IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JAMES T. GOLDEN,

Respondent.

_____/

CASE NO. 68,054
(Confidential)

RESPONDENT'S INITIAL BRIEF

JAMES T. GOLDEN, ESQUIRE
101-B W. 1st St.
P.O.B. 2202
Sanford, Fl 32771

305-323-8000

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CITATION OF AUTHORITIES

FACTS OF THE CASE

The complaining party was referred to the Respondent by Attorney Jesse McCrary of Miami, Florida. He wanted to probate the estate of his brother in Seminole County because his brother owned real property there which he wanted to obtain title to in his own name because he had paid the funeral bill. He also acknowledged that there was a nephew who might try to assert his right to probate the estate in Broward County. An attorney-client agreement was signed on November 13, 1984 calling for an immediate payment of a $750 retainer and a cost deposit of $138. The complaining party paid the cost deposit and paid $500 on the retainer. At that time a Petition For Administration, Oath of Personal Representative, Notice of Administration, Order Appointing Personal Representative, and an Order of Administration were prepared by the Respondent but not filed. The complaining party was to furnish the names of his brothers and sisters and their addresses so that their waivers and consent to his appointment as personal representative could be obtained. Moreover, the balance of the attorney fee was to be paid before any pleadings would be filed. The balance of the attorneys fees was not paid until December 2, 1984.

Sometime in December the complaining party was notified by letter from Attorney Henry Latimer of Ft. Lauderdale, Florida, that his nephew was preparing to begin probate in Broward County. He was informed that any claim he had against his brother's estate would be honored upon presentation of adequate proof. Unknown to the Respondent was the fact that Attorney Jesse McCrary had filed a Caveat in Seminole County, Florida on December 10, 1984, seeking reimbursement for the funeral bill.

The Respondent was notified by mail from the complaining party's wife on January 6, 1985, of the nephews intentions. Several conversations thereafter with the complaining party did not provide any clear direction for the Respondent. At various times we discussed filing a caveat in Broward County and waiting until probate was begun in Broward and moving to set aside the appointment of the personal representative. We also discussed proceeding with probate in Seminole County and publishing notice of the probate proceedings in Broward County as well as Seminole County.

On March 1, 1985, another attorney wrote the complaining party seeking his waiver and consent to the appointment of a third person as personal representative. These pleadings were furnished to the Respondent by mail on March 5, 1985. On March 13, 1985, the complaining party was served by mail with a Petition For Administration filed by a third person not his nephew.

On April 23, 1985, the Respondent received notice from The Florida Bar of its receipt of a complaint from the complaining party dated April 8, 1985. No request was ever made by the complaining party that I cease representing him or that I return any unearned fees forthwith.

On May 6, 1985, the Respondent tendered to The Florida Bar all of the legal fees as well as all of the cost deposit in two cashier's checks. These funds were returned on July 22, 1985, to the Respondent by a member of the grievance committee. The cashier's checks were thereafter forwarded to complaining party's attorney in New York on July 31, 1985.

By letter dated July 26, 1985, the Respondent was informed that the complaining party had retained other counsel to represent him in this matter.

I. THE FINDINGS OF FACT BY THE REFEREE ARE CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE EVIDENCE

Paragraph 4 of the referee's report states that the complaining party gave the Respondent the funeral bill. Paragraph 7 states that a court clerk informed the complainant that the Respondent had filed a caveat in the probate court. The evidence clearly shows that the Respondent never received a funeral bill and moreover that Attorney Jesse McCrary filed the caveat based upon a funeral bill furnished to him by the complainant's lawyer in New York.

Paragraph 6 seems to imply that Respondent communicated with the complainant but made misrepresentations when communicating with the complainant. Yet, no evidence is in the record that is clear and convincing which supports this finding.

Paragraph 7 infers that Respondent was unreachable for several weeks prior to March 29, 1985. Yet the record clearly reflects that there was communication between Respondent and complainant about the correspondence dated March 1, 1985 and March 13, 1985.

Paragraph 5 is completely misleading in that it states that there was no communication between the Respondent and the complainant. While it may be true to say that there was no written communication, it does not logically follow that this per se constitutes neglect on the part of Respondent, especially since there is absolutely no evidence as to what needed to be put in writing that was not already known to the complainant or that caused harm or prejudice to him.

