70,730

IN THE SUPREME COURT OF FLORIDA

Case No.: 70,830 and
71,085

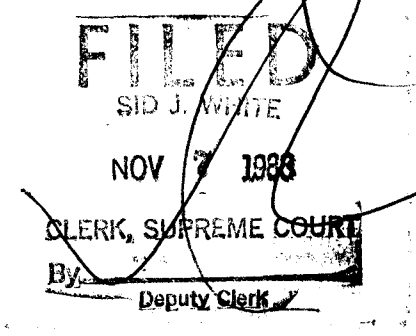
THE FLORIDA BAR,

Complainant,

vs.

GARY H. NEELY,

Respondent.



RESPONDENT'S INITIAL BRIEF
(On Petition for Review of Report of Referee)

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STATEMENT OF THE CASE

This case is before this Honorable Court after lengthy proceedings before the Grievance Committee, a finding of probable cause, filing of formal Complaints and various other pleadings by the Florida Bar and by the Respondent, trial on the merits before an appointed Referee, and the filing of a Petition for review of the Report of Referee. The Complainant has not filed any cross petition for review and, by letter informing the Respondent of the approval of the Referee's recommendation, has indicated that it will not seek review of the report or challenge the recommended findings or proposed disciplinary measures. There remains pending before this Honorable Court the question of whether or not Respondent's Petition for Review which, admittedly, was not timely filed under Rule 3-7.6, Rules Regulating the Florida Bar, should be considered based upon the statement contained in that petition to the effect that the untimely filing of that petition was based upon Respondent's reliance upon the dates set forth in the Complainant's letter notifying him of the Board of Governors' consideration and approval of the Referee's report.

Respondent has petitioned this Honorable Court for review of the Report of Referee alleging, in brief, the following irregularities and improprieties:

1) the measure of discipline recommended is overly vague and unnecessarily harsh;

2) assessment of excessive and improper costs;

3) that the findings of fact are not supported by the record; and

4) that the recommendations as to finding of guilt or innocence are not supported by the facts found by the referee.

STATEMENT OF FACTS

On or about June 7, 1988, some eleven months after his appointment as referee, the Hon. John Antoon, II, Circuit Judge, rendered his report and recommendations following the conclusion of the trial of the allegations of misconduct by the respondent set forth in the Complaints. It appears that the Board of Governors met in late July and, on August 2, 1988, the Florida Bar notified the Respondent by letter that the report and recommendations of the referee had been approved.

In that same notice letter, the Bar stated erroneously and unequivocally stated that the Respondent had until August 29, 1988 to file a petition for review of that report and those recommendations. When Respondent learned, on August 17, 1988, that the appropriate time for filing would have been no later than August 16, 1988, he immediately telephoned the author of the August 2, 1988 notice letter and was informed that the author was not present in the office, that they had recognized the error after the letter was mailed, that a message would be left to return the telephone call, and that counsel should contact Ms. Wichrowski in Orlando as she would likely be the attorney assigned to formulate and argue the Complainant's response to the petition. Relying on Complainant's representations as to time for filing a petition for review, Respondent did file such a

petition on August 26, 1988.

The cases before this Honorable Court for review of the referee's report and recommendations are comprised of two separate Complaints filed by the Bar alleging three instances of professional misconduct. The Complaint in case number 70,830 addresses the inquiry of Betty Ruth Kern. The second Complaint, case number 71,085, addresses the inquiries of Mr. and Mrs. Mancuso (Count I) and Mr. and Mrs. Wilkenson (Count II).

It is strangely coincidental that these three inquiries, along with at least four others which were disposed of at the Grievance Committee level, were all filed very close in time to an inflammatory report by the Daytona Beach News-Journal of the Respondent's last disciplinary order on or about January 29, 1987.

Equally bizarre is the fact that all of these investigations were originally scheduled for a single marathon Grievance Committee hearing session where the same panel would hear and then consider in executive session something on the order of seven consecutive allegations of professional wrongdoing on the part of this same Respondent. This improper and unfair abuse of procedure, which would certainly draw a fifteen yard penalty for "piling on" and/or "unsportsmanlike conduct" if it happened in so genteel a forum as a college football game, amounts to condemnation by innuendo which blatantly strips the respondent of any presumption of innocence or pretense of fairness in the proceedings and, further, appears to be a calculated tactic of the prosecuting agency to so prejudice and

confuse the probable cause panel as trier of fact as to ensure a finding of probable cause based upon the sheer number and variety of allegations, prompted by adverse newspaper publicity, rather than upon the particular merits of any or all of the allegations. In effect, this Respondent has been privileged to be hanged in and by the local newspaper and then tried by a prejudiced court. Respondent has raised and strenuously argued this issue by appropriate motions at each level of these proceedings.

