflicting evidence and the respondent challenged the referee's findings of fact as not being supported by clear and convincing evidence. The court stated:

> Our responsibility in a disciplinary proceeding is to review the referee's report and, if his recommendation of guilt is supported by the record, to impose an appropriate penalty, [Citing Hirsch] The referee, as our fact finder, properly resolves conflicts in the evidence. See The Florida Bar v. Rose, 187 So. 2d 329 (Fla 1966). We have reviewed the record and the report of the referee, and we find that the referee's findings of fact and recommendation of guilt are supported by clear and convincing evidence.

The Rose case noted that the referee is in the best position to consider and decide conflicting evidence. The same logic applies to the referee's conclusions from his findings. It is simply inappropriate for the respondent to attempt to retry his case in this forum after the referee has already made his findings of facts based on competent and substantial evidence before him, absent a showing that his findings are clearly erroneous or without support in the evidence.

ARGUMENT

POINT II

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE ON THE RECORD.

The record reflects the evidence for the referee's findings of fact in every respect. In such a case as this where there is a great deal of conflicting testimony, the credibility of the testimony is an important factor to the referee in making his findings of fact. In the case at hand, the referee, in making his conclusions of guilt, determined that the credibility of the testimony, or lack of it, was of more significance than the number of witnesses alone. In Hoffer, supra, the referee made such a determination in a case where there was also conflicting testimony, noting the incredibility of respondent's defense, at 641.

The respondent's allegation that the referee's findings of violations of the Code of Professional Responsibility, 9-102, are invalid is refuted by the record. 9-102 (B)(1) states that a lawyer shall "promptly notify a client of the receipt of his funds, securities or other properties". Throughout his report, the referee noted the inadequacies in the respondent's trust account maintenance. Further, the

referee questioned the moral conduct of the respondent in subscribing his client's name to her disbursement check and then failing to advance funds from the check to either his client or to her medical providers. The record clearly reflects the basis for the referee's findings at R1-30-31 and 35, where the client, Ms. Gardner, states that she was never informed of Mr. Neely's receipt of her insurance disbursement. Further, even in the respondent's version of the facts, he admits that he held onto the check for some fifteen (15) days without informing Ms. Gardner of it and, as his secretary testified, did not inform Ms. Gardner of it until she telephoned him; at R-45.

The respondent also challenges the referee's findings of a violation of Code of Professional Responsibility 9-102 (B)(4), which states a lawyer shall "promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive". As the referee noted, the respondent failed to promptly remit the proceeds of the draft which he deposited on July 27 to either his client or her medical providers and also failed to remit payment to his client's new attorney for some twenty (20) days. In summary, it is clear that the respondent received

the check in early July, deposited the check in his trust account on July 27, and, though advised of his termination in the case in August of 1983, did not turn his client's funds over to his client's new attorney until September 7, 1983. Thus, the clear and convincing evidence of the record clearly supports the referee's finding of guilt on this issue.

Regarding 1-102(A)(4), that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation", the referee noted that "though it would appear that respondent herein may have been dishonest in this matter, there is no proof of dishonesty and the referee must conclude that he is guilty of woeful if not willful neglect.", REF-5. However, it is clear that the referee found that the respondent was not authorized to sign the client's name to her disbursement check.

> "Finally, this referee questions the moral conduct of the respondent who would have, as did the respondent, a love affair with his client, subscribe the name of his client to the insurance company draft and then fail to either (1) promptly remit the proceeds of the draft deposited on July 7 to his client or to the provider of medical services, or (2) fail to remit payment to Larry Sands for twenty (20) days.", REF-5.

The respondent further challenges the referee's findings as to Fla. Bar Integr. art XI, Rule 11.02(4). However,

the referee's findings of violations were specifically stated in his report and were documented throughout the record. Rule 11.02(4)(b) provides for maintaining trust account records which "clearly and expressly reflect the date, amount, source and reason for all receipts, withdrawals, delivery and disbursement of the funds or property of a client". As the referee noted, the respondent's internal records "clearly demonstrate the respondent's inattention to his trust account and apparent inability to maintain clear and accurate records", REF-2. The referee noted that the internal trust account record reflects that the account did not contain sufficient funds to honor the check of his client for extended periods between its deposit on July 27, 1983 and September 7, 1983, when his client's new attorney attempted to cash the check and was informed of the insufficiency which Mr. Neely later covered. The referee further noted the numerous accounting errors and periods of insufficient funds in the account, some caused by the respondent transferring funds from the account to himself. These should have brought the respondent's attention to the irregularities in the trust account even if the alleged embezzlement by his employee was taking place, REF-3. Respondent himself admitted that he failed to review all of

the quarterly reconciliations of the account, R-55, and that he only reviewed the balance every three to four weeks, R-56. The referee further noted that had the respondent been paying attention to his internal trust account records, he would have been aware that his internal records reflected even greater overdrafts than the bank statement did, REF-3.

The above findings clearly provide for a basis of the referee's findings of violations of the more general 1-102(A)(6) and Fla. Bar Integr. art. X1, Rule 11.02(3)(a), reflecting on one's fitness to practice law and moral conduct.

ARGUMENT

POINT III

A SIX MONTH SUSPENSION AND SUBSEQUENT PROBATIONARY PERIOD IS APPROPRIATE DISCIPLINE ON THIS CASE INVOLVING TRUST ACCOUNT VIOLATIONS WHERE THE RESPONDENT HAS BEEN DISCIPLINED TWICE PREVIOUSLY.

