

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

FILED

S/D J. WHITE

SEP 16 1985

CLERK, SUPREME COURT

By

Chief Deputy Clerk

CASE NO. 65,522

THE FLORIDA BAR,

Complainant,

vs.

GARY H. NEELY,

Respondent.

BRIEF IN SUPPORT OF THE
PETITION FOR REVIEW OF THE
REPORT OF REFEREE IN JUDGMENT

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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 symbol will be used:

"R" for record on appeal.

STATEMENT OF THE CASE

On March 14, 1984, the Seventh Judicial Circuit Grievance Committee found probable cause to pursue an action against Mr. Gary H. Neely, the Respondent in this action, for violation of Fla. Bar Code Prof. Resp., D.R. 5-103(B). This case involved a client by the name of Cynthia Pollock. The Grievance Committee also found probable cause to pursue an action against Mr. Neely regarding violation of Fla. Bar Code Prof. Resp., D.R. 1-102(A)(4), 1-102(A)(6), 9-102(B)(1), and 9-102(B)(4), and Fla. Bar Integr. Rule art. XI, Rules 11.02(3)(a), and 11.02(4). These violations involved the client, Nancy Gardner.

The Florida Bar, Complainant, filed a two-count complaint for these various alleged violations involving the two clients, Cynthia Pollock and Nancy Gardner. Count I of the complaint involved the client, Cynthia Pollock and alleged basically that Mr. Neely had advanced living expenses to Ms. Pollock during the attorney-client relationship. Count II involved the client, Nancy Gardner, and alleged basically that Mr. Neely had improperly endorsed his client's name on the back of an insurance draft in the amount of \$2,948.51, which was payment for PIP benefits. Count II also alleged that Mr. Neely deposited the \$2,948.51 in his trust account and subsequently wrote a check on his trust account for the same amount, however, at the time the trust account

did not contain sufficient funds to honor the check. It was also alleged in Count II that Mr. Neely never advised his client, Ms. Gardner, that her health care bills were in excess of the policy limits on the recovery and that during the attorney-client relationship with Ms. Gardner, Mr. Neely had a personal relationship with her.

Mr. Neely appeared before the referee to answer these allegations on March 1, 1985. After hearing the evidence, testimony, and argument of counsel, the referee found that Mr. Neely was not guilty of disciplinary violations alleged against him involving his client, Cynthia Pollock. As to the allegations concerning his ethical responsibilities relating to Ms. Gardner, the referee found as follows:

I recommend that the respondent be found guilty and, specifically, that he be found guilty on the following violations of his oath as an attorney: The Integration Rules of the Code of Professional Responsibility, to wit: Integration Rules 11.02(3)(a) and 11.02(4) and Code of Professional Responsibility Disciplinary Rules 1-102(A)(4) and (6), and 9-102(B)(1) and (4).

It is from the referee's findings of fact from which Mr. Neely takes his appeal.

STATEMENTS OF THE FACTS

During the years of 1982 and 1983, Mr. Neely represented Ms. Cynthia Gardner regarding a personal injury claim which she was pursuing. During the course of the representation, Mr. Neely was receiving the PIP benefits on behalf of Ms. Gardner for payment of medical bills.

In 1983, Mr. Neely received a check in the amount of \$2,948.51. The check came to Mr. Neely's office and was not deposited immediately. Ms. Gardner, around July, 1983, called Mr. Neely's office and spoke with Mr. Neely. Mr. Neely informed her about the check and told her that it had been with him for a while. [R-45,51,54] Ms. Gardner informed Mr. Neely that she did not know when she would be able to come in and sign the check, so he should deposit the check in his trust account but not disburse any funds. [R-45,51] Mr. Neely signed Ms. Gardner's name to the check and deposited it into his trust account. [R-14]

During the course of the attorney-client relationship, there were indications that Ms. Gardner and Mr. Neely had serious disagreements. Ms. Gardner and Mr. Neely had been romantically involved during Mr. Neely's separation from his wife. [R-26,43] Mr. Neely decided to reconcile with his wife and informed Ms. Gardner of this fact. Ms. Gardner became very upset and angry in front of Mr. Neely's employees when she became aware that Mr. Neely was not going to marry

her. [R-43,54] Ms. Gardner and Mr. Neely also had continued disagreements regarding how the PIP benefits should be disbursed. [R-54] Mr. Neely had informed Ms. Gardner that medical bills were required to be paid from the check, nevertheless, Ms. Gardner continuously demanded that some of the money be paid to her. [R-54] Mr. Neely refused to do as Ms. Gardner requested, and this upset Ms. Gardner.