The language in paragraphs 8 and 9 creates an erroneous chronological impression. The complainant knew before March 29, 1985, that his nephew had begun probate in Broward County, not afterwards as the referee implies. The complainant had been refunded all of his retainer and all of his cost deposit via The Florida Bar on May 6, 1984, and he did not retain other counsel until July 26, 1985, not vice versa as the referee implies.

Paragraph 10 essentially avers that Respondent took a retainer, promised to begin work immediately, did no work at all, did not communicate to the complainant for not doing the work, and finally only returned the retainer because of the grievance filed by the complainant. The facts clearly show this not to be the case.

The complainant knew from the beginning that his nephew had a superior right to probate the estate than he did. The complainant informed the Respondent that the nephew was trying to exercise this right but never indicated just exactly what he wanted Respondent to do about the situation. Moreover, the Respondent never had any indication that the complainant was desirous of changing counsel until notified of the complaint filed against him. The Respondent genuinely believed that to file probate so precipitously under the circumstances would not be in the best interest of the complainant and told him so on several occasions. In view of the fact that all of the pleadings had been prepared for filing it would appear that the referee finds neglect in not filing. However, there is no clear and convincing evidence that compels the conclusion that this was neglect of a legal matter entrusted to the Respondent.

It is the Respondent's position that he was under no duty to act until and unless he received the agreed upon retainer. This is evident from the language of the attorney-client agreement. The retainer was not fully paid until December 2, 1984.

It is also Respondent's position that once he was on notice that someone with a superior right to probate the estate intended to do so, Respondent could not ethically proceed on behalf of the complainant. Moreover it does not yet appear in any shape,form,or fashion that the complainant has shown by any clear and convincing evidence that any action other than filing probate would constitute neglect, including the act of waiting to see if that someone with a superior right will indeed exercise it.

Therefore, it appears that none of the allegations separately or taken together establish by clear and convincing evidence that Respondent neglected a legal matter entrusted to him, failed to seek the legal objectives of his client, or failed to carry out a contract of employment entered into with a client for professional services. Wherefore, the report of the referee should be reversed and the Respondent released of these charges. The Florida Bar v. Rayman, 238 So 2d 594 (Fla. 1970).

II. THE DISCIPLINE RECOMMENDED BY THE REFEREE IS TOO SEVERE IN LIGHT OF THE FACTS OF THIS CASE.

Even if the facts support a finding of neglect, they do not support or justify the discipline recommended by the referee. See The Florida Bar v. Smith, 392 So 2d 1 (Fla. 1980), The Florida Bar v. Merrill, 462 So 2d 827 (Fla. 1985), The Florida Bar v. Gray, 380 So 2d (Fla. 1980), The Florida Bar v. Welch, 369 So 2d 343 (Fla. 1979).

III. SOME COSTS SOUGHT BY THE BAR ARE NOT ALLOWABLE COSTS

Only costs directly attributable to the disciplinary proceedings are allowable.

Rules governing disciplinary proceedings do not require the attendance of the complaining party and the complaining party is not a part of the proceedings. There is no evidence that the complaining party in this case was subpoenaed to appear. Thus his appearance should be construed as voluntary and not appropriately allowed as costs would be his travel.

CONCLUSION

There is no clear and convincing evidence which compels the conclusion that the Respondent neglected a legal matter entrusted to him, failed to seek the lawful objectives of his client, or failed to carry out a contract of employment. There is no evidence that the complainant has been prejudiced in any way nor has there been any testimony about any loss incurred by the complaining party because he was unable to probate his brother's estate.

The facts as set forth upon which the referee based his decision are erroneous and clearly not supported by the evidence.

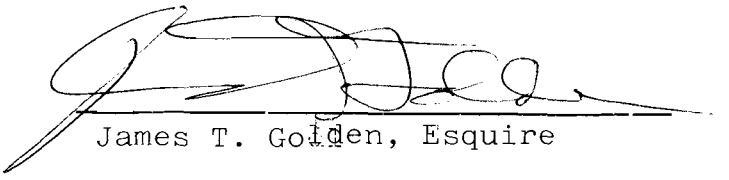
This court should conclude that the complaint has no merit and that the referee's report has no factual basis and further that the Respondent have these charges dismissed against him.

RESPECTFULLY SUBMITTED,

James T. Golden, Esquire
101-B W. 1st St.
P.O.B. 2202
Sanford, Fl 32771
305-323-8000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail this 2d day fo July, 1986, to Attorney Jan K. Wichrowski, Bar Counsel, The Florida Bar, 605 E. Robinson St., Orlando, Fl 32801.



James T. Golden, Esquire