The final hearing in both of these cases was originally scheduled for November 18, 1987. At that time, the referee heard approximately two-and-one-half hours of testimony as to Count I of the Complaint in case number 70,830, the allegations involving Betty Ruth Kern, and then announced that time for the completion of the hearing would be scheduled as soon as possible. That continuation of testimony occurred on January 20, 1988. During that January 20, 1988 hearing, Bar Counsel cross-examined the Respondent and further examined Ms. Kern in rebuttal. Following the close of evidence by both sides, the Referee heard both the Bar's and the Respondent's oral closing argument as to the Kern matter.

The next matter taken up by the Referee was the final hearing of Count II of case number 71,085 concerning the allegations of Mr. and Mrs. Wilkenson. Once again, it is interesting to note that the original inquiry by the Wilkensons alleged the infinitely more serious violation that Respondent had stolen monies belonging to them from his trust account. The only allegation of the Complaint was that Respondent had overdrawn his

trust account and then covered the overdraft without making adequate record of the transaction.

To prove that allegation, the Florida Bar presented the testimony of Charles Lee, a staff investigator in the Orlando office, and several documents relating to the exact overdrawing of the account alleged. By the same token, Respondent's evidence was clear and unrebutted that the overdraft was an arithmetic error and was immediately corrected when the bank notified him, by telephone, of the problem. Following the close of both sides' evidence, the referee heard oral closing arguments from both the Florida Bar and the Respondent. Finally, it appeared that the referee was prepared to hear evidence on Count I of case number 71,Ø85 regarding the inquiry by Mr. and Mrs. Mancuso.

Prior to that January 2Ø, 1988 hearing, there had been several motion hearings and, based upon Bar Counsel's representation she would read the transcripts of the Mancusos' Grievance Committee testimony into the record, Respondent had filed a motion in limine to exclude those transcripts. Neither Richard Mancuso nor Sandra Mancuso was physically present for the January 2Ø, 1988 hearing and the referee took up the Respondent's motion in limine for evidentiary hearing.

Bar Counsel offered the testimony of her secretary who stated that she had a telephone conversation with either Mr. or Mrs. Mancuso, that they were planning to be "out of the country" on vacation on January 2Ø, 1988, and that <u>she had not been instructed to subpoena the Mancusos for that hearing</u> [emphasis added]. On cross-examination, she admitted she had no direct

personal knowledge of their whereabouts or whether they would have appeared if subpoenaed. [A-226 - A-234].

Respondent proffered to the referee that he had obtained subpoenaes commanding the Mancusos' appearance and that service had been accepted by Mrs. Mancuso's mother. Respondent further argued that Bar Counsel had not made the necessary showing of unavailability under Florida Rules of Civil Procedure, that the complaining witness(es) were entitled to no special privilege under the Rules Regulating the Florida Bar and, therefore, the transcripts should be excluded. The Florida Bar argued that the transcripts, which would otherwise be inadmissible hearsay, are admissible.

At that time, there was a discussion between both counsel and the referee which may have been an off the record sidebar conference. However, during the course of that conversation, Respondent's counsel learned for the first time that there may have been some ex parte conversation between Bar Counsel and the referee about the unavailability of the Mancusos as witnesses and the potential admissibility of the Grievance Committee testimony. The referee then ruled that he would schedule another date for the completion of the final hearing and give appropriate notice.

Shortly thereafter, the referee informed both counsel that his schedule would not permit the taking of this testimony until sometime towards the end of March or beginning of April. A few days later, counsel were notified that the hearing was to be scheduled for April 1, 1988. On February 19, 1988, Bar Counsel

sent a letter to the referee requesting that the hearing be rescheduled again to suit the Mancusos' convenience [emphasis added] as they would again be vacationing out of town for approximately the first ten days of April.

This correspondence prompted a telephone conference call hearing, without record, at which time it was agreed the hearing would be held in New Smyrna Beach at the Volusia County Branch Courthouse on March 29, 1988 at 4:30 P.M. in order to permit Ms. Wichrowski to produce her witnesses without interfering with their vacation plans. Ms. Wichrowski followed this conversation by forwarding a notice of hearing, bearing a certificate of service dated March 23, 1988, setting the continuation of the Final Hearing for the Volusia County Branch Courthouse at New Smyrna Beach, Florida on April 29, 1988 at 4:30 P.M. That notice was received by Respondent's counsel on March 25, 1988.

