12-16

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY H. NEELY,

Respondent.
_____/

Case Nos. 70,830 and 71,085
[TFB Case Nos. 87-23,224 (07C)
87-23,226 (07C)
87-23,233 (07C)]

COMPLAINANT'S ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 222-5286

and

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(407) 425-5424

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SYMBOLS AND REFERENCES

Complainant=	The Florida Bar
Respondent=	Gary H. Neely, Mr. Neely
R ( )=	Record and date of Final Hearing testimony and reference to page number
REF- p.=	Report of Referee and reference to page number

STATEMENT OF THE CASE

The Florida Bar is the complainant in this Florida Bar disciplinary proceeding in which the respondent has sought review of the Report of Referee by his Petition for Review of August 26, 1988. Although respondent's Petition for Review was untimely, The Florida Bar has not contested this aspect of the case.

On November 10, 1988, The Florida Bar filed a Motion to Dismiss respondent's Petition for Review in this case due to the untimeliness of respondent's Initial Brief on Petition for Review and the apparent misrepresentation of the date on the Certificate of Service as well as the improper Statement of Facts. This Motion to Dismiss remains pending at this time before this Court. The Florida Bar recognizes that the period for filing an answer brief is not tolled by the Motion to Dismiss and therefore files this Answer Brief should the Motion to Dismiss be denied.

The case on review involves two separate disciplinary cases. Supreme Court Case No. 70.830 involves the Bar's complaint filed July 7, 1987, in which the complaining witness is Ms. Betty Kern. Final Hearing was held on this case on January 20, 1988. The grievance committee found probable cause on March 25, 1987.

A second complaint against respondent was filed by The Florida Bar on September 2, 1988, Supreme Court Case No. 71,085.

This complaint involves two counts, Count One in which the complaining witnesses are Mr. and Mrs. Richard Mancuso, and Count Two in which the complaining witnesses are Mr. and Mrs. Robert Wilkinson. The grievance committee found probable cause in regard to Counts One and Two on June 24, 1987.

In Case No. 70,830 on September 9, 1987, and in Case No. 70,830 on July 17, 1987, the Supreme Court assigned the Honorable John Antoon as Referee in these cases. Final Hearing began on January 20, 1988, and continued several times to include all of the testimony, and concluded on April 1, 1988. The referee forwarded his report to the Supreme Court of Florida on June 8, 1988.

The Board of Governors considered the referee's recommendations at their July, 1988, meeting and voted not to seek review. Respondent, however, sought review and this Answer Brief is filed accordingly.

STATEMENT OF FACTS

The Florida Bar provides this Statement of Facts rather than adopting that in respondent's Initial Brief due to respondent's failure to provide proper references to the record as well as the improper argument as noted in The Florida Bar's Motion to Dismiss.

As to Case No. 70,830:

The complaining witness, Ms. Betty Kern, was injured in an auto accident in June of 1982. Shortly thereafter, she retained respondent on a contingent fee basis to help her collect damages for her injuries resulting from the accident, R (Jan. 20, 1988)- p. 12-13, p. 120, 121.

Ms. Kern found respondent uncooperative in providing regular information to her regarding the status of her case. Although she made regular inquiries, respondent failed to respond with the requested information on the progress of the case, R (Jan. 20, 1988) p. 14, 19, 63. Although respondent claims that he was not aware of Ms. Kern's attempts to contact the office for information, R (Jan. 20, 1988) p. 32, his associate at the time, Mr. Aronoff, testified that he was aware of Ms. Kern doing so, R (Jan. 20, 1988) p. 87.

At one point, after the spring of 1986 (R-20), Ms. Kern was called into respondent's office by respondent and his partner and counsel in this case, Mr. Gary A. Bloom. For the first time, Ms. Kern was advised that respondent had received a PIP benefit check for Ms. Kern's injuries and that the insurance company who had paid the check was going to sue Ms. Kern for obtaining the check by fraudulently misrepresenting her Florida residency status. Ms. Kern had relied on respondent to complete the PIP claim for her and had truthfully advised respondent of her residency status which at the time of the accident was in the midst of a change between Tennessee and Florida, R-22. In fact, Ms. Kern was sued by the insurance company for fraud in misrepresenting her Florida residency. Although respondent was aware that the insurance company disputed Ms. Kern's right to receive PIP benefits, he failed to take action to prevent the lawsuit against Ms. Kern (TFB Exhibit 2, Correspondence of December 2, 1983, December 6, 1983, October 26, 1984, and November 8, 1984 [Toung to Neely]).

