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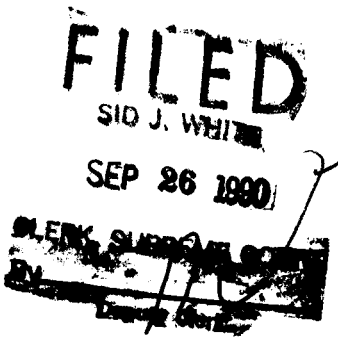

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

GARY H. NEELY,

Respondent.

_____/

Case nos.: 74,077 and 75,043

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

These cases were tried to the referee on April 6, 1990 and, in due course, the referee issued his reports including findings of fact, recommendations as to finding of guilt or innocence, and recommendation as to discipline.

In case number 75,043, the referee found violations of 11.02(4) for failing to timely account for disposition of trust funds, 9-103(B)(3) for failing to maintain complete records of all funds of the client coming into his possession and failing to promptly render an appropriate accounting regarding same and 4-8.4 (c) for conduct contrary to honesty by preparing a falsified settlelment statement and recommended a thirty-six month suspension.

In case number 74,077, the referee found violation of 1-102(A)(4) for conduct involving fraud, dishonesty, deceit or misrepresentation and 1-102(A)(6) for other conduct adversely reflecting on fitness to practice law in the Reynolds matter. In the Wright matter, the referee's findings sound in violation of 4-1.15 (a) for failing to preserve funds held in trust for a third person, 4-1.15(b) for failing to promptly advise a third person when the third person has an interest in the funds received and 4-5.3(a), 4-5.3(b) and 4-5.3(c) for failing to adequately supervise non-lawyer personnel. In this case, the referee separately recommended a thirty-six month suspension without any indication as to whether such suspensions would be concurrent or consecutive.

By way of background, Respondent's prior disciplinary record, which was included in the memoranda submitted to the

referee, is as follows:

The Florida Bar vs. Gary H. Neely
reported at 540 So.2d. 109 (Fla. 1989)

Respondent was disciplined (91-day suspension effective April 10, 1989) for neglecting a legal matter entrusted to him, for prejudicing or damaging his client during the course of the professional relationship, for conduct contrary to honesty, justice or good morals, for engaging in conduct that adversely reflects on his fitness to practice law, for failing to promptly pay or deliver to a client as requested the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive, for actions contrary to honesty and justice, and for failing to properly maintain a trust account.

The Florida Bar vs. Gary H. Neely
reported at 502 So.2d. 1237 (Fla. 1987)
Respondent was disciplined (90 day suspension and two years probation) for failing to adequately supervise non-lawyer personnel, inadequate trust account recordkeeping, and requesting a client's signature on an exculpatory letter.

The Florida Bar vs. Gary H. Neely
reported at 488 So.2d. 535 (Fla. 1986)

Respondent was suspended for 60 days and two years probation for gross neglect of a trust account.

The Florida Bar vs. Gary H. Neely
reported at 417 So.2d. 957 (Fla. 1982)

Respondent was disciplined by public reprimand and one year probation for neglect of a legal matter.

The Florida Bar vs. Gary H. Neely
reported at 372 So.2d. 89 (Fla. 1979)

Respondent was disciplined (90 day suspension and six months probation) for self-dealing in a business transaction with a client and other associated misconduct.

The Complainant timely filed a Petition for Review challenging only the measure of discipline and the Respondent filed a cross-petition seeking review of the findings of fact,

recommendations of finding of guilt or innocence, mitigating circumstances, procedural irregularities of the proceedings and clarification of the measure of discipline imposed.

STATEMENT OF THE FACTS

Respondent accepts the Complainant's stsement of the findings of fact reflected in the various referee's reports save for those exceptions specifically discussed in his argument concerning those mitigating factors which were apparently overlooked by the referee.

I S S U E S

1. WHETHER OR NOT THE REFEREE ABUSED HIS DISCRETION BY FAILING TO REOPEN THE EVIDENCE FOR PURPOSES OF DETERMINING WHETHER OR NOT CERTAIN WITNESSES HAD PERJURED THEIR TESTIMONY.

2. WHETHER OR NOT THE FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE IN THAT THERE ARE SUBSTANTIAL MITIGATING FACTORS WHICH WERE OVERLOOKED.

3. WHETHER OR NOT THE DISCIPLINE RECOMMENDED IS UNCLEAR IN THAT THE REFEREE FAILED TO ADDRESS THE QUESTION OF WHETHER THE SUSPENSIONS RECOMMENDED SHOULD BE CONCURRENT OR CONSECUTIVE.

