

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

CASE NO. 66,914

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THE FLORIDA BAR,
Complainant,

vs.

GARY H. NEELY,
Respondent.

RESPONDENT'S REPLY BRIEF

DWIGHT CHAMBERLIN, ESQUIRE of
DUNN, SMITH, WITHERS & HART
347 South Ridgewood Avenue
Post Office Drawer 2600
Daytona Beach, Florida 32015
(904) 258-1222

Attorneys for Respondent

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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.

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."

Respondent does not argue with the Bar's statement of the law as expressed in Point I. Respondent acknowledges that Referee's findings on review cannot be reversed unless they are clearly erroneous or are not supported by the evidence.

Elaborate reargument of the points raised in Respondent's

initial brief is not necessary, as the recitation of the testimony as outlined in Respondent's Brief demonstrates that the evidence was so conflicting and so controverted that the Bar failed to prove by "clear and convincing evidence" that Mr. Neely violated any disciplinary rules. Since the clear and convincing standard was not satisfied, the Referee's findings of guilt were not supported by the record.

It appears that the Florida Bar, in fact, agrees with the Respondent's position that this was a trial in which every piece of evidence was controverted not only by the Respondent but by the Florida Bar's most important witness, Mr. Conner. The Bar takes no position on the point raised by the Respondent that even Mr. Conner did not know exactly how the money was going to be used that he paid to Mr. Neely. The Bar also does not take any position on the clear evidence that showed Mr. Conner to be inaccurate as to what money was paid to Mr. Neely for the purpose of paying Ford Motor Company and what money was paid to Mr. Neely for the purpose of paying Mr. Neely for his services.

The Bar contends that Mr. Neely violated a disciplinary rule because he did not use money given to him for the purpose for which it was given. The evidence, submitted at the hearing however, does not support that position and the finding by the Referee that Mr. Neely violated Fla. Bar Integr. Rule 11.02(3) and (4) should be reversed.

ARGUMENT

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."

D.R. 3-104(C) and (D) have never been interpreted by this Court. Therefore, the breadth of the application of this rule in different circumstances has never been determined. Obviously, some perimeter should be set to determine exactly how much supervision a lawyer must supply non-lawyer personnel.

Obviously, the Bar advocates a position that any error committed by non-lawyer personnel within the lawyer's firm automatically subjects the lawyer to disciplinary proceedings. In effect, the Bar apparently advocates that this particular disciplinary rule holds a lawyer strictly liable for all acts of the lawyer's non-lawyer personnel.

As already argued in Point II of Respondent's initial brief, such a reading of this disciplinary rule works undue hardships on lawyers. Lawyers cannot be expected to supervise every employee under them for every act they may or may not do. If they were or are required to do this, than this, in effect, takes time away from their major responsibility which is practicing law. Lawyers are not accountants, they are not C.P.A.'s, and in a lot of cases, lawyers generally tend to be poor businessmen. Therefore, if a lawyer, as in this case, allocates his trust accounting and bookkeeping procedures to a third person, the lawyer should be protected from Bar prosecution if that bookkeeper makes an error.

In this case, there was evidence which demonstrated that the bookkeeper percieved payments by Mr. Conner as attorneys fees due Mr. Neely. This was a reasonable perception for the bookkeeper to have, especially in light of the numerous legal services Mr. Neely had rendered on behalf of Mr. Conner, for which he had not been paid.

Therefore, again the evidence submitted by the Bar failed to meet the clear and convincing standard necessary for Mr. Neely to have been found guilty of violating this particular rule and the decision of the Referee should be reversed.

ARGUMENT

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.

All the cases cited by the Florida Bar in support of their position involve instances where the lawyer has intentionally committed an act contrary to the client's interest. In this particular case, Mr. Neely did not do anything intentionally to his client. Any accounting error was the result of personnel error or, at the most, the result of a legitimate dispute between Mr. Neely and his client in regard to attorneys fees.

Because of the lack of any intention on the part of Mr. Neely and due to the conflicting evidence submitted at trial, a six month suspension is overly severe and should be reduced if not vacated entirely.

CONCLUSION

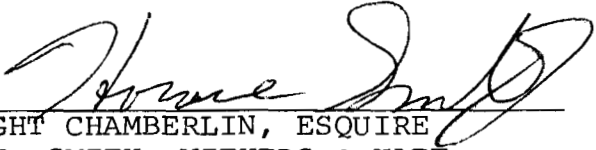
The clear and convincing evidence did not show that Mr. Neely was guilty of violating either the Florida Bar Code of Professional Responsibilities or the Florida Bar Integration Rules, and therefore, the findings should be reversed.

Respectfully submitted,

DWIGHT CHAMBERLIN, ESQUIRE
DUNN, SMITH, WITHERS & HART
Post Office Drawer 2600
Daytona Beach, Florida 32015
(904) 258-1222
Attorneys for Respondent

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 31ST day of March, 1986.


DWIGHT CHAMBERLIN, ESQUIRE
DUNN, SMITH, WITHERS & HART
Post Office Drawer 2600
Daytona Beach, Florida 32015
(904) 258-1222
Attorneys for Respondent