Finally, after approximately four years of representation, Ms. Kern became fed up with respondent's lack of communication to her and the lack of progress in the case, (R-25, 46, 60), and retained other counsel. Ms. Kern learned through other counsel (R-26) that her pending lawsuit had actually been dismissed for lack of prosecution (R-26) and that respondent had failed to advise her of that fact. On the contrary, Ms. Kern testified that after a hearing she believed to be on the Motion to Dismiss,

respondent informed her that she had won the case (R-17, 18). Ms. Kern's new counsel settled the case within a relatively short time.

Respondent contends that his health problems impaired his functioning and led to problems with his representation experienced by Ms. Kern (R-73) stemming from his January, 1986, blood sugar crisis which resulted in a diagnosis of diabetes. However, his physician testified that although some mental confusion would be present prior to the actual hospital admittance, respondent had not exhibited any symptoms to the doctor or contacted him seeking help for same (R-78, 80).

Respondent also called Mr. Aronoff, who had previously been associated with respondent's law practice. However, Mr. Aronoff admitted that he had only minimal contact with the case but that he did not believe Ms. Kern had received a permanency rating (R-103). Mr. Aronoff also stated that although respondent did at times seem confused (R-90, 91) there were "only 1 or 2 times" he noticed the confusion and the rest of the time appeared fine (R-100), and respondent did appear at work regularly (R-100) except for two periods of illness in early 1985 and January, 1986.

Both respondent (R-127, 128) and Mr. Aronoff (R-95) specifically testified that Ms. Kern had no permanency rating and this was a major reason for the delay with the case.

However, the February 22, 1984, report of examination from Dr. Lloyd A. Wright, Ormond Beach Chiropractic Clinic, contained in the Kern v. Harrell "Medical" file of respondent obtained from Ms. Kern's subsequent attorney Sylvan Wells, in evidence as The Florida Bar Exhibit 2 (R-114) indicates that Ms. Kern was given a permanency rating as early as February 22, 1984. Although respondent stated he was not reminded of this until after his November, 1987, testimony, he failed to correct this until confronted on cross-examination on January 20, 1988 (R-12 of January 20, 1988).

The Florida Bar charged respondent with violations of Rule 1-102A(A)(4) for conduct involving dishonesty, fraud, deceit, or misrepresentation; 1-102(A)(6) for other conduct that adversely reflects on his fitness to practice law; 6-101(A)(3) for neglect of a legal matter entrusted to him; 7-101(A)(1) for failing to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules; 7-101(A)(2) for failing to carry out a contract of employment entered into with a client for professional services; and 7-101(A)(3) for prejudicing or damaging a client during the course of the professional relationship. Rule 9-102(B)(2) was

withdrawn by The Florida Bar on January 20, 1988. In his report, the referee found respondent in violation of Disciplinary Rules 1-102(A)(4), 1-102(A)(6), 6-101(A)(3) for neglect of a legal matter and 7-101(A)(3) for prejudicing or damaging a client during the course of the professional relationship in regard to the above conduct.

As to Case No. 71,085

(All citations to the record in this case refer to the transcript of January 20, 1988 unless otherwise noted)

COUNT I

Mr. and Mrs. Richard Mancuso had an ongoing legal relationship with respondent regarding several different legal matters. Some of the representation related to Mr. Mancuso's arcade machine business although apparently not specifically to the particular arcade machine business located in Miami (R-44).

The Mancusos and respondent had a friendly relationship and respondent had even discussed going into the arcade machine business with Mr. Mancuso (R-45). In January, 1987, Mr. Mancuso learned that respondent would be in the Miami area that month on other legal business not involving Mr. Mancuso. Therefore, Mr. Mancuso requested that respondent pick up and collect the cash from his Miami arcade machine and deliver it to Mr. Mancuso upon

his return (R-24, 41). This particular request was not part of any particular client representation (R-49).

Respondent obtained Mr. Mancuso's money while in Miami. Upon respondent's return to the Daytona Beach area from Miami, Mr. and Mrs. Mancuso made prompt and frequent requests for the delivery of their money, which was still held as cash (R-28). Respondent failed to promptly deliver the money to Mr. and Mrs. Mancuso causing them great worry as part of this money belonged to their business partners (R-47, 51-52).

At one point, respondent believed that Mr. Mancuso had left a message at respondent's office threatening to go to the police if he did not receive the money soon (R-65).