A R G U M E N T

1. WHETHER OR NOT THE REFEREE ABUSED HIS DISCRETION BY FAILING TO REOPEN THE EVIDENCE FOR PURPOSES OF DETERMINING WHETHER OR NOT CERTAIN WITNESSES HAD PERJURED THEIR TESTIMONY.

The Referee abused his discretion by failing to reopen the evidence for purposes of determining whether or not certain witnesses had perjured their testimony. Respondent respectfully

submits to this honorable Court that the Referee committed prejudicial error by failing to grant the respondents motion to reopen evidence. That motion, filed on May 18, 1990 raised serious doubt and question as to whether or not the purportedly injured parties had perjured their testimony regarding their knowledge and understanding of the transaction involving the Plotts property. Further, the matters set forth in that motion were entirely consistent with the respondents position throughout these proceedings.

In his finding of fact, the Referee correctly recognized that the Respondent's purpose and intent in his intent in dealing with Mr. Reynolds and his mother, Mrs. Plotts, was to obtain sufficient security or collateral for the payment of fees and costs for services to be rendered in defending Mr. Reynolds. There is also testimony in the record to the effect that Mr. Reynolds guaranteed the payment of fees for services rendered to his girlfriend, Donna Crenshaw, and that there was a promissory note purportedly executed by Mr. Reynolds for which there is no explanation except that Mr. Reynolds did not recall signing the note. There has been no issue raised as to the genuiness of Mr. Reynolds signature on the note and handwriting exemplars taken during the final hearing would appear to support the contention that the signature on the promissory note is the signature of Ronald J. Reynolds. Other evidence in the record indicates that Mrs. Plotts knew that her son had guaranteed the payment of fees and costs for his girlfriend, Donna Crenshaw, and was concerned that her house not be encumbered for Donna Crenshaw, because she did not approve of her sons relationship with Ms. Crenshaw.

Respondent's position regarding the Reynolds testimony was and is that both Mr. Reynolds and Ms. Plotts have a very substantial interest in the result and therefore have a more than sufficient reason to shade their testimony. Simply put, the Reynolds did not obtain a favorable result and wanted to avoid or renounce the financial arrangements made early on in the case when they were hopeful of obtaining a favorable result. In fact there is also evidence in the record that the charges against Mr. Reynolds were very substantially reduced from multiple felonies to a single misdemeanor for which he was sentenced to twelve months probation with a special condition of probation that the first one hundred eighty days be served in the Volusia County Correctional Facility. This sentence was not negotiated and in fact came as a surprise to all when it was announced by the Court.

Given these matters which are part of the record, Respondent respectfully submits that it would have been appropriate for the Court to reopen the evidence and hear the testimony of a witness who purportedly overheard statements made by the Reynoldses after they were aware that the Court had made a ruling in their favor and no longer felt a need to protect their position. Respondent respectfully contends the paramount issue on the transaction involved in the Plotts property is the question of witness credibility; it boils down to whether you believe the poor little old lady with a fourth grade education, who says, after obtaining an adverse result, that the big bad lawyer overreached and failed to advise her as required, or whether you believe the attorney who candidly admitted from the

very beginning, that his purpose was to assure payment for the services to be rendered and that he explained the transaction to all concerned after you have carefully weighed the totality of the documents and testimony, including the fact that the deed back to Mrs. Plotts was executed more or less contemporaniously with the promissory note signed by her son. The obvious inference is that this was a mechanism to release the property and obtain alternate security for payment of the attorneys fees. In light of this set of circumstances and the importance of the question of witness credibility, Respondent respectfully submits that the court committed an abuse of discretion and prejudicial error by failing to conduct a hearing on the motion to reopen evidence and to hear the witnesses testimony as to the statements purportedly made by Mr. Reynolds and Mrs. Plotts after the Referee had issued his report.

2. WHETHER OR NOT THE FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE IN THAT THERE ARE SUBSTANTIAL MITIGATING FACTORS WHICH WERE OVERLOOKED.

With respect to the Reynolds matter, the facts are uncontested that the Respondent conveyed the property back to Mrs. Plotts and her son before (emphasis added) any action was taken either to foreclose the mortgage or to complain to any regulatory authority. It is important to bear in mind that Ronald Reynolds had not yet been sentenced and committed to 180 days county jail time on the reduced charges and that the appellate court had not yet ruled against him on the forfeiture. And there is further mitigating circumstance in that the Respondent made payments on the mortgage after the conveyance

back to Mrs. Plotts; presumably to protect the position of the parties while there were active negotiations to refinance the property and resolve the financial obligations between Mr. Reynolds and the Respondent.

