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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

v.

ISRAEL PEREZ, JR.,
Respondent.

Supreme Court Case
No. 78,593

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

ON PETITION FOR REVIEW

INITIAL BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
SYMBOLS AND REFERENCES.....	iii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	2-4
SUMMARY OF ARGUMENT.	5
ARGUMENT....."	6-9
A SUSPENSION FOR SIX MONTHS IS APPROPRIATE WHEN A LAWYER IS GUILTY OF GROSS NEGLIGENCE IN HANDLING A CLIENT'S FUNDS.	
CONCLUSION.....	10
CERTIFICATE OF SERVICE	11
INDEX TO APPENDIX.....	12

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>The Florida Bar v. Burke,</u> 578 So.2d 1099 (Fla.1991)	5,7,8
<u>The Florida Bar v. Diaz-Silveria,</u> 557 So.2d 570 (Fla.1990)	8
<u>The Florida Bar v. Howard M. Neu,</u> No. 76,158 (Fla.April 2, 1992)	5,6,7,8 12
<u>The Florida Bar v. Schiller,</u> 537 So.2d 992,993 (Fla.1989)	8
<u>The Florida Bar v. Wagner,</u> 212 So.2d 770,772 (Fla.1968)	6
<u>The Florida Bar v. Whigham,</u> 525 So.2d 873 (Fla.1988)	8

OTHER AUTHORITIES

	<u>PAGE</u>
<u>Disciplinary Rule,</u> 1-102 (A) (4).....	4
<u>Disciplinary Rule,</u> 1-102 (A) (6).....	4
<u>Disciplinary Rule,</u> 9-102 (B) (1)	4
<u>Florida Bar Integration Rule,</u> Article XI, Rule 11.02 (4) (b).....	4
<u>Florida's Standards For Imposing Lawyer Sanctions,</u> Paragraph 4.12 (Fla. Board of Governors, 1986).....	8

SYMBOLS AND REFERENCES

In this 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 "Perez" or "Respondent".

Abbreviations utilized in this brief are as follows:

"RR" will denote Report of Referee.

T will denote Transcript.

App.Ex. denotes Appendix Exhibit.

STATEMENT OF THE CASE

On September 16, 1991, The Florida Bar filed a Complaint in the Supreme Court of Florida. On September 23, 1991 the Chief Justice of the Supreme Court of Florida appointed Circuit Judge Melanie G. May to serve as referee in these proceedings. The final hearing was on May 18, 1992 at the Broward County Courthouse, Ft. Lauderdale, Florida.

The Venue in this case was in Dade County. However, Perez waived the Venue and agreed to the final hearing being in Broward County. See Stipulation, Exhibit 5 (App.Ex.B),

On April 13, 1992 the referee mailed the Report of Referee to the Supreme Court. On May 20, 1992, The Florida Bar filed a Petition For Review, recommending that the referee's recommendation for Public Reprimand be changed to six months suspension, with proof of rehabilitation being required before reinstatement.

STATEMENT OF THE FACTS

A summary of the **facts** is as follows: Perez represented Alina Diaz in a claim for personal injury protection benefits. Perez submitted claims to Florida Insurance Guaranty Association, Inc. The association issued the following checks, payable to Alina Diaz and the following medical providers: P.S. Medical Services - **\$728**; Manuel Sala, M.D. - \$104; Miami X-Ray Medical Center - \$212. RR, pages **2-6** (App. Ex. A).

The evidence indicated that neither Alina Diaz nor any of the medical providers received the funds or endorsed the checks. [See Stipulation, Exhibit 5 (App. Ex. B)]. Perez testified that he gave the **checks** to a friend, Julio Diaz (not related to Alina Diaz), who was to get the endorsements of Alina Diaz and the medical providers and was to pay the medical providers from his own funds, **as** Julio Diaz owed money to Israel Perez. Perez removed the funds from his trust account and used said funds for his own purposes. He testified that he believed Julio Diaz paid the medical providers, as they did not demand the funds from him. RR, **page 2** (App. Ex. A).

During 1988, Perez was arrested and charged with insurance fraud. However, the charges were dismissed, **as** the State could not locate certain important witnesses and the statute of limitations had run. (T.46).