On March 29, 1988, Respondent and his counsel and the referee appeared at the New Smyrna Beach Branch Courthouse ready to conclude this hearing. At that time, Respondent's counsel informed the referee of the notice stating the date as April 29, 1988 rather than March 29, 1988. However, after waiting about fifteen minutes and noting that neither Ms. Wichrowski nor the Mancusos had appeared, the referee and Respondent's counsel telephoned Bar Counsel in Orlando to investigate the delay. When Ms. Wichrowski answered the telephone, she represented to the referee and to Respondent's counsel that she had made an error in the dates, that she would need at least thirty to

forty-five minutes to drive from Orlando to New Smyrna Beach, and that the Mancusos had been informed of the April date on the notice of hearing. Bar Counsel further indicated that she believed the Mancusos had already left for vacation and could not be reached. The referee then announced to both counsel that he would hold a telephone conference call hearing at 1:15 P.M. on April 1, 1988 to dispose of the question of admissibility of the transcript of the Mancusos' testimony before the probable cause panel.

In the interim, Respondent's counsel sent subpoenaes commanding the Mancusos to appear at the offices of Respondent's counsel at the time of the telephone conference call hearing to be issued by the referee. Those subpoenaes were issued by the referee and, unknown to Bar Counsel, personally served on both Richard Mancuso and Sandra Mancuso at their residence on the evening of March 31, 1988.

During the course of that telephone conference hearing, Bar Counsel again attempted to argue that she could rely only upon the Grievance Committee transcript without [emphasis added] any showing that the witnesses were unavailable as defined by Florida Rules of Civil Procedure or that counsel had made effort to compel the attendance of the witnesses and was unsuccessful in that endeavor. Respondent's counsel then informed the referee (who was in his Chambers in Melbourne) and Bar Counsel (who was at her office in Orlando) that Richard Mancuso and Sandra Mancuso, who Bar Counsel had just represented to the referee as "unavailable" having "already left for vacation", were physically

present in his waiting room in Daytona Beach.

After this startling development, the following colloquy between the referee and counsel occurred:

> "MS. WICHROWSKI: Your Honor, it's clear that Mr. Bloom is fraudulently attempting to delay these proceedings. It'sHis fraudulent attempts and I've had more than enough. I beg, Your Honor, just to go ahead and have his testimony - -
>
> THE COURT: Hold on a second.
>
> I'm not going to get involved in the accusations being exchanged back and forth between attorneys. My job is to decide this case on its merits. I want to do that. I'm not going to dismiss the case.
>
> There's no showing and I'm not going to delve into the matter of what - - no showing that Ms. Wichrowski has done anything other than represent to the Court what the vacation and traveling plans were of Mr. and Mrs. Mancuso. If she has done something wrong, that can be taken up at another place and time." [emphasis added] [A-259,260].

After further discussions with both counsel it was decided that the Mancusos' "live" testimony would be taken by telephone conference call as soon as the referee completed another matter.

The referee heard testimony from Sandra Mancuso, Richard Mancuso and the Respondent. When both sides indicated that they had concluded their presentations, the referee ordered Bar counsel and Respondent's counsel to submit their closing arguments to him, in writing, within ten days. In due course closing arguments were submitted to the referee by both sides; however, Bar Counsel took that opportunity to reargue the Kern case and the Wilkenson case even though the referee had already heard oral closing arguments from both sides. Respondent moved

to strike the Florida Bar's written closing argument as to all except the Mancuso matter. That motion to strike was granted by order dated June 3, 1988.

On or about June 2, 1988, there was a telephone conference call, without record, initiated by the referee asking counsel for citation of authorities on the issue of taxation of costs. No indication was given as to the referee's decision; however, he asked for authority on taxation of costs against either party. At that time, counsel were instructed to submit authority on an expedited basis. Respondent's counsel called the referee's office to leave this authority and was informed by the secretary that Bar Counsel had already spoken to the referee and the authority should be submitted in writing. Respondent's counsel immediately informed Bar Counsel, by letter, of the authorities cited to the referee and contemporaneously filed with the referee a copy of that citation letter. On June 7, 1988, Bar Counsel forwarded to Respondent's counsel a "Citation Memorandum" reciting that the authorities contained therein were transmitted to the referee by telephone on June 3, 1988.

