IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant

Case No. 68,054
(18A85C52)

v.

JAMES T. GOLDEN

Respondent
_____/

COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar will be referred to as "The Bar", Respondent, Mr. James T. Golden, will be referred to as Mr. Golden, and Mr. James I. White will be referred to as Mr. White.

The following symbols will be used: R for the record of the final hearing of March 12, 1986. REF for the Referee's Report of April 14, 1986, attached in the Appendix.

STATEMENT OF THE CASE AND FACTS

On November 12, 1984, Mr. James I. White of New York retained Mr. Golden to probate the estate of his deceased brother, who died intestate in Broward County and owned real estate in Seminole County. Mr. White informed Mr. Golden that he wished to begin probate proceedings immediately in Seminole County. Mr. White further informed Mr. Golden that his deceased brother had an illegitimate son who might challenge the proceedings, R-7-13.

Mr. White and Mr. Golden signed an attorney-client agreement on November 13, 1984, which specified that Mr. White would pay Mr. Golden $750.00 fees plus $138.00 in costs for the purpose of probating the estate of George White (The Florida Bar exhibit one of March 12, 1986), R-12.

Mr. White was not from the Seminole County area but kept Mr. Golden apprised of his current address at all times. He received no information concerning the matter from Mr. Golden and was unsuccessful in reaching Mr. Golden despite many telephone calls to Mr. Golden's office. Mr. White finally contacted the Respondent on February 28, 1986, and Mr. Golden told Mr. White that he

had filed the probate in Seminole County. In late March, 1985, Mr. White became concerned because he had not heard anything recently from the Respondent. Mr. White telephoned the Clerk's Office of Seminole County and was informed that Mr. Golden had not filed anything to begin the probate, R-13-32.

Mr. White complained to The Florida Bar on April 1, 1985. Mr. Golden returned Mr. White's money after the matter had reached the Grievance Committee, R-20-21. The Grievance Committee found probable cause on October 22, 1985. The Honorable Frederick T. Pfeiffer was appointed as Referee and final hearing was held in Seminole County on March 12, 1986. The Referee found Mr. Golden guilty of violations of Disciplinary Rules of The Florida Bar: 6-101(A)(3) for neglect of a legal matter; 7-101(A)(1) for failing to seek the legal objectives of his client, and; 7-101(A)(2) for failing to carry out a contract of employment entered into with a client for professional services, REF-p.4. The Referee recommended that Respondent be publicly reprimanded and suspended for 30 days and thereafter until he shall pay the costs of the proceedings, REF-p.4.

SUMMARY OF ARGUMENT

It is well settled that the Supreme Court of Florida will not overturn a Referee's findings of fact without a clear showing that the Referee's conclusions are clearly erroneous or without support on the record. In this case, the Referee specifically stated that he found no evidence that the Respondent had done any work at all on behalf of Mr. White's probate. Although the Respondent stated that he had done legal research and concluded that Mr. White was not the proper person to file the probate, the Referee noted that there was no evidence that Mr. Golden had done such research and noted that even if this were the case, the Respondent was obligated to notify his client of his findings and return any portion of the unused fees and costs. However, the Respondent did not contact Mr. White with such information and in fact informed Mr. White some three months after being retained that he had filed the probate as requested. The facts fully support the Referee's findings in every respect.

The Referee, upon finding the Respondent in violation of the Disciplinary Rules of The Florida Bar regarding neglect, recommended that the Respondent be publicly reprimanded and

suspended for 30 days. Such discipline is appropriately more severe than would be called for if the Respondent did not have a prior record of misconduct. It is apparent that the Referee's recommendations, made after a full opportunity to observe the Respondent's actions and demeanor, were made on the belief that nothing less would serve the purposes of the attorney discipline.

The Referee, pursuant to the Integration Rule of The Florida Bar, Article XI, Rule 11.06(9)(a) appropriately taxed the costs of this proceeding, including the witness fees and traveling expenses, to Mr. Golden.

ARGUMENT

POINT ONE

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE ON THE RECORD.

