IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

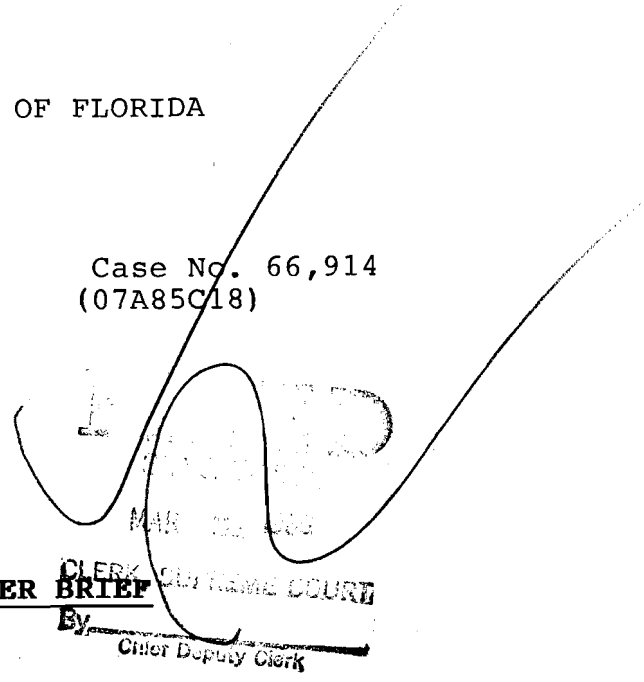
Complainant,

v.

GARY H. NEELY,

Respondent.
_____/

Case No. 66,914
(07A85C18)



COMPLAINANT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar:

Florida Bar Integration Rules, Article XI, Rules:

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 the Respondent, and Mr. Silas Conner will be referred to as "Mr. Conner". The symbol "R" will denote the appeal.

STATEMENT OF THE CASE

This is a public case. Mr. Silas Conner complained to The Florida Bar on September 20, 1984 regarding a problem he had with Respondent regarding a debt payment with Ford Motor Company. A hearing was held before the Seventh Judicial Circuit Grievance Committee "A" on February 1, 1985. The Grievance Committee found probable cause for violations of the Integration Rules, Article XI, of The Florida Bar as well as The Florida Bar Code of Professional Responsibility.

The Bar filed a formal complaint on April 13, 1985, charging Respondent with violations of the Integration Rule, Article XI, Rule 11.02(3)(a), Rule 11.02(4), and the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(6), 3-104(C), 3-104(D), 9-102(B)(3), and 9-102(B)(4). The Honorable John Antoon II, Circuit Judge of Brevard County, Florida, was assigned as Referee and final hearing was held on October 11, 1985.

The Referee obtained a 30 day extension for filing the Referee's Report from the Supreme Court of Florida and a

subsequent hearing was held on November 15, 1985 to address the appropriate discipline. The Report of Referee was completed November 26, 1985. The Referee found Respondent in violation of the Rules as charged and recommended that Respondent be suspended for a period of six months. It is from the Referee's Report, findings of fact, and recommended discipline that Respondent took this appeal.

STATEMENT OF THE FACTS

The Florida Bar is unable to accept Respondent's Statement of Facts which is insufficient on several points and therefore submits the following statement of facts.

Mr. Silas Conner retained Respondent in the fall of 1981 (R-23). It is undisputed that Respondent had represented Mr. Conner on several previous matters for which he had paid some fees but was never billed. Mr. Conner desired Respondent's representation him in an on-going debt collection dispute with Ford Motor Credit Corporation regarding a $3000.00 judgement against him(R-23). In June, 1983, there was a final settlement in this matter and both parties stipulated that Mr. Conner was accountable to Ford Motor Credit Corporation for regular monthly payments of $100.00 after an initial payment of $300.00. Respondent indicated to Ford's counsel that he would act as the intermediary for these monthly payments although Ford did not demand this (R-11). Mr. Conner was told by Respondent to send his monthly payments to Respondent who would then forward a check from his escrow account to Ford (R-24). Although Respondent denies advising Mr. Conner and Ford that he would forward the checks, an agreement (Complainant's exhibit 1) drawn up by Ford's counsel at the time of the

agreement indicates that Respondent stated he would forward escrow checks for Mr. Conner's payments (R-11).