ARGUMENT

I. THE MEASURE OF DISCIPLINE IMPOSED IS OVERLY VAGUE AND UNDULY HARSH.

The recommendation of the referee in the instant matter, "that the respondent be suspended from the practice of law for a period of more than three (3) months and thereafter respondent shall prove rehabilitation", is overly vague in that it makes no specific recommendation as to the discipline to be imposed. The referee recommends only that this Honorable Court suspend respondent from the practice of law long enough that he will not be reinstated automatically after that suspension. But from the report submitted by the referee it is impossible for the respondent to determine whether the referee is recommending a ninety-one (91) day suspension, the opposite extreme short of permanent disbarment, or something between the two. And lacking this information, the respondent is unable to frame any sort of intelligent argument in response to the recommendation.

It appears to respondent that the only genuine issue raised by the referee's recommended discipline is whether or not the miconduct found, taken with the respondent's past disciplinary record, rises to such a level that it requires a showing of rehabilitation. This demands an analysis of both the present finding of misconduct and all prior disciplines imposed.

In the Kern case, the referee found that the respondent had neglected a legal matter by allowing Ms. Kern's lawsuit to be dismissed for lack of prosecution, that he had permitted harm to come to her because a cost judgment was entered following the

dismissal and that he had committed acts which were fraudulent, dishonest or otherwise adversely reflected on his fitness to practice law when he "falsely" told Ms. Kern, "We won" after the hearing on the dismissal.

Here, the referee overlooks substantial mitigating evidence. First, the the Florida Bar's stricken written closing argument makes much ado that there was a chiropractor who assessed a 10% permanent disability in 1984. Yet the evidence was equally clear and unrebutted that, at about the same time, three (3) defense medical experts found no permanent disability whatsoever. Additionally, the findings of fact fail to address, directly or indirectly, the issue of respondent's ability to maintain contact with Ms. Kern even though the referee heard substantial testimony. There is no mention at all in the referee's findings of the unchallenged evidence that respondent had another attorney in his firm monitoring Ms. Kern's case for additional medical information which would increase the value of her case or that respondent suffered a lengthy major illness which eventually required him to hospitalized due to a diabetic coma.

The referee also fails to mention in his findings of fact that the evidence clearly indicates that respondent took immediate steps to protect Ms. Kern's rights after the dismissal by refiling the suit at his own expense, moving to adopt discovery, and paying over the amount of the cost judgment to her new counsel. In fact, there was no evidence showing that any harm came to Ms. Kern as a result of the dismissal for lack of

prosecution. Although the referee's findings come to this Honorable Court clothed with a presumption of correctness, respondent respectfully submits that there is a fine line between dark humor and deliberate misrepresentation when an attorney has the unwelcome duty to inform his client that an issue has been resolved in favor of the opposition.

In the Mancuso matter, the referee found that one of the unavoidable corollaries of Murphy's Law still holds; if you want to make an enemy, all you need to do is do a friend a favor. Here respondent was acting, by the testimony of all concerned, outside of any attorney/client relationship and, according to Mrs. Mancuso, "doing Richie a favor" by picking up money from a vending machine in Miami while respondent was there on other business. The referee found that respondent had committed acts subject to professional discipline for not promptly delivering the monies to the Mancusos and under the it-doesn't-look-good-for-a-lawyer-to-do-that rule.

Based upon the facts specifically found by the referee, the longest time the respondent held those monies was four (4) days; and further, there was testimony in the record that the respondent did have personal contact with Mr. Mancuso in Jacksonville during that time. There is also testimony in the record that the Mancusos were getting "pressure" from their partners regarding those monies which may have caused them to be more demanding. Moreover, there is no allegation or finding whatsoever that less than all of the monies due were turned over to the Mancusos.

In effect, the referee's findings of fact suggest that respondent tried to hold the money to ransom that Mrs. Mancuso would sign "a paper "dropping" her daughter's lawsuit for medical malpractice, as well as other unidentified papers" after she and her husband had called the respondent's office many times over a short period of time and, allegedly, threatened to swear out a warrant for his arrest. Respondent respectfully submits that, under those circumstances, it would be reasonable for an attorney to ask his client to sign consents to withdrawal as the relationship has probably deteriorated to the point where he can no longer function effectively as counsel. Interestingly enough, Mrs. Mancuso's memory improved when questioned on the issue of signing a receipt and, obviously dripping venom and sarcasm, on the question of whether or not she had ever before been held in contempt of court for failing to respond to a subpoena.

The referee found, in the Wilkenson matter, that the respondent received monies into his trust account on behalf of the Wilkensons in December 1986 and, on February 24, 1987, overdrew those funds by writing a check payable to himself. The referee further found that on March 2, 1987 the respondent deposited a sum of money to cover and correct that overdraft from his own funds without noting the client identification on the deposit ticket in violation of two rules of trust accounting procedure. There was no allegation or finding of any harm to the Wilkensons or to any other client of respondent as a result of this error.

