IN THE SUPREME COURT OF FLORIDA

(Before A Referee)

THE FLORIDA BAR,

Complainant,

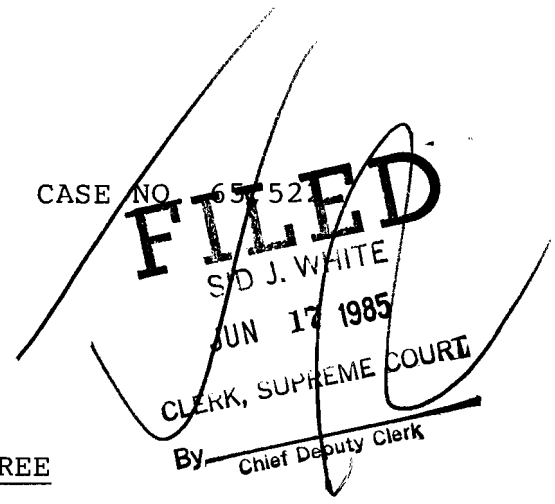
vs.

GARY H. NEELY,

Respondent.

_____/

CASE NO. 65,522



REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, hearings were held on November 29, 1984 and March 1, 1985. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits, all of which are forwarded to the Supreme Court with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar, David G. McGunegle

For The Respondent, Horace Smith, Jr.

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to Count I

Essential to proof of the allegations in Count I was the testimony of the Complainant, Cynthia Pollock, who was unavailable and therefore absent from the hearing. Without her testimony the Respondent's defense, that he advanced monies for treatment from proceeds of an anticipated settlement, is plausible. At conclusion of the hearing, Bar Counsel conceded that a finding of guilty of Count I would be unwarranted.

As to Count II

The Bar's Integration Rule 11.02(4)(b) places on an attorney the responsibility 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," and further provides that failure to maintain such records shall constitute grounds for disciplinary action. The Respondent in this cause placed the blame for overdrafts in his trust account on a former employee who he claimed embezzled funds which should have been in his trust account, but did not report the theft to law enforcement authorities and did not determine the amount allegedly stolen as would be prudent conduct for any attorney even suspecting irregularities in his trust account. Additionally, Respondent's Exhibit 2 and Complainant's Exhibit 1 in evidence clearly demonstrate the Respondent's inattention to his trust account and apparent inability to maintain clear and accurate records. As examples: (1) He should have been alerted to trust account problems which arose in July 1983 from an overdraft of funds which apparently resulted from writing

of check numbered 6080 and necessitated its reissuance as check numbered 6081. (2) Had issuance of check numbered 6091 for $2,948.51 not been aborted it would have resulted in another overdraft because the trust account balance was then only $1,414.36 (although, as calculated from the bank's statement, the balance was actually $2,519.37). In correcting this entry the bookkeeper compounded the accounting error by adding the check amount of $2,948.51 to the stated balance of $1,414.36 to created an overstated balance of $4,362.87. (3) The were extended periods between deposit of the insurance company draft for $2,948.51 on July 27, 1983 and payment of the same sum to Mr. Sands on September 9, 1983 when the trust account did not contain sufficient funds from which payment could have been made; during the same period the Respondent transferred funds from the account to himself creating at least one deficiency for check numbered 6092. (4) Page 3 of the bank statement indicated that on September 7, 1983 a check or other charge on the trust account resulted in a "non-sufficient fund charge." This overdraft could have resulted only from check numbered 6097 since there was no others in an amount sufficient to cause overdraft on that balance, and the check itself bears a date of September 7, 1983 which appears to be stamped thereon by the bank where it was presented for payment (T-16, lines 20-25; T-17, lines 1-7) and where the Respondent maintained his trust account. 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 (Complainant's Exhibit #2) and then fail to either

(1) promptly remit the proceeds of the draft deposited on July 7 to his client or the provider of medical service, or (2) fail to remit payment to Larry Sands for twenty days.

III. Recommendations as to Whether or not the Respondent Should be Found Guilty:

As to Count I

I recommend the Respondent be found not guilty and, specifically, that he be found not guilty of the following violations of his Oath as attorney, The Integration Rules of the Code of Professional Responsibility, to wit: The Florida Bar Code of Professional Responsibility, Disciplinary Rule 5-103(B).

As to Count II

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations of his Oath as an attorney, The Integration Rules of the Code of Professional Respondibility, 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).

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend the Respondent be suspended from the practice of law for a period of six months and thereafter until he shall prove his rehabilitation as provided in Rule 11.10(4) which would include an understanding and acceptance of minimum responsibilities of a practicing lawyer who handles clients' trust funds. The rationale of the Referee's recommendation is as follows:

1. In Florida Bar v. Davis, 446 So.2d 1072 (Fla. 1984),

the Respondent was found guilty of improper trust accounting procedures resulting from neglect rather than dishonesty. 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.

2. A three month suspension would suffice as an appropriate sanction for the Respondent except for the fact that he has previously been disciplined on two occasions, although neither prior incident involved a trust account violation. In 1979 he was found guilty of self-dealing, suspended from the practice of law for 90 days and placed on probation. In 1982 he was found guilty of failure to prosecute a criminal appeal, received a public reprimand and was placed on probation.

3. Accepting without deciding that the sanctions in Davis were appropriate for a first-time offender, it would be the opinion of this Referee that a suspension twice as long in duration would be appropriate for someone disciplined three times for unprofessional conduct. This Referee did not consider a suspension of greater duration because the Respondent's client suffered no harm by her attorney's actions, except that occasioned by being required to testify in these proceedings.

4. The Respondent's demonstrated lack of responsibility would warrant a probationary period during which he should be required to demonstrate at least the minimum responsibilities required of any practicing lawyer who handles and must properly account for clients' funds.

V. Personal History and Past Disciplinary Record: After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: Forty-three

Date Admitted to Bar: 1972

Prior disciplinary convictions and disciplinary measures imposed therein: 90 day suspension from July 9, 1979, to October 7, 1979, by Order of the Supreme Court dated June 7, 1979, (The Florida Bar v. Neely, 372 So.2d 89 [Fla. 1979]); public reprimand and a one year probation by Order of the Supreme Court dated May 13, 1982, (The Florida Bar v. Neely, 417 So.2d 957 [Fla. 1982]).

Other personal data: Married, two dependents. Education - Daytona Beach Community College, University of Florida, Stetson Law School. Sole practitioner with offices at 547 North Ridgewood, Daytona Beach. He has designations in areas of real property, personal injury and wrongful death, corporations.

VI. Statement of Costs and Manner in Which Costs Should be Taxed:

I find the following costs were reasonably incurred by The Florida Bar:

A.	Grievance Committee Level Costs	
1.	Administrative Costs	$150.00
2.	Transcript of Grievance Committee Hearing	134.40
B.	Referee Level Costs (Case No. 07A84C29)	
1.	Administrative Costs	150.00
2.	Transcript of Referee Hearing	145.60
3.	Discipline Hearing Appearance Fee	35.00
C.	Micellaneous Costs	
1.	Staff Investigator Costs	70.48
2.	Bar Counsel Travel Costs	30.64
3.	Long Distance Telephone Costs	3.64
	TOTAL	$719.76

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent.

DATED this 12th day of June, 1985.

Kenneth M. Leppler
Referee

Copies to:

David G. McGunegle, Bar Counsel
Horace Smith, Jr., Attorney for Respondent
Staff Counsel, The Florida Bar, Tallahassee, FL 32301