Ms. Gardner eventually engaged new counsel, Sarah White, and Mr. Neely's file was transferred to Ms. Gardner's new attorney. [R-24] Once the file had been transferred, Ms. Gardner claimed that she became aware of the check for \$2,948.51 for the first time and told Ms. White that she had never signed the check. Ms. White then requested Mr. Neely to transfer any money he was holding for or on behalf of Ms. Gardner. Mr. Neely wrote a check from his trust account in the amount of \$2,481.51, to transfer the PIP benefits to Ms. Gardner. During the transfer, it was discovered that Mr. Neely's account was short \$7.00. Mr. Neely immediately deposited the money to cover the shortage and, consequently, his trust account check was honored. There was also evidence of embezzlement by one of Mr. Neely's employees. One of the employees had been taking funds from the trust account, causing incorrect balances within the trust account. When Mr. Neely wrote the check, he did not know his trust balance was not accurate. Based on these facts, Ms. Gardner filed a complaint against Mr. Neely with the Florida Bar.

SUMMARY

Mr. Neely was found guilty of failing to promptly notify Ms. Gardner, his client, of the receipt of an insurance check, payable for medical bills. The referee made no finding of fact on this issue. Nowhere in the referee's findings does the referee state that Mr. Neely failed to promptly notify Ms. Gardner of the receipt of this check. Further, the evidence demonstrated that Mr. Neely did notify his client of the receipt of the insurance check. Therefore, the referee improperly found Mr. Neely guilty of violating Fl. Bar Code Prof. Resp., D.R. 9-102(B)(1).

The referee also found Mr. Neely guilty of violating Fl. Bar Code Prof. Resp., D.R. 9-102(B)(4). That rule requires Mr. Neely to promptly pay or deliver property or funds to the client which the client is entitled to receive. The evidence clearly demonstrated that the only property Mr. Neely held on behalf of Ms. Gardner was money that was required to be disbursed to her medical providers. The evidence was clear and undisputed that Mr. Neely could not transfer PIP insurance benefits to Ms. Gardner for her own personal use. Nevertheless, the referee found that Mr. Neely failed to promptly pay or deliver property of Ms. Gardner to her which she was entitled to receive. There was no evidence submitted which clearly and convincingly supported the conclusion of the referee.

The referee also found that Mr. Neely violated Fl. Bar Code Prof. Resp., D.R. 1-102(A)(4), which provides that an attorney should refrain from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. At no point in the proceedings was it ever contended that Mr. Neely was guilty of fraud, deceit, or misrepresentation. The referee made the finding that there was no proof of dishonesty on Mr. Neely's part. Further, there was no evidence submitted showing dishonesty on Mr. Neely's part.

The referee also found that Mr. Neely was guilty of violating Fla. Bar Integr. Rule art. XI, 11.02(4), which governs management of trust accounts. However, pursuant to that integration rule, all the lawyer is required to do is maintain certain records and checks, indicating transactions occurring within the trust account. Further, the attorney is required to do period reconciliations. At no point in the proceeding was it ever proved that Mr. Neely did not have records of the transactions which occurred within his trust account. Further, it was never proved that Mr. Neely did not complete periodic reconciliations of his trust account. Mr. Neely did issue one check in the amount of \$2,948.51 when his trust account was \$7.00 short of covering the check. However, evidence at the hearing demonstrated that an employee of Mr. Neely's had been embezzling from the trust fund, and he was unaware of the problems in the trust fund. Nevertheless, the referee found that Mr. Neely had violated

Fla. Bar Integr. Rule art. XI, 11.02(4), apparently because Mr. Neely did not catch the embezzlement scheme within that time period that the referee felt was reasonable.

ARGUMENT

POINT I

THERE WAS NO CLEAR AND CONVINCING EVIDENCE SUBMITTED THAT DEMONSTRATED THAT MR. NEELY VIOLATED FLA. BAR CODE PROF. RESP., D.R. 9-102(B)(1) and (4).

The referee specifically found that Mr. Neely was guilty of violating the Fla. Bar Code Resp. D.R. 9-102(B)(1) and (4). No clear and convincing evidence was submitted to support a finding of a violation of this disciplinary rule.

Fla. Bar Code Resp. D.R. 9-102(B)(1) and (4) provide:

(B) A lawyer shall:

(1) Promptly notify the client of the the receipt of his funds, securities, or other properties.

