IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

CASE NO. 65,522

THE FLORIDA BAR,

Complainant,

vs.

GARY H. NEELY,

Respondent.

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

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REFERENCES

In this reply 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 by referred to as "Ms. Gardner."

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).

Neely does not dispute that the standard to be used on review is whether the referee's findings are clearly erroneous. Applying that standard the referee's findings do not clearly and convincingly support the alleged ethical violations with which Neely was charged and therefore, the referee's findings that Neely had violated certain ethical rules is clearly erroneous.

Fla. Bar Code Resp. D.R. 9-102(B)(1) and 9-102(B)(4) did not define what is meant by "promptly". Nor does the rule define what is meant by "funds" or property of the client or funds or properties to which the client is entitled". The insurance check was to be paid only to medical providers, not to Ms. Gardner. The Bar does not deny this fact. Therefore, the funds or property which Neely was holding was property belonging to the medical providers not property belonging to Ms. Gardner. Neely had an additional duty to protect the medical providers as he surly had sent letters of protection to them guaranteeing that he would protect any and all monies which were required to be paid to them. Obviously, this also meant protecting the PIP medical benefits and preventing his client, Ms. Gardner, from improperly obtaining access to those

benefits.

It was also uncontested by the Bar that the check Neely held would not cover all the outstanding medical bills. Neely reasonably should have been allowed some period of time in which to decide, with the help of his client, which medical providers were to be paid. Unfortunately for Neely, his client was less than helpful because she commanded himnot to pay the providers until she received some of the money. The uncontested evidence shows that Neely was placed in a "catch 22"; he could either pay the medical providers as he was required to do and ignore his client's order or he could abide by his client's order and violate the rules of professional responsibility.

The Bar places great emphasis on the credibility of the witnesses at this hearing. Neely's credibility has never been challenged by the Bar until this appeal. Nor was Ms. Crabtree's credibility ever challenged; obviously because it was difficult to challenge the credibility of one who had absolutely no financial or other interest in the outcome of the trial. The record is again devoid of any evidence which would lead one to conclude that Ms. Gardner's testimony was more believable than either Mr. Neely's or Ms. Crabtree's.

The standard that the trial judge was faced with in determining the guilt of Mr. Neely was the clear and convincing

standard. The Bar had an obligation and a duty upon it to produce clear and convincing proof that Neely violated the Disciplinary Rules 9-102(B)(1) and (4). The record demonstrates that there is an absence of clear and convincing proof in the record or in the findings of the referee to support the alleged violations of these two Disciplinary Rules.

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 there was no proof of dishonesty. Ms. Gardner testified that she did not believe that Neely ever intended to take or convert the insurance check to Mr. Neely's own use. It is elementary that without the element of "intent" established, one cannot be held liable for fraud, deceit, or misrepresentation. In fact, as to misrepresentation, the Bar did not establish by clear and convincing proof what Neely allegedly represented to Ms. Gardner which was fraudulent or deceitful.

Again, where is the clear and convincing proof supporting the violation of D.R. 1-102(A)(4); clearly it does not exist. The Bar wants Neely found guilty of acting dishonestly when the referee found no proof of dishonesty. The Bar wants Neely found guilty of fraud or deceit, notwithstanding the absence of any proof of intent to defraud on Neely's part. The Bar wants Neely found guilty of misrepresentation without establishing any representation by him. Such an outcome is unfair, unjust and clearly not supported by the evidence and referee's finding of guilt was an abuse of descretion.

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).

Neely never denied at the hearing that there were problems with this trust account. Neely offered evidence,which was uncontested and uncontroverted,that he had been the victim of an embezzlement.

Fla. Bar Integr. Rule art. XI, Rule 11.02(4) was designed to require a lawyer to responsibly handle his trust account. The rule, however, was never intended to punish an attorney for inconsistancies or fluctuations in his trust account as a result of criminal acts committed by his employees. This Court is well aware of the principle of law which recognizes that criminal conduct is the type of conduct which usually cannot be foreseen. If the criminal conduct cannot be foreseen or expected then Neely should not be punished because it occurred and affected his trust account.

Further, the Bar was required to prove by clear and convincing evidence that Neely was the party guilty of the trust fluctuations. The only clear evidence by the Bar was that there were trust fluctuations. At no time did the Bar present evidence that Neely was the party responsible for the fluctuations. Merely

because the trust account was his does not make him guilty of the violation. If the bank had made an error resulting in fluctuations in Neely's account, surly the Bar would not find Neely guilty of violating Fla. Integr. Rule art. XI, Rule 11.02(4). Unfortunately, the Bar wants to find Neely guilty of violating this Integration Rule when he is the victim of an unforeseen criminal act. Lawyers are not accountants and are not C.P.A.s. They are illequiped to be able to instantaneously detect embezzlement schemes against them. Lawyers are also human and make human errors. In Neely's case, he erred in being overly trusting of his employees. It appears in this day and age complete trust in another is both foolhearty and irresponsible; at least based on the outcome of Neely's hearing this should be the conclusion any lawyer should draw.

It is respectfully submitted that the intent and purpose of Integr. Rule 11.02(4) was to prevent irresponsible handling of a trust account. The rule also intended to punish a lawyer who was responsible for the mishandling of his trust accounts. In Neely's case, the Bar did not extablish that it was Neely's carelessness or irresponsibility which resulted in the fluctuations in the trust account. Neely however proved that an embezzlement scheme did exist and did cause the fluctuations in his trust account without his knowledge or without him having the tools to detect the embezzlement scheme. Therefore, the

referee's finding of guilt regarding this integration rule was also a clear abuse of descretion and should be reversed.

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).

No further argument is necessary in regards to this point.

POINT V

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

The six month suspension was based upon a number of violations by Mr. Neely. If this Court finds that the violations are not supported by clear and convincing proof then the punishment should be vacated. If, however, this Court finds that many of the violations are not supported by clear and convincing proof then the punishment should be less severe and should be reduced.

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 8th day of October, 1985.

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