IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY H. NEELY,

Respondent.
_____/

Case No. 74,077 and 75,043
[TFB Case Nos. 88-30,600 (07A),
89-30,271 (07A),
89-30,291 (07A)]

REPLY BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

and

DAVID G. MCGUNEGLE
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
ATTORNEY NO. 174919

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as the Bar.

The Amended Report of Referee dated May 29, 1990, in case number 74,077 shall be referred to as RRA.

The Report of Referee dated June 5, 1990, in case number 75,043 shall be referred to as RR2.

The two volume transcipt of the hearing held on April 6, 1990, shall be referred to as TI and TII respectively.

Bar exhibits shall be referred to as B-Ex.

SUMMARY OF THE ARGUMENT

In his brief the respondent argues that the referee erred in not granting his motion to reopen the evidence in Case No. 74,077. The Bar submits that, as the trier of fact, the referee is in the best position to determine if the evidence should be reopened. The referee properly utilized his discretion in analyzing whether or not the "new" evidence deserved consideration. The only purpose of the "new" evidence was to attempt to impeach the credibility of Mrs. Plotts and Mr. Reynolds.

The respondent's argument that the referee failed to properly consider evidence in mitigation is totally without merit. In fact, these proceedings were not pressed until the respondent's health improved and the passage of time has worked to his benefit. Much of the respondent's argument in his brief on this point pertains more to credibility. Obviously, the referee, after hearing the testimony and reviewing the evidence, elected to believe the witnesses rather than the respondent.

Finally, if anything, the referee was unduly lenient in recommending a three year suspension given the respondent's prior disciplinary history which includes charges of fraud and/or deceit in three separate cases as well as other cases of

misconduct. Disbarment is clearly called given the charges of which he was found guilty and his extensive prior disciplinary history.

ARGUMENT

POINT ONE: THE REFEREE DID NOT ERR IN REFUSING TO GRANT THE RESPONDENT'S MOTION TO REOPEN THE EVIDENCE.

In Bar proceedings the referee is the finder of fact. His findings will be upheld unless clearly erroneous or lacking in evidentuary support and this court cannot reweigh the evidence or substitute its judgment for that of the trier of fact. For the most recent reiteration of this point see The Florida Bar v. Scott, 15 FLW 448 (Fla. Sept. 6, 1990). The respondent made his motion to reopen the evidence in Case No. 74,077 on May 18, 1990, the same day the referee mailed his initial report. The motion failed to identify the new "witness", the respondent made no proffer of the anticipated testimony, nor did the respondent set out the relationship of the "witness" to either Mrs. Plotts, Mr. Reynolds, or the respondent. Even if this "witness" had testified, it appears from the respondent's brief that it would have been only one more witness whose credibility the referee would have had to weigh. See e.g. The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). At some point a final disposition of a case must be made.

If the respondent had merely been attempting to secure his legal fees for representing Mr. Reynolds, whom he apparently

believed to be a credit risk, then it makes little sense for the respondent to readily return Mrs. Plotts' home back to her at Mr. Reynolds' insistence albeit he retitled it in the names of both Mrs. Plotts and Mr. Reynolds. The house obviously represented far better security for the fee than a promissory note from a client who appeared to be a credit risk.

This case presents the classic conflict of credibility. As this Court stated in Stalnaker, supra, "[t]he evidence presented before the referee boils down to a credibility contest between Stalnaker and Jones. The referee listened to and observed both of them, and, as a finder of fact, resolved the conflicts in the evidence." At p. 816. See also The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980). Similarly, the referee in the instant case observed Mrs. Plotts, Mr. Reynolds, the respondent and his witnesses. He weighed their credibility and chose to believe Mrs. Plotts and Mr. Reynolds. Their testimony was consistent with the evidence and supported by the testimony of Mr. Kramer and Mr. Odum.

The Bar submits the referee properly exercised his discretion in denying the respondent's unsupported motion to reopen the evidence. The respondent simply has not been prejudiced.

POINT TWO: THE REFEREE PROPERLY CONSIDERED EVIDENCE IN MITIGATION.

In his brief, the respondent argues many matters which the referee no doubt took into consideration in making his findings of fact.

In Case No. 74,077, it is uncontroverted that the respondent reconveyed the property back to Mrs. Plotts before foreclosure proceedings were initiated by Mr. Odum. This was done via a quitclaim deed on or around February 16, 1987. (B-Ex 5) The respondent then continued making payments through May, 1987, according to the testimony of Mrs. Plotts' attorney, Robert Kramer. (TI pp. 66, 70). The real issue is that Mrs. Plotts was unaware of the existence of the second mortgage held by Mr. Odum. It appears from his brief that the respondent considers the fact that he reconveyed the property before it was foreclosed as being a significant mitigating factor. The Bar submits, however, that it is quite the opposite. The respondent's corporation pocketed the $13,000.00 obtained from Mr. Odum (RRA p. 3) then reconveyed the property and effectively relieved both himself and his corporation from any further obligation for making the mortgage payments. The respondent made only three payments after returning the property to Mrs. Plotts and her son. Perhaps the reconveyance was made in anticipation of legal or disciplinary action being taken. Whatever the reason, by this method the respondent was able to obtain cash with little or no risk to either himself or his corporation.