* * *

(4) 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. (emphasis added)

The factual findings made by the referee did not decide the issue of Mr. Neely's failure to promptly notify Ms. Gardner of the receipt of the funds from the insurance company. In any event, Mr. Neely presented testimony, which was corroborated by the office staff, that Ms. Gardner, the client involved, was notified of his receipt of the \$2,948.51 insurance check. In fact, Ms. Crabtree overheard Mr. Neely

advise Ms. Gardner that this check had been sitting in his office for quite a while. [R-51] She heard Ms. Gardner tell Mr. Neely to go ahead and deposit the check into his account and not to disburse any of the funds. [R-45,51] Ms. Gardner denied this fact.

Further testimony revealed that Ms. Gardner wanted to be paid some money out of those funds. [R-54] However, Mr. Neely continuously explained to her that the funds had to be paid to the health providers and that he would not disburse any money to her personally. Ms. Crabtree also verified that Ms. Gardner wanted the money herself rather than have it disbursed for payment of medical bills. Therefore, since there was no clear and convincing evidence that Mr. Neely failed to notify Ms. Gardner of the receipt of those funds, and no finding by the referee on this issue was made, the referee should not have found that Mr. Neely was guilty of violating Fla. Bar Code Resp. D.R. 9-102(B)(1).

The referee also found that Mr. Neely had violated Fla. Bar Code Resp. D.R. 9-102(B)(4), by failing to promptly pay or deliver to Ms. Gardner, as requested by Ms. Gardner, property in the possession of Mr. Neely which Ms. Gardner was entitled to receive. There was no evidence submitted at trial from which the referee could conclude that this violation occurred. In fact, Mr. McGunegle, Florida Bar Counsel, asked Ms. White:

MR. MCGUNEGLE: At any rate, in a very short period of time the file was transferred over to you?

MISS WHITE: Yes, it was.

[R-15,16]

Nothing in Ms. White's testimony indicated that Mr. Neely had been negligent or slow in delivering property belonging to Ms. Gardner. It is true, Ms. Gardner requested Mr. Neely to pay her money out of the PIP benefits that Mr. Neely had received on her behalf, however, even The Bar admits that Mr. Neely could not have given her this money and, therefore, she was not entitled to it.

Since there is no evidence in the record demonstrating that Mr. Neely failed to promptly pay or deliver to Ms. Gardner property belonging to her to which she was entitled, the referee improperly found Mr. Neely guilty of violating Fla. Bar Code Resp. D.R. 9-102(B)(4). This finding should be reversed.

POINT II

THERE WAS NO CLEAR AND CONVINCING EVIDENCE SUBMITTED WHICH DEMONSTRATED THAT MR. NEELY VIOLATED FLA. BAR CODE PROF. RESP., D.R. 1-102(A)(4).

The referee found that Mr. Neely violated Fla. Bar Code Prof. Resp., D.R. 1-102(A)(4). D.R. 1-102(A)(4) provides:

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The referee, in his report stated: "There is no proof of dishonesty" on the part of Mr. Neely. Further, the findings of fact made by the referee do not indicate any fraud, deceit, or misrepresentation on the part of Mr. Neely. There was no such finding of fact, because no testimony or evidence was submitted which showed fraud, deceit, or misrepresentation on the part of Mr. Neely. In fact, Ms. Gardner testified that she did not believe that Mr. Neely ever intended to take or convert the insurance check to his own use.

Although, the referee found that Mr. Neely endorsed the name of Ms. Gardner on the insurance check, this fact alone is not sufficient to support a finding that Mr. Neely was guilty of acting dishonestly. The fact that Mr. Neely signed Ms. Gardner's name to the check was never an issue; Mr. Neely openly admitted throughout the entire proceedings

that he had done so. What was an issue, and what the referee never determined, based on his findings, was whether Mr. Neely had the consent of Ms. Gardner to sign her name to the check.

It is evident that The Florida Bar also agrees that the issue of consent was the issue to be decided regarding Mr. Neely's handling of the check. The Bar prosecutor stated to the judge that the issue was whether Ms. Gardner had authorized Mr. Neely to sign her name to the check. [R-4,5]

Nevertheless, the findings of the referee did not address the crucial issue of consent or authority. Further, the evidence solicited at trial does not clearly and convincingly show that Mr. Neely did not have this consent or authority. Perhaps the reason why the referee did not make such a finding is because of the corroboration of Ms. Crabtree that Ms. Gardner authorized Mr. Neely to sign her name. [R-45,51] Ms. Crabtree had no reason to lie; she was, perhaps, the only disinterested person to testify during the entire hearing. Ms. Crabtree no longer worked for Mr. Neely at the time of her testimony and had no financial or other interest resting on the outcome of the hearing.