Respondent testified, as did a disinterested witness and Ronald J. Reynolds, that there were convrsations between the Respondent and Ronald J. Reynolds pertaining to making arrangements on the second mortgage or refinancing the first over a longer period of time to reduce the payments. There was also evidence that Mr. Reynolds executed a promissory note to another of Respondent's corporations contemporaneous with the conveyance to Mrs. Plotts and Mr. Reynolds; presumably to replace the collateral which would be surrendered by transfer of the property. This is substantial mitigating evidence which strongly suggests that the Respondent took reasonable and appropriate actions both to resolve his fee dispute with Mr. Reynolds and to safeguard his client's interests and the interests of third parties without the coercive force of any pending lawsuit or disciplinary proceeding.

In his testimony, Dr. Wright did not dispute that there were other dealings with the Respondent both before and after this incident which were satisfactorily resolved and this fact lends support to Respondent's contention that the Lois Jordan matter was an isolated and unfortunate error rather than a deliberate act. Further, there was evidence that all of the settlement monies were disbursed to the client.

This is not to say that the Respondent should not have been forthright with the doctor as soon as he learned of the

error; but there was evidence that the Respondent made many attempts to reach a settlement of this matter with Dr. Wright up to and including the day of the final hearing and was met with exactly the type of intransigence displayed by Dr. Wright's demeanor at the hearing. Here, again, the Respondent recognized the necessity to resolve his professional and financial obligations to Dr. Wright and was unsuccessful in his attempts to negotiate an amicable resolution. The clear inference from the evidence before the Court is that Respondent had neither the cash nor the available credit to satisfy Dr. Wright's demands. However, the fact that Respondent did keep trying to work out the problem with Dr. Wright even up to as late a time as the day of the final hearing should be convincing evidence of his lack of intent to defraud or harm and, therefore, substantially mitigate any discipline imposed.

Regarding the Ross matter, the only funds for which the Respondent must account are "trust funds" which would be the monies disbursed as settlement to Dr. Rohrer and the funds delivered to Mrs. Ross regarding her pension plan benefits. That should be the focus of the inquiry. There is no contention that the other $20,000 is anything except the fees for services set forth in the retainer agreement and agreed travel expenses. Beyond that point, any accounting of expenses not billed to the client is purely an internal accounting for the benefit of the lawyer, not for the benfit of the client, which serves to show little more than that the attorney absorbed a substantial sum of incurred costs based upon his retainer agreement which stated the only costs to be billed to the client would be the airfare to go

to New Jersey, if necessary.

Moreover, there was unchallenged testimony in this record that the Respondent had several other active cases in his office during the relevant time for persons of the same fairly common surname and that the problem is more one of inadequate recordkeeping than a deliberate attempt to defraud. This case is not parallel to the case where an attorney was disciplined for manipulating (emphasis added) clients' bills to camouflage excessive costs by billing them as fees and then administratively changing things. There is no contention that Respondent asked for or received other monies from Ms. Ross which were outside the scope of the retainer agreement. Here the attorney honored his agreement and charged the client only for the agreed costs; any other costs incurred or expended by the Respondent in fulfilling his obligation to Ms. Ross are immaterial to this inquiry.

Respondent suffers from two serious health problems, diabetes and cancer, which have necessitated he be hospitalized several times to stabilize his condition and for surgical procedures to control the spread of the cancer. In at least one of those instances, his hospitalization was a major contributing factor to an incident of discipline. Respondent has been and continues to be under a doctor's care to manage and control his diabetes. Respondent verily believes that his medical condition, the inadequately controlled diabetes, was a major contributing cause to bad business judgment from approximately late 1985 through and including mid-1987. Further Respondent was diagnosed as having "galloping" cancer in May, 1989 and has undergone several surgeries for that condition including a substantial

removal of muscle and lymph node tissue in June, 1989. Respondent verily believes that the stress of these proceedings contributed to the breakdown of his immune system. It is now recognized and accepted that the practice of law is a stressful profession and the Bar itself has come to sponsor numerous symposiums and conferences on dealing with the stress of practice. Respondent respectfully submits that the attempt to listen everyone's problems, legal or otherwise, has substantially increased the stress on him and has thereby contributed to the deterioration of his health.

Assuming the Respondent knew or should have known he was acting improperly with respect to the client's property or to a third perosn's property in these cases, the mitigating facts clearly undermine any conscious or deliberate attempt by the Respondent to convert the client's property. And it cannot fairly be said, in light of the mitigating evidence, that he neglected the situations or showed a callous disregard for the interests of a client or third party which would support so severe a sanction as disbarment.

3. WHETHER OR NOT THE DISCIPLINE RECOMMENDED IS UNCLEAR IN THAT THE REFEREE FAILED TO ADDRESS THE QUESTION OF WHETHER THE SUSPENSIONS RECOMMENDED SHOULD BE CONCURRENT OR CONSECUTIVE.