Furthermore, the respondent's "disinterested witness" to which he refers in his brief appears to be Cheryl Kellerman (f.k.a. Cheryl Crabtree), the respondent's former secretary and stepdaughter. (TI p. 181). The Bar submits Ms. Kellerman, because of her relationship to the respondent, simply does not qualify as a disinterested witness.

The respondent's statement in his brief that both Ms. Kellerman and Mr. Reynolds gave testimony about a conversation between the respondent and Mr. Reynolds concerning making arrangements on the second mortgage or refinancing the first mortgage over a longer period of time does not appear to be totally correct. Ms. Kellerman testified that she witnessed a conversation between the respondent and Mrs. Plotts concerning the use of the home as security for her son's legal fees. (TI p. 183). Mr. Reynolds testified on direct that he was never asked about refinancing his mother's house or obtaining a second mortgage. (TI p. 123). However, it appears on cross-examination that there had been some discussions regarding security for Mr. Reynolds' legal fees. (TI pp. 132,133,140)

Likewise, the respondent's argument that there is substantial mitigating evidence suggesting that he attempted to resolve a fee dispute with Mr. Reynolds without coercion is totally without merit. The referee, after hearing the testimony

and examining the evidence, found that the respondent had defrauded Mrs. Plotts. (RRA pp. 3-4).

With respect to Dr. Wright's case, for whatever reason, the respondent failed to turn over to the doctor insurance proceeds to which he was entitled as payment for medical services rendered to Mrs. Jordan. The respondent then permitted his staff to mislead Dr. Wright with respect to the forwarding of the settlement proceeds to which he was entitled.

In Case No. 75,043, the central issue is not whether the respondent made a timely accounting but rather that he provided his client with a false accounting. (RR2 p. 3). It appears that the respondent did this in an attempt to justify his sizable fee. Clearly, it was done to deceive Ms. Ross into believing the respondent had done more work on the case than he actually had.

The respondent made the same argument to the referee that he does in his brief. He believes his misconduct should be excused because he had other clients with the surname "Ross" during this period and somehow the different cost accountings were mixed up. (TII pp. 207-208, 220-221). The referee considered the respondent's explanation in making his findings and gave it the appropriate weight. The net result, regardless of the excuses, is that Ms. Ross was deceived by an accounting which contained

fictitious expenses prepared either by the respondent or his staff.

Finally, the respondent again argues in mitigation that his poor health contributed to his misconduct. The respondent made this same argument in his memorandum as to the appropriate level of discipline which was submitted to the referee on May 2, 1990, in Case No. 74,077. In fact, these proceedings were postponed until the respondent's health improved. The Bar submits the referee has already given this argument full consideration.

POINT THREE: THE APPROPRIATE LEVEL OF DISCIPLINE SHOULD BE DISBARMENT OR, IN THE ALTERNATIVE, THE TWO THREE YEAR SUSPENSIONS RECOMMENDED BY THE REFEREE SHOULD BE CONSECUTIVE.

In his brief, the respondent mentions that the Bar omitted from its initial brief any mention of his petition for leave to resign. The petition was considered by this Court in The Florida Bar v. Neely, No. 74,093 (Fla. Oct. 5, 1989). The Bar chose not to make any reference to this matter in its argument because the differences between a resignation case and a disciplinary case made it appear inappropriate. In a resignation case this Court deals with a summary of largely unproven but apparently true allegations while in a disciplinary case it deals with a referee's findings of fact and recommendations. Further, this referee was aware of the respondent's resignation proceeding

through his services as referee in case 73,165 wherein he ultimately recommended the respondent be found not guilty which this Court accepted on June 14, 1990.

With respect to the referee's recommended discipline, in his two reports, he gave no indication as to whether or not the two recommended thirty-six month suspensions should run concurrent or consecutive. If this Court should opt to suspend the respondent, then the Bar submits that the two suspensions should run consecutively. The Bar stands, however, on its initial argument that given the findings of fraudulent misconduct and the respondent's extensive prior disciplinary history that disbarment is the most appropriate level of discipline. The evidence clearly shows that the respondent cannot and will not live within the rules which govern his chosen profession. He fails to understand the burdens associated with the privilege of practicing law in this state. Too often, through his role as an attorney, the respondent has abused his fiduciary obligations and taken advantage of his clients for his own personal gain. His conditional privilege should be terminated at last.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will approve the referee's findings of fact and recommendations as to guilt, but reject the two recommended suspensions for thirty-six months as being erroneous and unjustified and, instead, impose the discipline of disbarment for five years and order payment of costs in this proceeding currently totaling $3,853.82 or, in the alternative, make the two suspensions run consecutively.

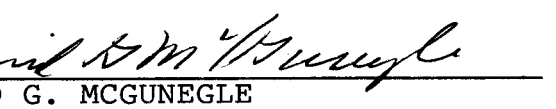
Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

and

DAVID G. MCGUNEGLE
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
ATTORNEY NO. 174919

BY: 

DAVID G. MCGUNEGLE
Bar Counsel