Additionally, the evidence at the hearing demonstrated that Mr. Neely had done exactly as he testified Ms. Gardner had instructed; he signed her name to the check, deposited the check, and did not disburse the funds.

Ms. Gardner's own testimony indicated that she had left the affairs of her case completely in Mr. Neely's care and given him authority to act as he felt was necessary. She testified that she had entrusted all the legal paper work to Mr. Neely. [R-30] In fact, Ms. Gardner recalled discussing with Mr. Neely that he had a power of attorney to act on her behalf. [R-29] This testimony indicated that Ms. Gardner had complete confidence in Mr. Neely, and so it would not be unusual for her to have requested Mr. Neely to sign her name to the check and deposit it.

There was no clear and convincing evidence showing that Mr. Neely acted dishonestly; in fact, the referee found "no proof of dishonesty." Further, the referee never reached a decision on the issue of consent or authority, at least none is reflected in the findings of fact. Therefore, the referee erred in finding Mr. Neely guilty of violating Fla. Bar Code Prof. Resp., D.R. 1-102(A)(4).

POINT III

THERE WAS NO CLEAR AND CONVINCING EVIDENCE SUBMITTED AT THE DISCIPLINARY HEARING WHICH SUPPORTED THE REFEREE FINDING MR. NEELY GUILTY OF VIOLATING FLA. BAR INTEGR. RULE, ART. XI, RULE 11.02(4).

Fla. Bar Integr. Rule, art. XI, Rule 11.02(4) governs trust management. Pursuant to this rule, the attorney is required to maintain records reflecting withdrawals and general transactions affecting the clients' money. The rule defines records as checkbooks, cancelled checks, check stubs, vouchers, ledgers, journals, closing statements, accountings, or other statements reflecting disbursements. The rule also requires an attorney to do reconciliation of his bank trust at periodic intervals and to file annually a certificate reflecting compliance with the minimum record keeping procedures.

In the instant case, no evidence was submitted by the bar which demonstrated that Mr. Neely failed to keep records of transactions concerning his trust account. Mr. Neely produced these records at trial. No evidence was submitted by The Bar which indicated Mr. Neely failed to perform periodic record reconciliation or file the annual certificate of compliance, which was required. In fact, Mr. Neely testified that his accountant, Bill Brown,

performed the reconciliations, and Mr. Neely maintained that he had copies of those reconciliations. [R-55]

The only complaint The Bar alleged was that Mr. Neely had a \$7.00 insufficiency when he issued the \$2,948.51 check to Ms. Gardner's new attorney, and The Bar alleged that there were incorrect balances existing in Mr. Neely's trust ledger during a six-week period. [R-5] In fact, Mr. McGun-egle stated on the record that Mr. Neely's record system was the standard system used throughout the system today. [R-56] Therefore, it was apparent that The Bar was not taking issue with the type of records system Mr. Neely was using.

There is no question that Mr. Neely's trust balance had fluctuated and on occasion did not reflect the proper balances. The question which remained, however, was whether Mr. Neely was responsible for these fluctuations and incorrect balances existing within his trust account.

The uncontroverted testimony at the disciplinary hearing demonstrated that Mr. Neely was not responsible for those fluctuations and incorrect balances. Both Ms. Crabtree and Mr. Neely testified that an employee of Mr. Neely's was embezzling funds from Mr. Neely's trust account. [R-47,57] This testimony was never disputed by The Bar. The Bar prosecutor offered no evidence to rebut Mr. Neely's defense that the incorrect balances were the result of acts beyond Mr. Neely's control. In fact, Mr. Brown testified that after reviewing the accounts, he found instances where amounts of

money had been added to the trust balances, but no deposits had been made. In his opinion, there was an embezzlement; and no matter what trust account system is used, someone could still embezzle money from the account without the attorney's knowledge.