Subsequent to this agreement, Mr. Conner forwarded six $100.00 checks to Respondent for payment to Ford over a period of several months. All of the funds were delivered by checks to Respondent's office, pursuant to Respondent's instructions(R-27). Mr. Conner believed and intended that these checks were to be applied to the Ford judgement. All but one of the checks bore the notion "vs. Ford" or "Ford" (R-23-26 and 33-38). Mr. Conner also delivered $750.00 in cash to Respondent's office in June, 1983. Since this was prior to the final settlement of the Ford matter and Respondent's trust account records are wholly inadequate, the purpose of the cash payment is unclear (R-27-30, 86,87).

As each of the above payments were received in the Respondent's office, they were deposited by Respondent's bookeeper into what Respondent refers to as his "attorney account" rather than into trust (R-86). Respondent made absolutely no payments to Ford on behalf of Mr. Conner (R-37).

In the summer of 1984, Mr. Conner attempted to contact Respondent to determine the status of his case. He received no satisfactory response and therefore contacted Ford's

counsel, who informed him that Ford had never received the sums given to Respondent for payment to Ford. When Mr. Conner confronted Respondent with this, Respondent stated that he had sent the payments directly to Ford instead of their counsel. Mr. Conner then contacted Ford and was again advised that no payments had been received. Respondent refused to supply Mr. Conner with an accounting when asked to do so (R-37-38).

Mr. Conner complained of this matter to The Florida Bar on September 20, 1984. Respondent prepared an exculpatory letter dated September 25, 1984 to The Florida Bar for the signature of Mr. Conner. The letter contained falsehoods and Mr. Conner refused to sign it although Respondent offered to return the $1350.00 if he did. (R-42,70 and 93 and Complainant's exhibit 5). Respondent finally returned the $1350.00 to Mr. Conner in October 1984 after discussions with the investigating member of the grievance committee on the matter (R-95).

SUMMARY OF ARGUMENT

Although it is the duty of The Supreme Court of Florida to review a Referee's findings of facts and conclusions, it is settled that this Court will not overturn the Referee's findings unless it is shown that they are clearly erroneous or without support in the record. Thus, it is inappropriate for the Respondent to attempt to retry his case in this forum absent a showing that the Referee's findings are erroneous or without support in the evidence. The Respondent has failed to make such a showing.

The Respondent, rather, dwells on the evidence presented at the Referee hearing which was most favorable to the Respondent without acknowledging that there were conflicts in the evidence. It is clear that the Referee simply found the evidence which was unfavorable to Respondent to have the greater credibility. The Referee's findings are clearly well supported by the record. In fact, the Referee cites the pages of the transcript which he relies on in making his findings of fact in the Referee's Report.

Thus, although it is undisputed that there was conflicting testimony on some issues, the fact remains that the Referee based his findings of violations of The Integration Rules of The Florida Bar, Article XI, Rule 11.02(3)(a) and 11.02(4) as well as Disciplinary Rules 1-102(A)(6), 3-104(C), 3-104(D), 9-102(B)(3) and 9-102(B)(4) on clear and convincing evidence before him and recommended the appropriate discipline.

ARGUMENT

POINT I

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

The Respondent has failed to show that the Referee's findings are clearly erroneous or unsupported by the evidence. The Referee's findings were based upon the evidence before him. 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 Florida Bar Integration Rules, Art. XI, Rule 11.06(9)(a) establishes that a Referee's findings shall have the same presumption of correctness as the judgement of the trier of fact in a civil proceeding. In The Florida 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 responsibilty 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 Responsibilty 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, 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 responsibilty 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 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's findings of fact and recommendation of guilt are supported by clear and convincing evidence at 642.

The Rose case noted that the Referee is in the best position to consider and decide conflicting evidence. 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 clearly convincing 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 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, looked at the evidence before him and made his findings of facts reflecting the evidence which he believed to have the most credibility. Although Respondent, in his brief on appeal, continues to dwell on those facts which are most favorable to him, it is undisputed that there was testimony which supported the Referee's conclusions. 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 of The Florida Bar, 3-104(C) and 3-104(D), are invalid is refuted by the record. 3-104(C) states that a lawyer shall "exercise a high standard of care to assure compliance by the nonlawyer personnel with the applicable provisions of the Code of Professional Responsibility". In

Section II, paragraph L, of his report, the Referee notes particularly that the Respondent breached this duty and cited the transcript of the referee hearing at pages 86, 87 as well as Respondent's Exhibit Number 4. On pages 86 and 87 of the transcripts, Respondent admits during examination by his own attorney that he failed to give specific instructions regarding the disposition of Mr. Conner's payments to his staff.

