

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

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CASE NO. 66,914

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 "respondent" or "Mr. Neely", Silas E. Conner will be referred to as "Mr. Conner".

The following symbol will be used:

"R" for record on appeal.

STATEMENT OF THE CASE AND FACTS

The respondent, Mr. Gary H. Neely represented Mr. Conner in the settlement of a law suit brought against Mr. Conner by the Ford Motor Credit Corporation. Pursuant to that settlement agreement Mr. Conner was to make payments of \$100.00 a month, with a first installment of \$300.00.

How this money was to be paid, specifically, whether it was to be paid to the law firm of Bray and Singletary, attorney for Ford Motor Credit Company or whether it was to be paid by Mr. Conner to Mr. Neely and Mr. Neely would then forward it to Ford's law firm, was never clear. Mr. Neely's testimony clearly shows that he never made an agreement with the law firm of Bray and Singletary regarding his responsibility for forwarding these payments.[R-78]

In fact, the testimony of Mrs. Bray, who is a secretary with the law firm of Bray and Singletary testified that the law firm would have accepted Mr. Conner's payments directly from Mr. Conner if he had paid them. [R-12]

Nevertheless, Mr. Conner made certain payments to Mr. Neely in the amount of \$1,350.00. On many of these payments to Mr. Neely the checks bore the notation of "vs. Ford" or "Ford". Mr. Conner stated at the hearing that part of these payments to Mr. Neely were the result of either paybacks on loans made by Mr. Neely's wife or were for payment of fees for services rendered by Mr. Neely on behalf of Mr. Conner. [R-27-36]

The other payments by Mr. Conner, were claimed to be paid to Mr. Neely with the intent that Mr. Neely would forward these payments on to Bray and Singletary in payment of the settlement with the Ford Motor Credit Company. [R-23-26-33-38]

Apparently the Ford Motor Credit Company, via Bray and Singletary, their attorneys, did not receive any money from Mr. Neely on behalf of Mr. Conner for a period of one year after the settlement agreement.

Nor, had the Ford Motor Credit Company, via Bray and Singletary, received any money from Mr. Conner in payment of the settlement agreement. [R-15-16]

The money that was sent, or given to Mr. Neely by Mr. Conner was perceived by Mr. Neely's bookkeeping staff as payment by Mr. Conner of attorneys fees due Mr. Neely. Mr. Neely represented Mr. Conner on a pensioncase whereby Mr. Conner received \$8,250.00. Prior to Mr. Neely receiving the money from Mr. Conner, he had not received any payment on that case. [R-87] Mr. Neely represented Mr. Conner on a criminal case where Mr. Conner used an axe and tore up a stove as well as a room where he had been residing. Mr. Neely managed to have the State Attorneys office file a no information on that charge. [R-88] \$750.00 of the \$1350.00 that Mr. Conner paid to Mr. Neely was applied to Mr. Neely's representation of Mr. Conner in that case. The \$750.00 was paid early in June of 1983, specifically June 3, 1983. [R-89] Mr. Neely also represented Mr. Conner when he was stopped by

police officers and was about to be arrested by the police officers on the charge of solicitation. [R-89] Mr. Neely, at one o'clock in the morning intervened on Mr. Conner's behalf such that Mr. Conner was issued only a citation for having no tag. Prior to Mr. Conner paying Mr. Neely the \$1,350.00 Mr. Conner had not paid Mr. Neely for that service.

In addition to Mr. Conner's failure to pay Mr. Neely's attorney fees, Mr. Conner had also failed to repay the loan made by Mr. Neely's wife to him.

Mr. Conner contacted Bray and Singletary, the attorney for Ford Motor Credit Company to determine the status of his account. It was at that time Bray and Singletary informed Mr. Conner that no payments had been made on his account. Mr. Conner then contacted Mr. Neely's office about this matter. [R-37-38]

After contacting Mr. Neely's office, Mr. Conner then brought a complaint against Mr. Neely alleging that Mr. Neely had misused funds paid to him. A notice of finding of probable cause for further disciplinary proceedings was entered against Mr. Neely on February 21, 1985. On April 11, 1985 a complaint was filed by the Florida Bar, charging Gary Neely with violation of FLA. BAR INTEG. RULE 11.03(a), RULE 11.02(4), D.R. 1-102(A)(6), D.R. 3-104(C), D.R. 3-104(D), D.R. 9-102(B)(3) and D.R. 9-102(B)(4).