The Florida Bar Integration Rule, Article XI, 11.06(9)(a) establishes that a Referee's findings shall have the same presumption of correctness as the judgement of the trier of facts in a civil proceeding. This Court has established that such a presumption will not be overturned absent a clear showing that they are clearly erroneous or lacking evidentiary support, The Florida Bar v. Fields, 482 So.2d 1354, 1359 (Fla. 1986); The Florida Bar v. Hecker, 475 So.2d 1240, 1242 (Fla. 1985); The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980); The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978). Pursuant to Hoffer, supra, at 642, it is the responsibility of the Referee as the fact finder to resolve conflicts in the evidence before him, noting that the Referee has the advantage of directly observing the demeanor of the participants in the proceeding before him. Upon review, the court reviews the report and the record and imposes appropriate discipline. It should be noted in reviewing the record that, as the Referee noted in his Report,

the Respondent refused to give testimony under oath, R-86-87, 97 and REF-p.4.

Although Mr. Golden states that in his Point One that his evidence clearly shows that the Respondent never received a funeral bill, the record indicates otherwise. Mr. White, who did give sworn testimony, indicated that he gave a copy of the bill to Mr. Golden at the time he retained him, R-14, R-52-53, and R-79. Further, there is no evidence that Mr. Golden ever contacted Mr. White to request the bill which would indicate that Mr. Golden did not have it. Mr. Golden also made no showing as to why he could not have at least started probate proceedings, as he agreed to do in the attorney-client agreement in evidence as Exhibit One of the Final Hearing, even if he did not have the bill. There was absolutely no evidence presented by Respondent or otherwise which indicated that Mr. White had not given the funeral bill to Respondent.

Respondent further states that paragraph 6 of the Referee's Report is erroneous regarding Mr. White's attempts to contact the Respondent and Respondent's statement to Mr. White that the probate had been filed and would take 120 days to complete. However, Mr. White's testimony was that the Respondent failed to

respond to all of his calls except once, in March, 1985, when Respondent advised Mr. White that the probate had been filed and would take 120 days to complete, R-14-16. This statement is unrefuted by any sworn testimony or evidence.

Respondent states that the Referee was further incorrect in finding that Mr. White was unable to contact the Respondent for several weeks prior to March 29, 1985. Although Exhibit 10 of the Respondent of March 12, 1986 indicates that Mr. White did forward some correspondence to Mr. Golden, there is no evidence of any reply by Mr. Golden and it is evident that this lack of response is what motivated Mr. White to telephone the Seminole County Courthouse to inquire about the probate that Mr. Golden had told Mr. White he had filed. Upon contacting the Courthouse, Mr. White learned that no probate had been filed.

Respondent avers that he had decided that it would not be in the best interests of Mr. White to file the probate and told him so on several occasions. However, there is no evidence of this in evidence. During the period from November 13, 1984, when Mr. White and Mr. Golden completed an attorney-client agreement which stated it was for the purpose to "probate the estate of George White", The Florida Bar Exhibit One of March 12, 1986, until Mr. White complained to The Florida Bar regarding Mr. Golden's

neglect on April 1, 1985, Mr. Golden did not send a single piece of correspondence to Mr. White. As Mr. White testified, in his only phone conversation with Mr. Golden, Mr. Golden stated that probate had been filed for Mr. White in Seminole County.

Further, Mr. Golden had a duty to return any unearned funds if he decided not to probate the estate since keeping unearned funds would constitute excessive fees. So called non-refundable retainers are not exempt from this requirement.

In summary, it is clear that the evidence and Mr. White's sworn testimony prove by clear and convincing evidence that the Respondent neglected his client, Mr. White.

ARGUMENT

POINT TWO

A THIRTY DAY SUSPENSION AND A PUBLIC REPRIMAND IS APPROPRIATE DISCIPLINE WHERE THE RESPONDENT HAS PREVIOUSLY BEEN PUBLICLY REPRIMANDED FOR MISCONDUCT.