In its statement of the case the Bar correctly observes that the referee failed to make any recommendation on the issue of whether any discipline imposed as a result of these cases should be concurrent or consecutive. As a practical matter, this begs the question of a three year suspension as opposed to a six

year suspension as opposed to a five year disbarment. To a certain extent, that question has previously been litigated on Respondent's petiton for leave to resign, with leave to apply for reinstatement after three years, which was denied. Gary H. Neely vs. The Florida Bar, case number 74,Ø93.

Respondent respectfully submits and contends that the referee's recommendation as to discipline, if supported by the evidence, should be afforded no lesser dignity than referee's findings of facts which are supported by the evidence. This is so as a function of the referee's role as trier of fact who has heard all of the evidence and had the opportunity to weigh that evidence in light of the demeanor of the witnesses and the other intangible factors of decisionmaking which are not readily observed from a cold transcript of proceedings. The referee is in the best position to determine those inevitable questions of degree which are inherent to both the finding of fact and the recommendation of appropriate sanctions upon a finding of guilt or innocence.

If it is the Bar's position that the referee failed to properly consider the Respondent's prior disciplinary history, that contention is entirely without merit. Rule 3-7.5 (k)(4), Rules Regulating the Florida Bar, provides the necessary mechanism in that "after a finding of guilt all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent" and both memoranda on the measure of dicipline submitted to the referee contained an exhaustive recitation of Respondent's prior encounters with the Bar. Further, the Bar argued strenuously for

disbarment in its memoranda. There is no question but that the referee was given full disclosure of Respondent's past disciplines and had ample opportunity to take those matters into consideration in making his recommendation.

What the Bar omits from its recitation is that these matters were continued, with the approval of the referee, so that Respondent could file and litigate his petition for leave to resign with leave to apply for readmission after three years. Had that petition been granted, it would have been a final resolution of all pending disciplinary matters. Respondent presumes that the referee was aware that the petition for leave to resign was denied and that his recommendation as to discipline, silent as it may be on the question of whether the recommended suspensions should be concurrent or consecutive, is a product of due consideration of all of the information submitted including the Respondent's prior record and the denial of the petition for leave to resign. On that basis, Respondent respectfully submits that the Bar's observation that the suspensions would be "presumably" concurrent is an accurate interpretation of what the referee intended as his ruling.

Respondent respectfully contends and submits that the referee's recommendation of thirty-six months suspension would adequately punish the Respondent and serve as sufficient deterrent to others without undermining the dignity of these proceedings or of the disciplinary process. This strkes a fair balance in that it is more severe than prior discipline attributable to similar matters, not unduly harsh, and sets up a deterrent to others who would see that a pattern of insufficient

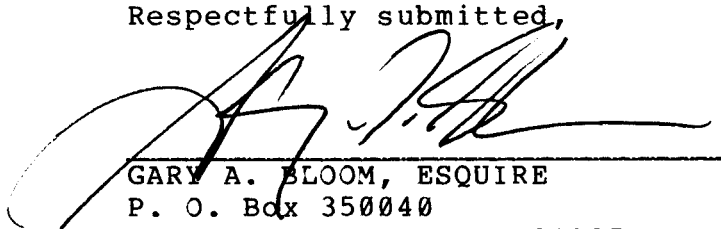
attention to the business side of operating a law practice has consequences which would cause them to be diligent. Additionally, Respondent submits that this suspension should be concurrent with any other active or pending discipline. Respondent respectfully asserts that it will not undermine the public confidence in the practicing Bar nor will it otherwise hinder the administration of justice to grant this measure of discipline as it will not likely appear to the public as if Respondent is "getting off lightly".

Respondent respectfully submits that in light of all of these mitigating factors, and the fact that he is currently under an active suspension which will not be terminated until he petitions for reinstatement and demonstrates rehabilitation, concurrent suspensions of thirty-six months as recommended by the referee rather than disbarment would be the appropriate sanction.

C O N C L U S I O N

Based upon the arguments and authorities set forth above, the Respondent respectfully urges this Honorable Court to remand this cause for further proceedings on the Reynolds matter as requested, or, in the alternative, that this Honorable Court adopt and approve the recommendation of the referee as to the measure of discipline to be imposed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished to David McGunegle, Esq., Branch Staff Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida, by U. S. Mail, John T. Berry, Esq., The Florida Bar, 650 Apalachee Pkwy., Tallahassee, Florida and to John Harkness, Jr., Esq., The Florida Bar, 650 Apalachee Pkwy., Tallahassee, Florida by facsimile and U. S. Mail this 24 day of September, 1990.

GARY A. BLOOM, ESQUIRE