On the basis of the complaint filed by the Florida Bar, hearings were held on October 11, 1985 and November 15, 1985.

The result of that hearing was a report of the Referee, dated November 26, 1985 finding Mr. Neely guilty of violating the above-mentioned Integration Rules and Disciplinary Rules. It is from that report that the respondent, Gary H. Neely takes this appeal.

SUMMARY

The issues before this court involve entirely the sufficiency of the evidence to support the determination by the Referee. It is the petitioner's position that the evidence does not support the particular finding of guilt and for that reason the decision of the Referee should be reversed.

ARGUMENT

POINT I

THERE WAS NO CLEAR AND CONVINCING EVIDENCE SUBMITTED THAT DEMONSTRATES THAT MR. NEELY VIOLATED FLA. BAR INTEGR. RULE 11.02(3),(4) and D.R. 9-102(3) and (4).

FLA. BAR INTEGR. RULE 11.02(3) requires a lawyer to refrain from:

"[Doing] any act contrary to honesty, justice, or good morals, whether the act is committed in the course of his relations as an attorney or otherwise."

FLA. BAR INTEGR. RULE 11.02(4) requires:

"Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counter-claim or set-off for attorneys fees and a refusal to account for and deliver over such property and money upon demand shall be deemed a conversion. This is not to include the retention of money or other property upon which the lawyer has a valid lien for his services or to proclude the payment of agreed fees from proceeds of transactions or collections."

The evidence and testimony offered at the hearings on October 11, 1985 and November 15, 1985 demonstrate at the most, that Mr. Neely was foolhearted in expecting to be paid for services rendered to his clients. The testimony was abundantly clear that Mr. Neely performed a wide variety of

services for Mr. Conner. The testimony was also clear that Mr. Neely expected to be paid for these services.

Mr. Conner admitted that Mr. Neely had performed some services for him and, in fact, testified that at a minimum \$200.00 of the \$1,350.00 paid to Mr. Neely was for the purposes of paying fees. [R-30,32,33,34] Additionally, \$750.00 of the \$1,350.00 paid to Mr. Neely was paid prior to any agreement or settlement with the Ford Motor Credit Company. [R89,114,119]

This evidence strongly indicated that the \$750.00 was paid to Mr. Neely for attorneys fees rendered on behalf of Mr. Conner. It is impossible for the Bar to explain, as they were unable to at the hearing held on November 15, 1985, why Mr. Conner would, with apparent clairvoyance, pay Mr. Neely \$750.00 with the intention that the money be applied to an agreement not yet existing.

Mr. Conner at all times had maintained that all of the \$1,350.00 paid to Mr. Neely was for payment on a settlement agreement he had entered into with the Ford Motor Credit Company. This agreement was allegedly entered into on or about June 9, 1983. [R-9,119]

However, the uncontroverted evidence shows that Mr. Conner gave Mr. Neely the \$750.00 on June 3, 1983 six days prior to any agreement. Judge Anton requested the Bar prosecutors to explain this discrepancy however, no explanation was offered. [R-119-120]

Consequently, the uncontroverted evidence shows that at least \$950.00 of the \$1,350.00 paid by Mr. Conner was retained by Mr. Neely as attorneys fees legitimately. The remaining \$400.00 of the \$1,350.00 reasonably could also have been applied to attorneys fees owed to Mr. Neely or applied to the payback of loans which Mr. Conner had borrowed from Mr. Neely's wife. Mr. Conner, at the November 15, 1985 hearing testified openly that he did borrow money from Mr. Neely's wife. [R-47] He also testified openly that he was unable to prove that he had paid Mr. Neely's wife back. [R-54] He was also unable to prove that at any time he had paid Mr. Neely for his attorney services. [R-50-60]

Although the checks which were paid to Mr. Neely amounting to \$1,350.00 were marked with the notation "vs. Ford" or "Ford" the deposit of these checks in Mr. Neely's attorneys account was only negligent at best. This is so especially in light of the fact that the hearing conclusively showed that at least \$950.00 of that \$1,350.00 was legitimately due to Mr. Neely for attorneys services. At least at a minimum there was surely a debatable issue as to why these checks were paid to Mr. Neely.