In addition to the foregoing, Perez did not comply with trust accounting procedures. Stipulation concerning staff Auditor, Exhibit 6, (App.Ex.C). Also, see RR, pages 7 and 9. (App.Ex.A). on page 4, paragraph 6 of RR, the referee found that the evidence failed to establish that Julio Diaz, as President of P.S. Medical Service, did not endorse check number 073965. However, Mr. Diaz stated that he did not sign or receive the check. (Affidavit, Exhibit 4). On page 6, paragraph 2, RR, the referee states: "The evidence did not establish that Alberto Gutierrez, Director of Miami X-Ray Center did not sign or endorse check number 073966." However, this is in conflict with paragraph D, 4, 5 and 6 of the Stipulation, Exhibit 5 (App.Ex.B). Also, it was stipulated that Alberto Gutierrez would testify, "That he did not endorse or sign said check and he did not authorize anyone to sign his name to said check." [Stipulation, Exhibit 5 (App.Ex.B)].

The referee stated that the evidence established that Perez failed to follow rules, regulations and procedure concerning trust accounts and improperly relied upon persons unrelated to his law firm in the handling of checks payable to clients. The referee also stated: "As admitted by the respondent, his actions and lack of diligence in maintaining his accounts and records constituted gross negligence." RR. page 2 (App.Ex.A). In addition, the referee made the following findings of facts: "However, I cannot find on the evidence presented that the Respondent acted in an intentional manner or he intended to defraud either his client or health

care providers. His conduct reflects ignorance and gross negligence in the extreme." RR, page 2 (App.Ex.A),

The referee found Perez not guilty of violating Disciplinary Rule 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 9-102(B)(4) (promptly pay or deliver to the client the funds the client is entitled to receive). RR, page 9 (App.Ex.A). However, the referee found Perez guilty of violating the following: Disciplinary Rule 1-102(A)(6) (conduct adversely reflecting fitness to practice law), and Disciplinary Rule 9-102(B)(1) (Promptly notify a client of the receipt of his funds). RR, page 9 (App.Ex.A).

Florida Bar Integration Rule, Article XI, Rule 11.02(4) (using client funds for purposes other than for which they were entrusted - However, he did not act with intent to defraud). Florida Bar Integration Rule, Article XI, Rule 11.02(4)(b) (trust accounts as official records) and (c) - trust accounting procedures. (See RR, page 9 (App.Ex.A).

The referee recommended the following discipline: Public Reprimand; Successful completion of course or courses in Trust Accounting Procedures; Probation for two years; Restitution to Alina Diaz's mother in the sum of \$104.00. See RR, **page 10**, (App.Ex.A). The referee found that The Florida Bar reasonably incurred costs in the amount of **\$2,515.64**. (RR, page 11, App.Ex.A).

SUMMARY OF ARGUMENT

The referee's recommendation for discipline was as follows: Public Reprimand; Successful completion of a course or courses in Trust Accounting Procedures; Probation for two years; Reimbursement of \$104.00, plus interest to Alina Diaz's mother and Payment of Costs to **The** Florida Bar in the amount of \$2,515.64.

The Florida Bar does not object to the discipline shown above, except it contends that a six month suspension is more appropriate than a Public Reprimand. Two recent cases, The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991) and The Florida Bar v. Howard M. Neu, No. 76,158 (Fla. April 2, 1992) support the Bar's position that a six month suspension is appropriate when a lawyer misuses client funds, even when there is no intent to commit fraud and when there is more than one instance of negligence.

ARGUMENT

A SUSPENSION FOR SIX MONTHS IS APPROPRIATE WHEN A LAWYER IS GUILTY OF GROSS NEGLIGENCE IN HANDLING A CLIENT'S FUNDS.

The referee found that Perez **did not** intend to defraud his clients or the medical providers. (RR-2). Therefore, she found Perez not guilty of dishonesty, fraud, deceit or misrepresentation. (RR-9). The Florida Bar will not contest this finding, as it cannot show that these findings **are** "clearly erroneous or lacking in evidentiary support." The Florida Bar v. Wagner, 212 So.2d **770,772** (Fla.1968). However, The Florida Bar submits that the referee's recommendation for a Public Reprimand is not appropriate, considering the serious nature of the violations.