On page 87 of the transcript, Respondent further admits that he delegated full responsibility for deposits of funds received in the office to his bookkeeper/secretary and did not supervise these transactions, which violates 3-104(D) which requires, in pertinent part, that an attorney shall examine and be responsible for all work delegated to nonlawyer personnel.

The Respondent further argues that the Referee's findings of The Florida Bar Integration Rules, Article XI, Rule 11.02(4) and Code of Professional Responsibility of The Florida Bar, 9-102(B)(3) and 9-102(B)(4), are not supported by clear and convincing evidence. The Referee noted his findings of fact regarding the Respondent's violations concerning his trust fund at Section II, paragraphs B, C, D, H, I, and K, and specifically noted the pages of the record which he relies on in support of his conclusions. The Referee found that the Respondent advised Mr. Conner to send his monthly payments on the Ford judgement to his office so that he could deposit the payments in an escrow account and

then forward his escrow account check to Ford. The Referee further found that although Mr. Conner's checks were entrusted to Respondent for payment to Ford and all but one were notated as being for Ford, Respondent never deposited a single payment into a trust account and never forwarded any money to Ford. The above clearly violates The Florida Bar Integration Rules, Article XI, Rule 11.02(4) which states that money entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose. The Referee specifically found in paragraph K that there was no evidence that the Respondent had a valid lien on the sums collected and retained by Respondent. Although it is undisputed that the Respondent and Mr. Conner had a previous relationship involving both a personal loan and legal representation, Respondent's billing procedures were sporadic and it was never established whether or not these had already been paid. It is undisputed that Respondent did not take any steps to establish a valid lien.

The Referee specifically noted in paragraph H of his report that Respondent's trust account records were inadequate and incomplete and cited pages 77, 78, 79, 86, and 96-98 of the transcript. Throughout these pages of the transcript, Respondent asserts that he kept no records regarding the receipt of Mr. Conner's payments for Ford in his office. Respondent also never provided Mr. Conner with

any accounting of the funds sent to him or even acknowledged receipt of the funds as the Referee noted in paragraph I, citing pages 79 and 96-98 in support. The above is in violation of 9-102(B)(3) which requires that an attorney maintain complete records of all funds, securities and other properties of a client coming into his possession and render appropriate accounts to his client regarding them.

The Referee also found Respondent in violation of 9-102(B)(4) where Respondent refused to promptly refund the sums entrusted to him for payment to Ford when requested to do so by Mr. Conner. In support, the Referee cites page 38 of the transcript where Mr. Conner describes the Respondent's conduct when Mr. Conner learned that Ford had never received the payments. Mr. Conner testified that Respondent first stated that he would return the money only if Mr. Conner signed a statement containing misrepresentations which exculpated Respondent from the Florida Bar grievance which Mr. Conner had filed.

Respondent further argues that the Referee's remaining findings of violations of the Integration Rules of The Florida Bar, Article XI, Rule 11.02(3)(a) and 1-102(A)(6) are invalid. These rules, respectively, proscribe conduct which is contrary to honesty, justice or good morals and which reflects adversely on one's fitness to practice law. The course of conduct described above is clearly contrary to these rules and it is clear the Referee relied on the evidence and testimony outlined above in making this determination.

ARGUMENT

POINT III

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

The Florida Bar Integration Rules, Article 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 judgement 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 judgement 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 judgement 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

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 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 pled 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 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.

Although Respondent's mishandling and lack of attention to his trust account may not be as egregious as some 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 tolerated.

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 recommendations; approve the findings of fact and recommendation of guilt and his recommended discipline of a six month suspension with proof of rehabilitation required prior to reinstatement as recommended by the referee and pay costs in these proceedings currently totalling $1,102.94.

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 Dwight Chamberlin, Counsel for Respondent, 347 South Ridgewood Avenue, 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 19th day of March, 1986.

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