

FILED
SID J. WHITE

AUG 14 1986

CLERK, SUPREME COURT

By _____
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

Case No. 68,054
(18A85C52)

JAMES T. GOLDEN, ESQUIRE

Respondent.

_____ /

RESPONDENT'S REPLY BRIEF

JAMES T. GOLDEN, Esquire
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STATEMENT OF THE FACTS AND THE CASE

The statement of the facts and case set forth in the Respondent's Initial Brief is herewith adopted and by reference incorporated herein as if fully set forth.

SUMMARY OF ARGUMENT

The Supreme Court of Florida must prevent the injustice that is about to be done to the Respondent. It must overturn the findings of fact by the referee in this cause because there is no clear and convincing evidence that the relief sought by The Florida Bar should be granted based upon the record of this case.

Assuming, arguendo, that the facts are sufficient, then the proposed discipline is excessive in light of the facts of this case.

The fees requested by The Florida Bar as an assessment is unreasonable.

ARGUMENT

POINT ONE:

THE REFEREE'S FINDINGS OF FACT ARE INSUFFICIENT IN THAT THEY ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The cases which charge neglect of a legal matter, failure to carry out a lawful objective, and/or failure to carry out a contract of employment seem to suggest the following elements as being clear and convincing evidence of the above stated ethical violations:

There must be a lengthy period of inactivity in a case and/or a total lack of communication between the lawyer and client. There must be a loss of some substantive legal right by the client. There must be a refusal to refund fees paid if a request is made. The Florida Bar v. Collier, 435 So. 2d 802 (Fla. 1983). The Florida Bar v. Harden, 448 So. 2d 1017 (Fla. 1983). The Florida Bar v. Segal, 441 So.2d 1624 (Fla. 1983). The Florida Bar v. Tato, 435 So. 2d 807 (Fla. 1983).

There is no clear and convincing evidence that The Florida Bar has produced that is sufficient to warrant any disciplinary measures. Therefore the complaint in this cause should be dismissed. The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970); The Florida Bar v. Wagner, 212 So. 2d 770 (Fla. 1968).

ARGUMENT

POINT TWO:

THE DISCIPLINE RECOMMENDED IS EXCESSIVE EVEN IN LIGHT OF PREVIOUS MIS-
CONDUCT BY THE RESPONDENT.

All of the cases cited by The Florida Bar as justification for a suspension of the Respondent contain factual situations that are so much more egregious than the situation herein. Any comparison of this case with those cases would be pointless. For example, the Respondent has not wilfully failed to file an income tax return or given improper advice to a client which justified a suspension of six (6) months. The Florida Bar v. Vernell, 374 So. 2d 473 (Fla. 1979). The Respondent has not had two (2) prior public reprimands and a private reprimand which justified a three (3) year suspension. The Florida Bar v. Reese, 421 So. 2d 495 (Fla. 1982). The Respondent has not previously received a private reprimand and a public reprimand and subsequently brought before this court for another similar charge which justified disbarment. The Florida Bar v. Leopold, 399 So. 2d 978 (Fla. 1981). The Respondent does not have a twelve (12) year "history" of violating trust accounting regulations. The Florida Bar v. Neale, 432 So. 2d 50 (Fla. 1982).

The Florida Bar seeks to suspend the Respondent in this case for thirty (30) days because of a previous public reprimand in 1981 for failing to keep adequate trust account records and failing to timely repay a loan borrowed from a client.

One isolated disciplinary action five years ago concerning matters not in any way similar to the matter presently before this court should not constitute a "history" of disciplinary proceedings sufficient to justify a thirty (30) day suspension. This matter would otherwise receive a private reprimand. The Florida Bar v. Reese, 421 So. 2d 495, 497 (Fla. 1982). When considered along with the

prior disciplinary action, a public reprimand would be appropriate.

Indeed, the record reflects that when the referee inquired of The Florida Bar as to what discipline would be appropriate, the response was "...Nothing less than a public reprimand..."

ARGUMENT

POINT THREE:

ALL OF THE COSTS SOUGHT ARE NOT REASONABLE AND/OR APPROPRIATE

Rule 11.06(9)(a) states in part that The Florida Bar is entitled to recover "...witness fees and traveling expenses..." Rule 11.13(3) sets forth the procedure for obtaining the presence of witnesses. The Florida Bar has not followed any of these procedures with respect to subpoenas of witnesses.

Moreover, The Florida Bar represents that Mr. White travelled from New York to Orlando knowing that he would receive no financial reward for his time and trouble. If The Florida Bar expected to tax travel to the Respondent, then it is only fair that they should have subpoenaed him.

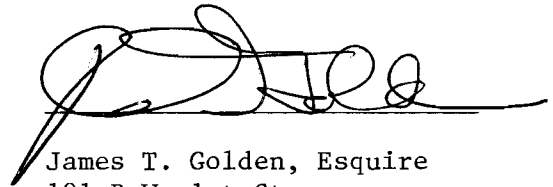
In The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982), this court held that the discretionary approach should be used in assessing costs in disciplinary proceedings. One factor to be considered is the reasonableness of the costs. It should be patently unreasonable to require a Respondent to pay for a witness who voluntarily appeared with knowledge that no compensation would be forthcoming.

CONCLUSION

There is no clear and convincing evidence which compels the conclusion that the Respondent neglected a legal matter entrusted to him, failed to carry out a contract of employment, or failed to seek the lawful objectives of his client. 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 arising because he was unable to probate his brother's estate.

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 against him dismissed.

RESPECTFULLY SUBMITTED,

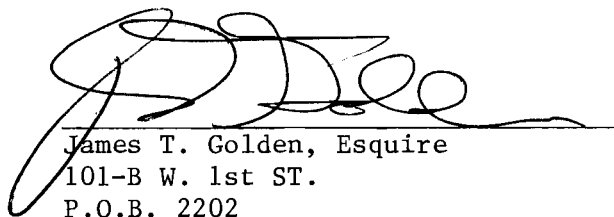
A handwritten signature in black ink, appearing to read "James T. Golden", written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Reply Brief was served by U.S. Mail this 13th day of August, 1986, to Jan Wichrowski, Assistant Bar Counsel, The Florida Bar, 605 E. Robinson St., Suite 610, Orlando, Fl 32801.



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