In The Florida Bar v. Howard M. Neu, No. 76,158 (Fla.,- April **2**, 1992, App.Ex.D), this court found no intent to commit fraud on the part of Mr. Neu. Nevertheless, it suspended Mr. Neu for six months, inter alia. This court stated, "The instant case has more than one instance of Neu's negligence in handling his client's trust account." The Florida Bar v. Neu, supra, at **page** 11. In the **case sub judice**, the referee found that Perez's "conduct reflects ignorance and gross negligence in the extreme." (RR-page 2, App.Ex.A). (Underscoring supplied for emphasis). Also, in the case sub judice, like the Neu case, there was "more than one instance" of negligence, as follows: Perez failed to notify Alina Diaz of his receipt of the monies. He used client's funds for

purposes other than those for which they were entrusted. He did not remit monies to Doctor Sala and he did not remit funds to Miami X-Ray Medical Center. (RR-pages 2-6, App,Ex.A). Perez failed to comply with trust accounting procedures as described on pages 7 and 8 of the Report of Referee. (App,Ex.A). Perez entrusted Julio Diaz with checks made payable to Alina Diaz and medical providers under the apparent misapprehension that Diaz would obtain the necessary endorsements for Respondent to deposit the checks and remit to the providers in cash. (RR-page 2, App,Ex.A).

As can be seen by the foregoing there was "more than one instance" of negligence in this case. In The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991), Mr. Burke was suspended for 91 days because of gross negligence in handling a client's trust account and conduct prejudicial to the administration of justice. 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 v. 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.

Based upon this Court's decisions in Neu and Burke, it is apparent that the case sub judice warrants a suspension for

six months rather than a Public Reprimand, as recommended by the referee. The Bar interprets Neu and Burke for the proposition that more than one instance of negligence in handling client trust accounts, warrants a six month suspension.

In The Florida Bar v. Schiller, 537 So.2d 992,993 (Fla. 1989), this Court stated that the misuse of client funds is one of the most serious offenses a lawyer can commit. The Bar realizes that:

This Court's case law draws a distinction between cases where the lawyer's conduct is intentional and deliberate and cases where the lawyer acts in a negligent or grossly negligent manner.

Compare The Florida Bar v. Diaz-Silveria, 557 So.2d 570 (Fla. 1990) (intentional and deliberate misuse of client funds warranted disbarment) with The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988). (A lawyer's gross negligence in managing a client's trust account, absent willful misappropriation of client funds, warrants a three year suspension, but not disbarment). See The Florida Bar v. Neu, Supra at page 9 (App.Ex.D). While the case sub judice does not involve intentional misconduct, **it** does involve gross negligence. (RR-page 2, App.Ex.A) and it contains multiple violations. RR, pages 2-8 (App.Ex.A).

Florida's Standards For Imposing Lawyer Sanctions, paragraph 4.12 (Fla. Bar Board of Governors 1986), it states "suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes an injury or potential injury to a client."

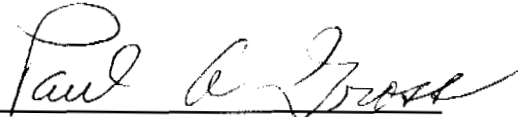
Based upon the foregoing, The Florida Bar recommends the Report of Referee be approved, except for the referee's recommendation of Public Reprimand. That recommendation, in the Bar's view, should be changed to suspension for six months.

CONCLUSION

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

Suspension for six months; successful completion of a course or courses concerning Trust Accounting Procedures; Probation for two **years**; Reimbursement to Alina Diaz's mother the amount of **\$104.00**, plus interest; Payment of Costs to The Florida Bar \$2,515.64.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 1992, the original and seven copies of the foregoing The Florida Bar Initial Brief were mailed **by** Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 **and** that a true and correct **copy** was mailed by U.S. Certified Mail, Return Receipt Requested No. P 258 098 412, **to** Israel Perez, Jr., Respondent, at P.O. Box 558403, Miami, Florida, 33255 and a **copy** was mailed **by** regular mail to John A. Boggs, Director of Lawyer Regulation, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.



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INDEX TO APPENDIX

REPORT OF REFEREE.....	EXHIBIT A
SPIAIN	EXHIBIT B
STIPULATION CONCERNING STAFF AUDITOR.....	EXHIBIT C
<u>THE FLORIDA BAR V. HOWARD M. NEU,</u> <u>NO. 76,158 (FLA. APRIL 2, 1992)</u>	EXHIBIT D