However, the findings of fact fail to mention

respondent's unchallenged mitigating testimony that this was an honest arithmetic error and that the respondent immediately corrected the deficieny upon receiving telephone notice from the bank of the overdraft. Admittedly, the deposit ticket was not clearly identified on its face as to the particular client account; but from a policy standpoint, the referee's recommendation on this matter does not withstand analysis. This is an unnecessarily narrow and technical interpretation of the rules and leaves no margin for the correction of legitimate errors which may be found in compliance with another rule of trust accounting procedure requiring periodic reconcilliation of ledger cards with the account balance. If this interpretation is the correct application of the applicable rules as a whole, then it would seem that every attorney who ever found a discrepancy in his trust account due to an error in addition or subtraction would be subject to discipline even if that attorney immediately corrected that error. This would entirely undermine the purpose of the rule requiring regular monthly reconcilliation of the client ledger cards and the trust account balance as any error found could not be corrected without jeopardizing the attorney's license to practice law. This makes no practical sense.

A brief review of the respondent's prior disciplinary actions reveals that he has, in the past, been disciplined for failure to adequately supervise non-lawyer personnel, untimely filing of an appellate brief, inadequate supervision of trust account recordkeeping and the catch-all it-doesn't-look-good-for-a-lawyer-to do-that rule. Most recently, he was suspended for

ninety (90) days in 1987 for conduct reflecting adversely on his fitness to practice law, inadequate supervision of non-lawyer personnel, inadequate trust account recordkeeping, and misuse of truat funds under parallel provisions of the Disciplinary Rules and the former Integration Rule. The Florida Bar vs. Neely, 502 So.2d. 1237 (Fla. 1987).

Reviewing the cases on the question of "the punishment fitting the crime", respondent respectfully asserts that the misconduct found by the refereee in the instant cases does not rise to such a level as to require a suspension in excess of ninety (90) days and proof of rehabilitation as a precondition of reinstatement in order to discourage similar acts by other lawyers and to protect the interests of society. And considering the mitigating factors which are clearly present in the instant record, none of the acts found by the referee amount to the type of blatant or malicious misconduct for which such penal sanctions should be reserved.

A suspension of this respondent exceeding ninety (90) days is the practical equivalent of disbarment and, taking into consideration the mitigating factors and that no tangible harm came to any person involved as a result of respondent's conduct, is an unduly and unjustifiably harsh sanction. Respondent has been a member of the Bar for more than fifteen years and, even if the supension is only ninety-one (91) days, will be required to locate and sift through all of the records of his practice from 1972 to the present; the sheer volume of material this respondent will have to produce in order to comply with readmission

procedures set forth in the Rules Regulating the Florida Bar will effectively turn a ninety-one day suspension into at least a two year suspension. Yet when the acts of misconduct found by the referee are examined standing alone, none of them is so serious that it would likely justify anything harsher than a public reprimand but for the fact that this is not this respondent's first instance of professional discipline.

II. THE REFEREE ASSESSED IMPROPER AND EXCESSIVE COSTS.

One of the referee's recommendations in this matter is that Respondent be assessed costs of the Florida Bar in the approximate amount of $4,142.50. Of that amount, two items stand out as unusually high under the circumstamces. Respondent raised by motion before the referee the question of the propriety of all of the costs. This motion was never heard before the referee filed his report and recommendations.

First, the Bar has wholly failed to in any way itemize or identify any of these costs to the actual investigation in which it was incurred. In fact, the Bar's affidavit of costs is so lacking in detail or information as to render it virtually useless in assisting the trier of fact in its determination of the costs attributable to the individual inquirires. Respondent fears that there may be some confusion, particularly of the Grievance Committee level transcript costs, because of the number of inquiries heard in that same marathon session. Yet those costs are almost one quarter of the total costs the referee recommends be assessed against this respondent.

Taking into consideration the referee level transcript costs accounts for almost half of those costs the referee recommends be assessed against this respondent. The second major contested item, the investigator's expenses, is not in any way linked to any investigation done in this matter by any substantial or competent facts set forth in the Bar's affidavit. In fact, the only evidence in the record which is even arguably related to those costs is the bank records. Certainly the testimony given by Mr. Lee is not adequate to support the amounts claimed by the Bar absent some substantiation as to the actual work done and the actual costs expended.

