IN THE SUPREME COURT OF FLORIDA

THE FLORIDA EAR,

Complainant,

vs.

ISRAEL PEREZ, JR.,

Respondent.

_____/

Supreme Court Case
No. 78,593

The Florida Bar File
No. 89-70,789(11E)

ON PETITION FOR REVIEW

ANSWER BRIEF OF RESPONDENT

ISRAEL PEREZ, JR.
ATTORNEY-AT-LAW
Respondent
P.O.Box 558403
Miami, Florida 33255
(305) 669-4373

TFE #341363

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SYMBOLS AND REFERENCES

In this Answer Brief, The complainant, The Florida Bar, will be referred to as either "The Florida Bar" or "the Bar".

ISRAEL PEREZ, JR., the Respondent, will be referred to as "Respondent".

Abbreviations utilized in this brief are as follows:

"RR" will denote report of Referee.

"T" will denote Transcript.

"App.Ex." denotes Appendix Exhibit.

SUMMARY OF ARGUMENT

The referee's recommendation for discipline in the case sub judice is appropriate. (RR-pg.10). The two recent Florida cases, The Florida Bar vs. Burke, 578 So.2d 1099, (Fla.1991) and The Florida Bar vs. Howard M. Neu, No. 76,158 (Fla. April 2, 1992), cited by the Bar in their Initial Brief in support of stricter discipline than recommended by the referee here are distinguishable from the instant case.

Public Reprimand is proper discipline in a case where there is no intentional misconduct as in the instant case. The referee properly weighed the mitigating circumstances in the instant case in making a proper recommendation for discipline.

ARGUMENT

REFEREE'S RBCOHHENDATION FOR DISCIPLIIE IS APPROPRIATE IN THE INSTANT CASE, SPECIALLY, AFTER CONSIDERING THE MITIGATING FACTORS.

The respondent submits that the referee's recommendations for a Public Reprimand is appropriate in the instant case where the findings show negligence or gross negligence and sufficient mitigating factors. The Florida Bar contends that the disciplinary recommendations are not appropriate in light of two recent Florida cases. The Florida Bar vs. Howard M. Neu, No. 76,158 (Fla.-April 2, 1992, App.Ex.B) and The Florida Bar vs. Burke, 578 So.2d 1099 (Fla.1991). The position of the respondent is that the above stated cases are distinguishable from the facts in the instant case and furthermore that the Florida Bar is in no position to contest the disciplinary recommendations of the referee unless it can show that the findings are "clearly erroneous or lacking in evidentiary support." The Florida Bar vs. Wagner, 212 So.2d 770, 772 (Fla.1968).

In the Neu case, the court correctly determined that there was more "than one instance of Neu's negligence in handling the client's trust account.'' The Florida Bar vs. Neu, supra at page 11. Respondent's position with reference to the Florida Bar's assertion that the case sub judice is similar to the Neu case because it contains various instances of negligence is that in the Neu case the

instances of negligence, ie. Neu's investments in the music venture using client's trust account funds and Neu's commingling of his personal and client's trust account funds in order to pay his Internal Revenue Service obligations (Underscoring supplied for emphasis) are distinct and separate from one another as opposed to the acts of negligence in the instant case that were part of a chain of events arising out of the initial act of admitted negligence by the respondent in acting under the improper assumption that the monies were paid to the proper parties and not separate and independent acts of negligence unrelated to the initial act of negligence. (RR-pg.2, App.Ex.A).

It is respondent's contention that the specific distinguishing factors between the Neu case, supra, and the case sub judice are the specific motives and actions or omissions undertaken with reference to each instance of negligence in the disciplinary proceeding. In the Neu case, the attorney undertook separate actions with reference to his client's trust account funds reflecting separate motives as to each act or action. In the instant case, there was one motive and act, the erroneous assumption that the monies were paid and the subsequent chain of events that led to separate violations of the disciplinary rules. (RR-pg.9, App.Ex.A).

Respondent takes the position that the second case which the Florida Bar relies on as an example and precedent

of "more than one instance'' of negligence meriting a stricter discipline than recommended by the referee in the instant case, The Florida Bar vs. Burke, 578 So.2d 1099 (Fla.1991), is also distinguishable on the facts from the instant case. On page 10 of the Neu case, supra, this court made the following comments concerning the Burke case;

> In Burke, that attorney's problems in the disciplinary proceedings stemmed back to his extremely sloppy accounting procedures which had been the focus of an earlier disciplinary proceeding. See The Florida Bar vs. Burke, 517 So.2d 684 (Fla.1988). Because of the attorney's negligent accounting procedures, the problems in the second disciplinary proceedings did not come to light until a subsequent complaint and audit in 1987. In imposing the attorney discipline in the second proceeding, we stated that if we had considered both instances of misconduct simultaneously, the attorney's penalty would have been a six month suspension rather than ninety one days. In such a case the Court would have imposed the lawyer suspension based on multiple instances of misconduct involved.

Respondent takes the position that the "multiple instances of misconduct involved", as stated in Burke, supra, clearly refer to separate instances of disciplinary action against an attorney involving separate cases and separate and distinct facts. In the case sub judice, there is one disciplinary case against an attorney involving issues relating to one main event of gross negligence that unintentionally created further violations of the disciplinary rules.

The respondent interprets the Neu and Burke cases, supra, for the proposition that more than one instance of negligence in handling client trust accounts might

warrant stricter discipline than a public reprimand when the instances of negligence show independent and clear motive on the part of the attorney to undertake acts or omissions that are distinct and separate from one another and as such create multiple independent violations of the disciplinary rules. The respondent submits that the case sub judice falls outside the holdings of Neu and Burke, supra, in that the evidence and findings of *gross* negligence arise from one course of action, eventhough that course of action can violate several sections of the disciplinary rules.

Additionally, the respondent takes the position that the Florida Bar in its appeal to this court for the imposition of a suspension does not take into account the role of the mitigating factors determined by the referee in reaching a just and fair disciplinary recommendation. (RR-pg.10, App.Ex.A).

The respondent contends that the referee made appropriate findings following Florida's Standards for Imposing Lawyer Sanctions, paragraph 9.31 and paragraph 9.32 (Fla. Bar Board of Governors 1986), in recommending a reduction in the degree of discipline to be imposed.

Based upon the foregoing, Respondent recommends the Report of Referee be approved.

CONCLUSION

WHEREFORE, Respondent respectfully requests this Court to impose the following discipline on the Respondent:

Public Reprimand; Successful completion of course(s) in Trust Accounting Procedures; Probation for two years; Restitution to Alina Diaz's mother in the sum of *$104.00*. (RR-pg.10). Additionally, the Respondent should be made liable for a reasonable amount of the costs incurred by the Florida Bar. (RR-pg.11).

Respectfully Submitted,

ISRAEL PEREZ, JR.,
Attorney-at-Law,
Respondent
TFB #341363
P.O.Box *558403*
Miami, Florida *33255*
(305)669-4373

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 17, 1992, the original and seven copies of the foregoing, Respondent's Answer Brief, was mailed to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy(s) was mailed to: Paul A. Gross, Bar Counsel, The Florida Ear, Miami Office, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 and John T. Berry, Staff Counsel, The Florida Bar, 640 Apalachee Parkway, Tallahassee, Florida 32399-2300.

ISRAEL PEREZ, JR.,
Attorney-at-Law
Respondent

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