This court has established four principles which must be addressed by attorney discipline; the protection of the public, administration of justice, the protection of the legal profession, and the protection of the favorable image of the legal profession. The Florida Bar Integration Rule, Article XI, Rule 11.02 and The Florida Bar v. Larkin, 447 So.2d 1340, 1341 (Fla. 1984).

In The Florida Bar v. Lord, the court further addressed the goals of discipline, stating:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgement must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgement must be fair to the respondent being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgement must be severe enough to deter others

> who might be prone or tempted to become involved in like violations; at 986.

The case at hand warrants more serious discipline because the Respondent has previously received a public reprimand for borrowing money from his client with the client's permission, failing to repay the loan for two years, and failing to keep adequate records of his trust account, The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981). It is well settled that ethical violations warrant more serious discipline where the Respondent has a prior history, The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979); The Florida Bar v. Reese, 421 So.2d 495 (Fla. 1982); The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981).

In The Florida Bar v. Neale, 432 So.2d 50 (Fla. 1983), the attorney was suspended for sixty days followed by three years of probation where the Referee found that he had accepted a retainer yet taken no action to further his client's interest or keep the client advised of the situation at all times, noting that there was no evidence of a corrupt motive, where Respondent had prior disciplinary actions.

In The Florida Bar v. Moxley, 462 So.2d 816 (Fla. 1985), the Supreme Court of Florida imposed a suspension of sixty days

followed by three years probation on a Respondent where the Referee had recommended only a public reprimand. The court noted that the attorney, who had violated trust account procedures, should be suspended noting, "In disciplinary cases it is important to look at the offense and the circumstances surrounding it. But it also is important to consider the effect of the derilection of duty on others as well as the character of the wrongdoer and the likelihood of further disciplinary violations"; at 816.

The Respondent has apparently failed to take heed of the importance of strict ethical adherence and has yet to acknowledge any wrongdoing in the present case. Therefore, a thirty day suspension and public reprimand are warranted in this case involving neglect, failing to seek the legal objectives of his client, and failing to carry out a contract of employment entered into with a client for professional services.

ARGUMENT

POINT THREE

THE REASONABLE COSTS OF THE FLORIDA BAR ARE APPROPRIATELY CHARGED TO THE RESPONDENT.

Pursuant to the Integration Rule of The Florida Bar, Article XI, Rule 11.06(9)(a), The Florida Bar is entitled to recover the costs of disciplinary actions;

> The costs shall include court reporters' fees, copy costs, witness fees and traveling expenses and reasonable traveling and out-of-pocket expenses of the Referee and Bar Counsel, if any. Costs shall include a $150 charge for Administrative costs at the Grievance Committee level and a $150 charge for Administrative costs at the Referee level. Costs taxed shall be payable to The Florida Bar.

This rule is also reiterated in The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). Respondent asserts that The Florida Bar is not entitled to recover the expenses of the complaining party, Mr. White, since he was not subpoenaed to appear at the grievance committee hearings or the final hearing, but appeared pursuant to notice and request by The Florida Bar. Respondent cites no case law to support this view and a subpoena is not required by the Integration Rule.

Mr. White was the only witness to Respondent's ethical violations and was a necessary witness to these proceedings. Mr. White traveled from New York to Florida to aid The Florida Bar in this disciplinary action knowing that he would receive no financial reward for his time and trouble. Denying Mr. White the reimbursement for his reasonable traveling expenses, which are specifically authorized by Rule 11.06, supra, would add further injury to Mr. White who has been previously troubled by Respondent's negligence.

CONCLUSION

WHEREFORE, The Board of Governors of The Florida Bar respectfully prays that this Honorable Court will review the Referee's Report and recommendations, approve the findings of fact and recommendation of guilt and his recommended discipline of a public reprimand and or thirty days suspension as recommended by the Referee and pay costs in these proceedings currently totalling $2,032.54.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Answer Brief have been been furnished by ordinary U.S. mail to the Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing has been furnished by ordinary mail to James T. Golden, Respondent, at Post Office Box 2202, Sanford, Florida, 32771; and a copy of the foregoing has been furnished by ordinary mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 23rd day of July, 1986.

Jan K. Wichrowski
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