In the cases of Florida Bar vs. Davis, Fla., 419 So.2d. 325, and Florida Bar vs. Lehrman, 485 So.2d. 1276 (Fla. 1986) this Court has consistently ruled that the referee has broad discretion to apportion costs including taxing costs against the Florida Bar in appropriate circumstances.

Here, the Bar has asserted without any substantiation, detail or other fact which links those expenses to some necessity to the matter before the refereee that an amount in excess of $1,200.00 was expended as "investigator expenses". Further, under Rule 3-7.5(k)(1)(5), Rules Regulating the Florida Bar, "investigator expenses" is not a defined category of taxable costs. Nor are "investigator expenses" a category of chargeable costs under Florida Rules of Civil Procedure such that they would become chargeable under Rule 3-7.5(e)(1), Rules Regulating the Florida. To the contrary, the category of "costs" the Bar has attempted to recover from Respondent in this matter are a type of

cost which is usually recoverable only under specific stautory authority as used to be under the civil theft provisions of Section 812.Ø35(7), Florida Statutes prior to the 1984 revision.

Respondent respectfully submits that the very limited inquiry Mr. Lee testified about does not support any fee or expense in the range claimed. At most, he obtained and reviewed four short bank statements and a few miscellaneous documents. The record is clear that he did not act as a process server in either the Wilkenson matter or in the Mancuso matter which would justify some compensation. Further, given the lack of substantiation in the Bar's affidavit and the fact that the respondent challenged those costs by motion, it would appear that the minimum duty of the referee would be to have some further hearing on the matter before exercising the broad discretion given him under these rules. On that basis, Respondent respectfully submits that the costs, at least as to the "investigator expenses", constitute an abuse of the referee's discretion and should be disallowed.

III. THE RECOMMENDED FINDINGS OF FACT ARE NOT SUPPORTED BY THE RECORD.

In his findings of fact, the referee has drawn numerous inferences which are not supported by the testimony of the witnesses or the exhibits admitted into evidence. Specifically, the referee has entirely discounted or ignored virtually all of the testimony of any witness called on behalf of the respondent.

In fact the respondent's testimony squarely meets the allegations of Mrs. Kern that she was not notified of the

dismissal for lack of prosecution. [A-136, 137]. Further, the testimony clearly addresses the issue of Mrs. Kern's inability to accurately recall dates, the fact that there was some difficulty and/or delay due to the insuror for the driver of the vehicle going into liquidation, and the likelihood that Mrs. Kern's injuries did not meet the threshhold set by Florida law. There is also uncontroverted testimony that Mrs. Kern did not leave messages as frequently as she claimed, she moved at least three times, and she suffered two additional accidents during the representation which she failed to disclose to Mr. Neely. In his finding letters "C", "D" and "E", the referee clearly rejects any testimony that respondent or anyone in his office informed Ms. Kern of the dismissal, interjects his characterization of the alleged incident at the courthouse annex on March 17, 1988 as "falsely" without the slightest scintilla of evidence to support any such characterization, and completely evades the mitigating fact that the cost judgment was paid by respondent and that the judgment did not in any way prejudice Ms. Kern's rights or prevent her from obtaining a resolution of the claim. At best, this is an issue of credibility of the witnesses; however, it appears that the referee either overlooked or did not believe the testimony of the respondent, Mr. Aronoff or Dr. Canakaris. Given the mitigating factors that respondent assigned the monitoring of the file to another attorney while he was physically unable to keep up with his practice, that he refiled to preserve his client's rights and that he paid the cost judgment which was entered after the dismissal and refiling before it prevented Mrs.

Kern from pursuing her action, respondent respectfully asserts that his conduct does not amount to fraud or dishonesty, neglect, or prejudice to the rights of the client. Respondent further respectfully submits that this amounts to clear and convincing showing that the referee has committed error in his findings of fact and his application of those facts to the applicable law.

The referee's characterization of the delivery of the Mancusos' cash to Mrs. Mancuso as a re-enactment of the shootout at the O-K Corral strains the limits of credibility. Perhaps the telephone connection was somehow garbled that the referee did not hear Mr. Mancuso testify that he spoke to Mr. Neely in the period between the actual pickup and the delivery of the money and that Mr. Mancuso was particularly concerned because he had to account for those funds to his "partners". Even Mrs. Mancuso admitted in her testimony that she calmed down enough at some point in the transaction to sign a receipt for the cash delivered.