It is respectfully submitted that the rule punishing an attorney for keeping records of trust transactions was not intended to apply to situations where theft by an attorney's employee is involved. Rule 11.02(4), as it existed in 1983, only required periodic reconciliations. In the instant case, the reconciliations were based on what the bookkeeper had given the accountant. In this case, the bookkeeper was the thief. [R-55,57]

It is unfair to expect, as the referee apparently did, for Mr. Neely to immediately uncover the embezzlement scheme. The referee's findings of fact indicated that the referee felt that the inconsistent balances in the trust account should have put Mr. Neely on notice of a problem with his account. Unfortunately, no evidence was submitted from which the referee could have drawn this conclusion. Embezzlers often go undetected for months at a time. They are in a position to hide their theft by adjusting the books to reflect balances that do not actually exist. Even major financial institutions suffer from acts of embezzlement that may exist for months, even years, without detection. This

occurs even when advanced and sophisticated computers are used which are designed to detect such criminal acts.

The referee, in determining that Mr. Neely should have discovered the embezzlement within only a few months, was not basing his opinion on any of the evidence submitted. Mr. Neely relied on the honesty of his bookkeeper, and once it was discovered that there was a problem, he took immediate steps to correct it. [R-54] Further, when Mr. Neely wrote the check, the trust balance showed sufficient money to cover the check. [R-55] Mr. Neely's only fault was that he was overly trusting.

Reviewing the testimony and evidence at the hearing, there was no clear and convincing evidence that Mr. Neely violated Fla. Bar Integr. Rule, art. XI, Rule 11.02(4). The Bar prosecution failed to show that Mr. Neely did not keep trust records. The Bar prosecution failed to prove that Mr. Neely did not do periodic reconciliations. The Bar did not prove that Mr. Neely failed to file the annual certificate. Finally, The Bar did not show that Mr. Neely was the one that was responsible for the incorrect balances, as he was the victim of embezzlement.

What the evidence did show was that Ms. Gardner was not harmed in the slightest by the problems existing in the Neely trust account. Nor was Ms. Gardner's new attorney delayed in prosecuting Ms. Gardner's action, as a result of the inconsistencies in the Neely trust account. It appears

that the only victim and the only individual harmed by the inconsistencies in the Neely trust account was Mr. Neely himself. Not only did he lose money, as a result of the embezzlement, but then he was also subject to disciplinary proceedings brought by The Bar, resulting in determination that he would be suspended from the practice for six months.

POINT IV

THERE WAS NO CLEAR AND CONVINCING EVIDENCE SUBMITTED AT THE DISCIPLINARY HEARING THAT MR. NEELY VIOLATED FLA. BAR CODE PROF. RESP., D.R. 1-102(A)(6) AND FLA. BAR INTEGR. RULE ART. XI D.R. 11.03(a).

Fla. Bar Code Prof. Resp., D.R. 1-102(A)(6) provides:

(a) A lawyer shall not:

(6) Engage in any other conduct that adversely affects on its fitness to practice law.

This catch-all provision requires the finding that the attorney has done something wrong. Since Mr. Neely did nothing wrong, or the evidence did not clearly and convincingly show any wrongdoing, Mr. Neely should not have been found guilty of violating this rule.

Further, the finding of guilt based upon alleged violation of Fla. Bar. Integr. Rule art. XI, D.R. 11.03(a) should also be reversed based on the arguments already given.

POINT V

THE SIX MONTH SUSPENSION IS OVERLY SEVERE
BASED ON THE FACTS PROVED.

It is undisputed that Ms. Gardner did not suffer any harm or loss of funds. It is undisputed that Mr. Neely handled Ms. Gardner's case competently, in fact, the settlement Ms. Gardner received was exactly the same settlement Mr. Neely had gotten for her.

There was a finding by the referee that Mr. Neely's conduct was not dishonest and no willful breach of any disciplinary rule had occurred. Mr. Neely's difficulties with the trust account were not the result of his carelessness, rather they were the result of embezzlement, which was corroborated by two witnesses.

Finally, many of the violations the referee found Mr. Neely guilty of were not supported by the findings of fact or evidence.

It is, therefore, respectfully submitted that Mr. Neely's six month suspension is improper. See, The Florida Bar v. Thompson, 429 So.2d 2 (Fla. 1983).

CONCLUSION

The clear and convincing evidence did not show that Mr. Neely was guilty of violating either the the Florida Bar Code of Professional Responsibilities or the Florida Bar Integration Rules, and therefore, the findings should be reversed.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was furnished, by mail, to DAVID C. MCGUNEGLE, Esquire, Branch Staff Counsel, The Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801, this 13th day of September, 1985.



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