Finally, respondent appeared unannounced at the residence of Mr. and Mrs. Mancuso at approximately 10:00 P.M. at night approximately one week after picking up the money. Mr. Mancuso was not at home. Respondent refused to deliver the money to Mrs. Mancuso until she signed certain documents. One of these documents was a waiver regarding respondent's withdrawal of representation of Mr. and Mrs. Mancuso's minor daughter on a personal injury case. Mrs. Mancuso does not recall the nature of the other documents. An altercation ensued since Mrs. Mancuso refused to sign the documents and demanded the return of the cash. Finally, Mrs. Mancuso succeeded in physically grabbing the

cash from respondent and running into her home without signing the documents (R-29-31). Although Mr. and Mrs. Mancuso had expected two sets of keys to the arcade machines to be with the cash, only one set was present. It is not known with certainty, however, that respondent ever received two sets of keys (R-53-54). Approximately $2000 of cash was involved (R-24).

The referee found respondent guilty of Rule 3-4.3 of the Rules of Discipline that prohibits the commission of a lawyer of any act which is unlawful or contrary to honesty or justice, and Rule 4-1.15(b) of the Rules of Professional Conduct for failing to promptly notify the client or third person of the receipt of funds or other property in which the client or third person has an interest.

COUNT II

Regarding Count II of the Supreme Court Case No. 71,085, The Florida Bar offered the testimony of Florida Bar Staff Investigator Charles R. Lee. Mr. Lee testified that he reviewed the trust account of the respondent pursuant to a complaint filed by Mr. and Mrs. Robert Wilkinson (R-34).

Mr. Lee's investigation revealed that respondent deposited a check for approximately $37,500 from an insurance company in settlement of the Wilkinson's claim into his trust account on

December 12, 1986. Subsequently, respondent issued checks against these funds which exceeded the total amount of these funds (R-37, 49). The check which actually caused the overdraft was a $450.00 check made payable to respondent (R-38). Respondent's bank initially debited respondent's account $20.00 for the overdraft (R-37). This occurred on February 27, 1987. The total overdraft of the Wilkinson account exceeded $400.00 (R-44).

Thereafter, on March 2, 1987, respondent deposited $220.00 of his own cash into the trust account. The deposit slip used by respondent did not indicate if this sum was deposited in relation to any pending client matter (R-39). Only one deposit was made regarding that particular client matter (R-69).

The referee found respondent in violation of the Rules Regulating Trust Accounts, Rule 5-1.1(c) for failing to maintain minimal trust accounting procedures and 5-1.2(b)(2) for failing to clearly identify the client or matter for which the funds were received in regard to the above conduct in Count II.

The referee further recommended that respondent be suspended from the practice of law for three months and thereafter until he shall prove rehabilitation pursuant to the Rules of Discipline, Rule 3-5.1(e) and pay The Florida Bar costs.

SUMMARY OF ARGUMENT

The referee's recommendation and findings of fact should be upheld in this case. Respondent's attempts to overturn the referee's fact finding is improper absent any indication that the findings are erroneous or without support in the evidence. The Report of Referee is clear and succinct and contains numerous references to the record upon which the findings are based.

The referee's recommendation a suspension greater than 91 days requiring proof of rehabilitation prior to reinstatement is fully appropriate in this case due both to the cumulative nature of the misconduct as well as respodnent's lengthy discipline history.

The costs of The Florida Bar which the referee assessed against respondent are proper and appropriately assessed against respondent in this case.

ARGUMENT

POINT ONE

THE REFEREE'S FINDINGS OF FACT ARE FULLY SUPPORTED BY CLEAR AND CONVINCING EVIDENCE ON THE RECORD IN THIS CASE.

The Supreme Court of Florida has stated frequently and unequivocally that a referee's findings of fact in Bar discipline cases are to be upheld unless it is shown that the findings are clearly erroneous or without support in the evidence, The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978).

The Court attaches great weight to the referee's findings of facts since the referee is in the best position to have direct knowledge of the case facts, witness demeanor, and reach a decision concerning conflicting evidence, The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966). Respondent attempts to argue that the referee's findings are improper simply because "the referee has entirely discounted or ignored virtually all of the testimony of any witness called on behalf of the respondent.", Respondent's Initial Brief, p. 20. This is wholly inadequate for a showing of improper findings under the Hirsch standard.

Although the respondent is clearly unhappy with the referee's findings, this does not provide a proper basis for the respondent to attempt to retry his case in this forum absent a

showing that the findings are clearly erroneous or without support in the record.