Consequently, there is a complete absence in the record demonstrating that Mr. Neely was not honest or did not demonstrate good morals. Further there is a complete absence of the record demonstrating that the money paid to Mr. Neely was for the specific purpose of paying Ford Motor Credit

Company. Pursuant to RULE 11.02(4) Mr. Neely was simply retaining money paid to him as a result of his services rendered to Mr. Conner. D.R. 11.02(4) allows an attorney to retain money or other property upon which the lawyer has a valid lien for his services or to proclude the payment of agreed fees from the proceeds of transactions or collections.

Consequently, the finding by the Referee that there was no evidence that respondent had a valid lien upon the payments made by Mr. Conner to Mr. Neely is not supportable by the record. Rather the record shows that Mr. Neely had rendered services, had not been paid for these services, was entitled to be paid for these services and that, at least, \$950.00 of the \$1,350.00 paid by Mr. Conner was for the purpose of paying for these services.

The Bar has also charged that Mr. Neely has failed to comply with D.R. 9-101(3)(4). This Disciplinary Rule requires an attorney to maintain complete records of funds coming into his possession and to render appropriate accounts to his client regarding them. This rule also requires an attorney to promptly pay or deliver to the client, as requested by the client, funds in the possession of the lawyer which the client is entitled to receive.

In this case, the evidence showed that Mr. Neely did maintain complete records of funds coming into possession. In fact, Mr. Neely's records were so complete that it was easy to track the funds being deposited into Mr. Neely's attorneys

account as distinguished from the funds being deposited into Mr. Neely's trust account. The accounting by Mr. Neely clearly accounted for all monies received by Mr. Conner. Therefore, it is difficult to understand why Mr. Neely has been found guilty of violating this rule. If Mr. Neely did not properly account for the money, in other words, did not place the money in the proper account, then Mr. Neely would have violated D.R. 9-102 (A)(2). That provision requires that funds belonging to the client must be deposited in the client's account and not in the lawyers account. However, the Bar did not charge Mr. Neely with violation of that provision. Rather it maintained that Mr. Neely did not maintain complete records of the funds. The evidence shows clearly that Mr. Neely did maintain complete records of the funds and therefore he should not be found guilty of violating this rule.

Mr. Neely was also charged with failing to deliver funds to a client upon the clients request. The evidence shows that Mr. Neely did return \$1,350.00 to Mr. Conner. [R-69,93] He returned these funds upon advice of counsel and under protest because at all times, he believed that he had earned these funds as a result of services he had rendered to Mr. Conner and as a result of loans that were required to be paid back to Mr. Neely's wife. [R-94,95] D.R. 9-104 is not intended to require an attorney to immediately pay back money to a client when there is a dispute as to whether that money belongs to the

client or is money which is retained as fees to the attorney. The evidence showed that the delay in Mr. Neely returning the \$1,350.00 to Mr. Conner was the result of Mr. Neely's firm belief, which was proved to be accurate during the hearing, that this money belonged to him as earned fees.

The Referee's report concludes that Mr. Neely's trust account records were inadequate and incomplete because certain monies received from Mr. Conner were deposited into Mr. Neely's attorneys account rather than his escrow or trust account. The Referee overlooks the fact that the uncontroverted testimony showed that \$950.00 of the \$1,350.00 received was clearly attorneys fees. Therefore, Mr. Neely properly deposited the money into the attorney account rather than the escrow or trust account and the evidence submitted showed that his records were indeed adequate and complete. The judge at no time made a finding that the accounting method used by Mr. Neely was insufficient or did not comply with Florida Disciplinary Rules.

Therefore, the Bar failed to prove by clear and convincing evidence that Mr. Neely violated FLA. BAR INTEGR. RULE 11.02(3) and (4) and D.R. 9-102(3) and (4) and the findings should be reversed as to those charges.

POINT II

THERE WAS NO CLEAR AND CONVINCING EVIDENCE SUBMITTED WHICH DEMONSTRATED THAT MR. NEELY VIOLATED D.R. 3-104(C)(D) or D.R. 1-102(A)(6).

D. R. 3-104(C) and (D) require that:

- (C) "[The lawyer] exercise a high standard of care to assure compliance by the non-lawyer personnel and that the initial and continuing relationship with the client must be the responsibility of the employing attorney."
- (D) "The dedicated work of non-lawyer personnel shall be such that it will assist only the employing attorney and will be merged into the lawyers completed product. The lawyer shall examine and be responsible for all work delegated to non-lawyer personnel."