The referee's finding in paragraph "I" is wholly at odds with the evidence. Mrs. Mancuso, in her anger, used the characterization "dropping" her daughter's lawsuit; in fact, she showed the referee just a hint of her temper when she reacted with dripping sarcasm to counsel's question about whether or not she had ever been adjudged in contempt of court. However, this is clarified by respondent's testimony that he asked Mrs. Mancuso to sign a consent to the firm's withdrawal from that case. When considered in light of the fact that Mrs. Mancuso was, by her own testimony, agitated and anxious to get her hands on that money, as well as the fact that she has not had any formal legal

training, it is entirely plausible that she misunderstood Mr. Neely's request that she consent to obtaining substitute counsel as a demand that she abandon her daughter's action against the doctor. By the same token, it is likely that the Mancusos were so concerned about accounting to their "partners" for the proceeds from that Miami vending machine that their perception of time was influenced such that the several days lapse stated by the respondent seemed like a week or more.

Based upon the referee's grudging finding that the respondent delivered the property to the Mancusos within approximately four (4) days from when it came into his possession and that the Mancusos knew that the funds were in his possession, it is patently absurd to conclude that respondent's actions were unreasonable and that he did not timely deliver the funds or property in his possession to the Mancusos as contemplated by the applicable Rules Regulating the Florida Bar. Rule 4-1.5(b), Rules Regulating the Florida Bar does not require that money or property be delivered immediately or at the whim of the client or third party without some concern for the practicalities of the situation, as here, where there was communication between the attorney and the owner of the funds or property. Impatience on the part of the Mancusos, especially when amplified by some perceived pressure from a third party, is not the standard by which this Honorable Court should measure the reasonableness of the respondent's conduct; rather, the language of Rule 4-1.5(b), Rules Regulating the Florida Bar, measures the conduct of the attorney by the yardstick of reasonableness. Applying that

reasonableness standard to the whole of the facts found by the referee in the Mancuso complaint, it is clear that Gary H. Neely did not commit a violation of Rule 4-1.5(b), Rules regulating the Florida Bar.

By the same logic, the conclusion that respondent violated the "it-doesn't-look-good-for-a-lawyer-to-do-that" rule is equally without merit. The facts in the record clearly stand for the proposition that respondent faithfully performed the favor he told Mr. Mancuso he would do, that the Mancusos were collectively impatient due to forces beyond their control or Mr. Neely's, and that he delivered their money to them in a timely fashion under the circumstances.

Understandably, there was some flaring of tempers due to the Mancusos' impatience and, in retrospect, it might have been better to have called before stopping at the Mancuso residence unannounced to deliver the funds; however, there has been no showing or suggestion of any intention on the part of the respondent to interfere with those funds or wrongfully fail to turn them over to the Mancusos. But on balance, it should be considered that respondent's available alternatives were to deliver the funds at less than the most genteel hour of the day, and hopefully resolve the matter, or risk that the situation would escalate if he waited until the next day and allowed the Mancusos' impatience feed on itself and likely make them even more hostile. Choosing between those equally unpleasant alternatives does not rise to the level of violating Rule 3-4.3, Rules Regulating the Florida Bar, as the respondent was not

attempting to commit some heinous or questionable act. He was trying to defuse a situation which, through the fault of persons not within his control appeared to be deteriorating rapidly from bad to worse. Viewed in the glare of hindsight, it may not have been the best course of action; but it lacks the dimension of nonfeasance, misfeasance or malfeasance which is required to cast hard decisions as conduct which should subject an attorney to discipline under such a catch-all rule.

There is one pertinent fact which has been overlooked by the referee in the Wilkenson matter. The clear and uncontroverted testimony in the record is that the deposit slip which, admittedly, did not have a client identification on its face, was prepared by the bank when the respondent appeared to cover the overdraft which, he testified, was nothing more serious than an error in addition and subtraction which was corrected as soon as it came to the Respondent's attention. The real question here is one of whether the more technical rule requiring client identification should override the provision and policy of the rules of trust accounting requiring periodic reconcilliations of the account balance to the individual ledger cards. Respondent respectfully contends that the rules concerning trust accounts, taken as a whole, adopt the policy that there is some allowance for the timely correction of legitimate errors.

A system lacking this opportunity to deal with the occasional error which may occur would soon collapse as the incentive would be far greater to avoid any required reconcilliation as it might disclose an error which could not be

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resolved without putting one's professional license and livelihood in jeopardy. Respondent does not deny that there was an error in this account due to sloppy arithmetic and haste to correct it once found; but that error was immediately corrected as contemplated by the policy of the rules and there was no evidence of any harm to anyone other than the respondent's embarrassment at being told his account was overdrawn. Under these circumstances, respondent respectfully submits to this Honorable Court that his actions were reasonable and within the spirit and policy of the applicable rules of trust accounting procedure.