The respondent merely cites conflicting testimony rather than claiming the referee's findings are without evidentiary support. For example, the referee made very succinct and clear findings complete with specific references to the supporting evidence regarding the respondent's neglect of Ms. Kern's case in Case No. 70,830, REF- p. 1, 2, and Att. A, concerning respondent's neglect of Ms. Kern's case which resulted in a dismissal and assessment of costs against her as well as respondent's misrepresentation to Ms. Kern of these facts. Although in his Initial Brief respondent asserts his own version of the facts, it is clear that the referee found Ms. Kern's testimony to be most fully supported by the evidence with which he clearly and specifically documented his report.

Similarly, regarding Case No. 71,085, Count One, the respondent makes assertions but fails to show the referee's findings are without support in the evidence. The referee found the respondent's actions in agreeing to act as a courier for his client's cash, failing to promptly deliver same or respond to his client's anxious inquiries until threatened with legal prosecution, and then physically withholding it from Mrs. Mancuso after arriving at her home late at night unannounced until she signed a paper "dropping" her daughter's lawsuit, in violation of

Rule 3-4.3 of the Rules of Professional Conduct, for the commission by a lawyer of any act which is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations or otherwise. The referee also found a violation of Rule 4-1.15(b) for failing to promptly notify the client or third person of his receipt of these funds and promptly deliver same to them. Although the respondent attempts to cast these facts in the most favorable light for himself, there is no showing of anything in the referee's findings that is clearly erroneous or without basis in the evidence. Again, the referee's specific references to the record are most indictive of the evidentiary support for his findings.

As to Count Two of Case No. 71,085, known as the Wilkinson matter, respondent does not deny the correctness of the referee's factual findings but merely argues that discipline is unwarranted and thus his inclusion of that matter in his argument as to the impropriety of the respondent's facts appears unwarranted.

ARGUMENT

POINT TWO

THE SUSPENSION OF GREATER THAN THREE MONTHS AND A DAY RECOMMENDED BY THE REFEREE CLEARLY INDICATES APPROPRIATE DISCIPLINE IN THIS CASE.

Respondent argues that the referee's recommended discipline of "suspension for a period of more than three months and thereafter respondent shall prove rehabilitation as provided in Rule 3-5.1(e), Rules of Discipline", REF, Section IV, is overly vague. However, the referee's intentions appear clear, particularly by reference to Rule 3-5.1(e) which provides that a suspension of ninety (90) days or less shall not require proof of rehabilitation while a suspension of longer than ninety days shall require proof of rehabilitation prior to reinstatement. It is clear from the above that the referee had definite intentions that respondent should be suspended for a period which would require proof of rehabilitation prior to reinstatement. The sufficiency of the referee's recommendation is further reinforced by the procedural fact that any suspension requiring rehabilitation requires a hearing and determinations by a referee, and thus the actual suspension period is rarely the exact length of time stated in a discipline order. Further, this Court has allowed similar recommendations to stand, see The Florida Bar v. Gelman, 504 So.2d 1228 (Fla. 1987), where respondent was suspended for "a period of not less than six months", at 1231.

The respondent also argues that rehabilitation should not be required in this case. At this point it is appropriate to examine respondent's discipline history. As the referee noted, respondent has no less than four previous cases of discipline for ethical violations within the last ten years:

> 1) The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979) 90 day suspension and six months probation for self dealing in a business transaction with a client and lying under oath at disciplinary proceedings.
>
> 2) The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982) Public reprimand and one year probation for neglecting a legal matter.
>
> 3) The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986) 60 day suspension and two years probation for gross neglect of a trust account.
>
> 4) The Florida Bar v. Neely, 502 So.2d 1237 (Fla. 1987) Three month suspension and two years probation for handling client's funds improperly and demanding a client's signature on false exculpatory letter as well as improper trust accounting procedures.

Thus, respondent has been previously disciplined for at least one instance of similar conduct regarding neglect, and in the case of trust account violations, twice previously for misconduct similar to the pending case before this Court. Respondent is in fact presently on probation from the most recent 1987 action by this Court. Since the misconduct in Case No. 70,830 involving Ms. Kern took place between 1982 and late 1986, respondent was on probation for two different discipline matters at the time he committed this misconduct. Regarding Case No. 71,085, Counts One and Two, where his misconduct occurred in about January, 1987, respondent was on probation from the 1986

suspension. Thus, the previous discipline of respondent does not appear to have been sufficient to rehabilitate Mr. Neely.

It is well settled that a prior discipline history demands more serious discipline, The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983); The Florida Bar v. Gelman, 504 So.2d 1228 (Fla. 1987); The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980). As the Court noted in Bern, a suspension with proof of rehabilitation is warranted where the respondent has a discipline history even where the particular misconduct currently before the Court is not especially egregious.