It is respectfully submitted that the intent of this rule is to assure that lawyers supervise work which is legal in nature and which requires the supervision of the lawyer. Clearly the intent of this law does not require the lawyer to supervise accounting tasks which may or may not be within the realm of the lawyers expertise. Obviously, if a lawyer was to allocate his trust accounting and book-keeping procedures to an accounting firm made up of C.P.A.s and experts in the realm of accounting, the Florida Bar does not expect that lawyer to supervise the activities of a certified public accountant.

This is so especially in light of the fact that the particular lawyer does not have expertise in accounting practices nor was he required to have knowledge of accounting to become a lawyer in the State of Florida. Further,

there are few, if any, law schools that require accounting to be a prerequisite to the law curriculum in law school.

In the present case, Mr. Neely delegated the check accounting to his bookkeeper after explaining to her the proper procedure to be followed in accounting for client's funds. He supervised the work as much as possible but could not be expected to supervise each and every deposit made in the course of hundreds of deposits.

In the case at bar, it is apparent that at a minimum 66% of the funds received from Mr. Conner by Mr. Neely were legitimately allocated to Mr. Neely as attorneys fees. There was no evidence submitted that Mr. Neely did not supervise his non-lawyer personnel. Further, the evidence that was submitted demonstrated that the non-lawyer personnel properly allocated the money received by Mr. Neely by depositing it into his attorneys fees account. If there was a mistake in the allocation of the money between the attorneys account and the trust or escrow account, such a mistake was only negligent at best and was the result of the bookkeepers and not the result of Mr. Neely. Even Mr. Conner was unsure what money was for Ford Motor Credit Company and which money was for Mr. Neely.

Therefore, it is difficult to understand how the Referee came to the conclusion that Mr. Neely's conduct adversely reflects on his fitness to practice law. Quite to the contrary, the evidence submitted shows that Mr. Neely

handled several legal issues for Mr. Conner and he handled all of those legal issues rather successfully. First, Mr. Neely successfully obtained pension funds from Mr. Conner. Second, Mr. Neely successfully defended a malicious mischief charge against Mr. Conner. Third, Mr. Neely successfully defended a solicitation action against Mr. Conner. The record is repleat with instances which show that Mr. Neely's fitness to practice law is quite apparent.

Again, the Florida Bar has the burden of proving by clear and convincing evidence that Mr. Neely violated the Integration Rules and Disciplinary Rules charged. There is no evidence or at least there is no clear and convincing evidence that Mr. Neely failed to supervise his non-lawyer personnel. Further, there is no clear and convincing evidence based on the facts already discussed that show that Mr. Neely engaged in conduct adversely reflecting on his fitness to practice law. As such, the Referee's findings that Mr. Neely violated Disciplinary Rule 1-102(A)(6) and Disciplinary Rules 3-104(C)(D) should be reversed.

POINT III

BASED UPON THE EVIDENCE SUBMITTED, THE REFEREE'S RECOMMENDATION THAT THE RESPONDENT BE SUSPENDED FOR A PERIOD OF SIX MONTHS IS OVERLY SEVERE.

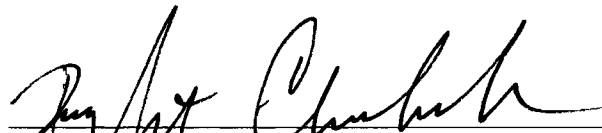
Based upon the arguments already submitted, Mr. Neely should not be found guilty on any of the charges specified in the Referee's report. However, if Mr. Neely did violate, in a technical sense, any of the rules or regulations charged, such violation was unintentional and was the result of staff personnel's innocent misunderstanding of how the money paid by Mr. Conner was to be allocated between the attorney account and the trust or escrow account. The transcripts of the proceedings demonstrate that there was a viable and legitimate claim by Mr. Neely for attorneys fees and that it was legitimate for Mr. Neely to deposit at least \$950.00 of the \$1,350.00 paid by Mr. Conner into his attorney account. As to the remaining \$400.00, at the most, it was an oversight in accounting and there was negligence by staff members as to proper accounting of this money and requires, at most, a private reprimand rather than suspension.

Therefore, the six months suspension is overly severe based on the charges, facts, and circumstances surrounding this case.

CONCLUSION

The clear and convincing evidence did not show that Mr. Neely was guilty of violating either 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 24th day of February, 1986.



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