The Fla. Bar Integr. art. XI, Rule 11.02 provides that the purposes of attorney discipline are protection of the public, administration of justice, and the protection of the legal profession through the discipline of members through the Bar. In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), the court further addressed the goals of discipline, noting:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations, at 986.

In The Florida Bar v. Larkin, 447 So. 2d 1340, (Fla. 1984) the court noted another important purpose, that of

protecting the favorable image of the legal profession by imposing visible and effective discipline for serious violations, at 1341. Obviously, each discipline case has a different fact pattern and individual consideration is necessary to carry out the above purposes. It is evident that trust account violations are among the most serious types of violations, and trust account rules have been consistently tightened in an effort to insure greater diligence and fiduciary care by all attorneys. In compliance with the disciplinary goal of deterrence, it is imperative that attorneys be made to understand that mismanagement of trust accounts will be dealt with severely.

There are many cases which demonstrate the seriousness of trust account violations, regardless of whether the client is ultimately harmed or not. In The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982), the attorney withheld $2,500 for almost a year and his trust account encountered shortages approximating $20,000 due to both improper record keeping and misuse of the money. There were also overdrafts, commingling, and inadequate staff supervision. Although the money was returned to the clients, Whitlock was

suspended for three years with proof of rehabilitation required.

In The Florida Bar v. Bryan, 396 So.2d 165 (Fla. 1981) an attorney was suspended for six months with proof of rehabilitation required for wrongfully withholding over $10,000 for at least six months after demand and more than three months after the complaint was filed with The Florida Bar. The client suffered no economic loss. The respondent also had deficiencies in his trust account and his trust records were improperly maintained. The respondent indicated that he had not consciously intended to misappropriate his client's money, pleading that there had been a dispute over the amount of his fee and he had delayed the remission of the money out of anger and frustration. The referee also noted that Bryan had health problems.

In The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980) the attorney had substantial trust account deficits totaling over $24,000 over a two year period. Although he was fully cooperative, made repayment and plead lack of knowledge of the rules, Welty was suspended for six months with proof of rehabilitation required. The court noted that: "The lawyer should guard his client's funds with much greater diligence and caution than his own.", at 1222.

Trust account violations are treated seriously even when only small amounts of money are involved. In The Florida Bar v. Kates, 387 So.2d 947 (Fla. 1980) an attorney was suspended for three months and one day with proof of rehabilitation required for neglect of an estate and failing to properly account for trust monies by improperly commingling $74.50, note Kates had one prior discipline for neglect.

As the referee noted, The Florida Bar v. Davis, 446 So.2d 1072 (Fla. 1984) is factually similar to this case if one takes the position that respondent's improper trust account procedures were a matter of neglect rather than dishonesty. Davis, who had one prior reprimand, received a suspension of three months for each of the counts he was found guilty of, both to run concurrently for neglect and improper trust account record keeping. It should be noted that respondent's reference to The Florida Bar v. Thompson, 429 So.2d 2 (Fla. 1983) is inappropriate. That case involved a number of bounced checks from an attorney's office account rather than trust account violations. Further, the court noted, at 3, that Thompson would have been suspended if the bounced checks had not occurred so long ago.

Although respondent's mishandling and lack of attention to his trust account may not be as egregious as many of the

trust account violation cases noted above, serious discipline is warranted in order to effectuate the purposes of discipline. The purpose of protecting the public is especially necessary where respondent is displaying a lack of attention to and mishandling funds which a member of the public has entrusted to a member of the Bar. Second, the recommended discipline is fair to the respondent to punish the breach and encourage rehabilitation and reform. This is particularly apt in this case where respondent has been subject to discipline twice previously. Proof of rehabilitation is amply warranted by the respondent's failure to learn from his two prior disciplinary actions that misconduct will not be tolerated. Third, deterrence of other attorneys is especially important where trust accounts are involved. This court's series of changes to the rules of trust account keeping and reporting demonstrate the importance of this aspect. The Florida Bar knows of no other way that this court can warn other members that trust account violations will not be allowed.

Respondent's violation obviously is made more serious because of his discipline history. His prior two cases did not involve trust accounts, but rather a 1979 ninety (90) day suspension for self-dealing with the client to the

client's disadvantage and misrepresenting matters to either the grievance committee, the referee or both, The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979) and a 1982 public reprimand and one (1) year probation for neglecting a legal matter, The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982). It is well settled that discipline has a cumulative effect, The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983); The Florida Bar v. Reese, 421 So.2d 495 (Fla. 1982); and The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981). In Bern, the attorney was found guilty of entering into a partnership with a client in a situation involving conflict. Although this misconduct was not that egregious per se, the court held that in view of his prior history a suspension with proof of rehabilitation required was warranted.

The respondent has apparently failed to take heed of the importance of strict ethical adherence and has yet to acknowledge wrongdoing in the present case. Thus, the discipline recommended by the referee involving a six month suspension with proof of rehabilitation required, followed by an appropriate probationary period is necessary to serve the purposes of attorney discipline.

CONCLUSION

WHEREFORE, the Board of Governors of The Florida Bar respectfully prays that this Honorable Court will review the referee's report and recommendation; approve the findings of fact and recommendation of guilt and his recommended discipline of a six month suspension as well as a subsequent probationary period with proof of rehabilitation required prior to reinstatement as recommended by the referee and pay costs in these proceedings currently totalling $719.76

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the forgoing Complainant's Answer Brief has been furnished by ordinary U.S. mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing was mailed by ordinary U.S. mail to Horace Smith, Jr., Counsel for Respondent, Post Office Drawer 2600, Daytona Beach, Florida, 32014; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 4th day of October, 1985.

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