Further, the facts of the pending case alone call for significant discipline. Noting that the pending case involves no less than three separate incidents of misconduct, they shall be examined individually. Case No. 70,830, Ms. Kern, the complaining witness, suffered from respondent's neglect of her case by having her lawsuit to recover damages for her medical injuries dismissed for lack of prosecution and having the costs of the defendant assessed against her after respondent had misrepresented the status of the case to her. In The Florida Bar v. Gaskin, 403 So.2d 425 (Fla. 1981), the Court noted the seriousness of similar misconduct involving neglect and found the lack of candor with the client to be particularly egregious, and imposed a public reprimand despite no stated prior misconduct.

Case No. 71,085, Count One, involved respondent's failure to properly handle the funds of Mr. Mancuso. Note that respondent

was also disciplined in 1986 and 1987 for improperly handling funds of his client. Although it appears that respondent's courier role in delivering the cash was not part of an attorney-client relationship, the rule, 4-1.15, clearly encompasses a duty to third parties as well as clients. Further, a business relationship was at least contemplated between respondent and Mr. Mancuso, R-(April 1, 1988) p. 4, in regard to the service. This Court has not hesitated to impose serious discipline on a respondent for ethical violations outside the attorney-client relationship, The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1983).

Count Two of Case No. 71,085 involves respondent's third discipline case for trust account rule violations. The respondent's trust account was overdrawn due to a check respondent drew to himself for $450.00 fees, R- (January 20, 1988), p. 38. When the bank notified respondent of the overdraft, he deposited $220.00 of personal cash into the account, failing to indicate on the deposit slip the client identification as required by the rules.

Supreme Court of Florida case law holds that attorneys should be sanctioned for misconduct of this type. The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981) held that discipline was warranted for violations of the trust accounting rules, including improperly advancing funds from his client's trust account in excess of the amount they had on deposit at the time

of the advances, maintaining a balance on six occasions in the trust account which was less than the outstanding trust liabilities, and improperly preparing a disbursement statement. See also The Florida Bar v. Bartlett, 462 So.2d 1087 (Fla. 1985) where respondent was suspended for mixing personal and client funds, failing to properly maintain ledger cards, and drawing a check which caused an overdraft in the trust account.

It is the position of The Florida Bar that nothing less than a minimum of a 91 day suspension, requiring proof of rehabilitation pursuant to Rule 3-5.1(e) of the Rules Regulating The Florida Bar, is appropriate in this case in order to effectuate the purposes of attorney discipline required by this Court. In noting that three complaining witnesses are present in this case, while four prior complaining witnesses are involved in respondent's previous cases, protection of the public is called for by a significant suspension requiring proof of rehabilitation prior to reinstatement.

ARGUMENT

POINT THREE

THE COSTS ASSESSED BY THE REFEREE ARE REASONABLY AND APPROPRIATELY TAXED TO RESPONDENT IN THIS CASE.

Respondent argues that the referee's assessment of the Bar's costs as contained in the Final Affidavit of Costs dated April 12, 1988, was improper. Respondent asserts in his Initial Brief that his Motion to Disallow Costs was never heard by the referee, although the referee held a conference call between respondent's counsel and bar counsel on this issue on June 2, 1988, as evidenced by the letter of respondent's counsel of June 3, 1988, attached in the Appendix. The respondent protested the investigator expenses on the grounds that they are undefined. This Court has routinely allowed this category of costs to be assessed by the Bar without further requirement. Contrary to the Davis case cited by respondent in which the Bar's costs were discounted, respondent was found to be in ethical violation for each charge the Bar carried foward, based in large part upon the information provided by the investigator's charged work.

To require a detailed statement of each dollar expended in investigator expenses was, as found by the referee, unnecessary. Respondent's argument that the record does not support the investigative expenses is without merit since no evidence was

sought or presented concerning the investigator's work other then the Bar's Affidavit of Costs. As with each Bar case, each cost expenditure is fully documented and necessary for the case.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court to approve the referee's findings of fact and recommendations of discipline and suspend respondent for no less than a minimum 91 days with proof of rehabilitation required, and to assess the Bar's costs currently totalling $4142.50.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 222-5286

and

JAN WICHROWSKI
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(407) 425-5424

BY: 

JAN WICHROWSKI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Answer Brief has been furnished by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing Complainant's Answer Brief has been furnished by regular U.S. mail to Gary A. Bloom, counsel for respondent, at 547 North Ridgewood Avenue, Daytona Beach, Florida 32018; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 22nd day of November, 1988.

Jan Wichrowski

JAN WICHROWSKI
Bar Counsel