IV. THE RECOMMENDATIONS AS TO FINDING OF GUILT OR INNOCENCE ARE NOT SUPPORTED BY THE FACTS FOUND BY THE REFEREE.

The rules cited by the referee as having been violated by this respondent in case number 70,830 sound in conduct amounting to fraud, dishonesty or otherwise adversely reflecting upon respondent's fitness to practice law, neglect of a legal matter, and prejudicing or damaging the client in the course of the professional relationship. The facts found, and the other uncontroverted facts in this record clearly do not support this finding.

First, respondent did not neglect this matter. It is clear that the respondent took this matter off of the trial docket in 1985 in order to avoid what in his professional opinion would have been a costly defeat for his client. There is unchallenged evidence in this record that there was a period of

time during 1985 and early 1986 when respondent was physically unable to attend to this matter and, at that time, another attorney practicing with respondent was assigned to monitor the case, attempt to get some movement towards settlement from the liquidator of the insurance company, and attempt to develop addidtional medical evidence as to the injury threshhold issue. When the matter was dismissed for lack of prosecution, respondent immediately refiled, moved to adopt discovery, and took every available step to protect Mrs. Kern's possibility of recovering money damages. Admittedly, after the case was refiled, a cost judgment was entered in the dismissed case. But there is uncontroverted evidence that respondent paid that cost judgment and that that judgment was not an impediment to Mrs. Kern proceeding against the allegedly negligent party. This, respondent respectfully submits, does not rise to the level of prejudicing the client in the course of the professional relationship.

In the Mancuso matter, the finding of the referee is that the respondent held the Mancusos' funds for less than five days before delivering those funds. This cannot, under any reasonable interpretation of Rule 4-1.5(b), Rules regulating the Florida Bar, amount to an untimely delivery of those funds. When viewed in the context of the fact that there was some communication between the parties and that the Mancusos were under pressure to account for those funds, it appears that the situation is more one of the impatience of the complainants than of the improper acts of the respondent. In either case, such

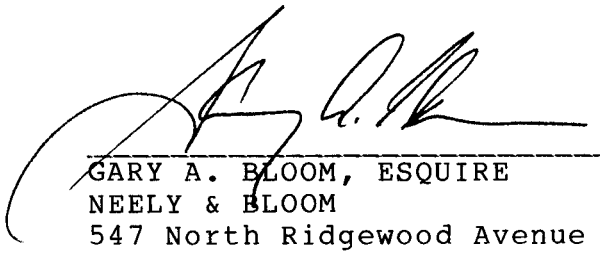
conduct cannot reaonably amount to a violation of either Rule 4-1.5(b) or Rule 3-4.3, Rules Regulating the Florida Bar.

In the Wilkenson matter, the entire question of whether or not respondent should be disciplined hinges on whether this Honorable Court chooses to take a strict and overly technical position on a single rule of trust accounting procedure or the that the policy of the rules as a whole permits harmless error, as here to be corrected in an orderly fashion. Respondent admits that there was an overdraft of the Wilkenson account which he covered by redepositing funds which he believed he was entitled to withdraw on that account and which were overdrawn due to an arithmetic error. Absent some greater showing of intentional misconduct or gross negligence, Respondent respectfully contends that his actions are not a violation of the applicable rules and do not rise to the level of supoorting professional discipline.

CONCLUSION

Based upon the facts and argument set forth in this brief, Respondent respectfully requests this Honorable Court to set aside the recommendations of the referee as to findings of guilt or innocence and recommendations as to discipline to be imposed. Respondent respectfully contends that the costs recommended to be assessed are excessive and are not sufficiently related to this action to justify their being taxed against respondent. Lastly, Respondent respectfully submits to this Honorable Court that there has been no recommended finding of guilt against him in the instant matters which would justify and support a suspension from the practice of law exceeding ninety (90) days and requiring that he prove rehabilitation as a condition of reinstatement.

Respectfully submitted,



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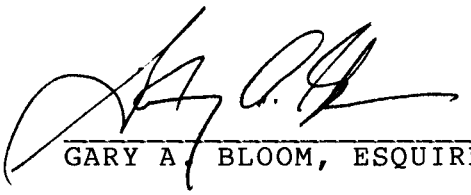
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing RESPONDENT'S INITIAL BRIEF (On Petition for Review of Report of Referee) was furnished to Jan K. Wichrowski, Esq., The Florida Bar, 605 East Robinson Street, Orlando, Florida, and to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida this 3 day of November, 1988.



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