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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JAMES T. GOLDEN,

Respondent.

Case No. 70,4[illegible]
[TFB No. 86-20,938(18A)]

COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief the Complainant, The Florida Bar, shall be referred to as the Bar.

The Referee Report shall be referred to as R.

The transcript for the final hearing on December 18, 1987, shall be referred to as TI.

The transcript for the final hearing on February 5, 988, shall be referred to as TII.

Bar Exhibits shall be referred to as B-Ex.

Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561 (Fla. 5th DCA 1984) - shall be referred to as Whack I.

Whack v. Seminole Memorial Hospital, 487 So.2d 1091 (Fla. 5th DCA 1986) - shall be referred to as Whack II.

STATEMENT OF THE CASE

The Bar considers that for clarity and accuracy, additional information needs to be supplied to the respondent's Statement of the Case.

On March 24, 1986, Gerald W. Jones, Jr., then chairman of Eighteenth Judicial Circuit Grievance Committee "A", wrote to the Branch Staff Counsel of the Orlando Branch Office of The Florida Bar reporting that it had come to his attention that the respondent had been dilatory in representing his client in Whack v. Seminole County Hospital, Inc., (81-2535-CA-11-E) and indicating that there was inexcusable neglect by the respondent in the case which should be investigated. (See Appendix Exhibit 1) Mr. Jones' complaint was logged in on April 1, 1986, and reflected him on Bar records as the complainant. An investigation was commenced in the Orlando office which resulted in the matter being forwarded to the grievance committee for appropriate action on May 13, 1986. (See Appendix Exhibit 2)

On March 31, 1986, a member of the Board of Governors of The Florida Bar wrote to The Florida Bar bringing to its attention the same case which had previously been reported by Mr. Jones. This correspondence was date stamped in the Orlando office on April 1, 1986. (See Appendix Exhibit 3)

The committee held a probable cause hearing in the matter on October 28, 1986.

Probable cause for further disciplinary action against the respondent was found by the committee and, on May 5, 1987, a formal complaint was filed.

The case was heard before Honorable Frederick T. Pfeiffer, referee, on December 18, 1987. The referee found that there was adequate evidence to prove each allegation of Count I of the complaint by clear and convincing evidence. (See Report of Referee)

The referee found that there was not sufficient evidence to prove the allegations of Count II. (See Report of Referee)

On February 5, 1988, the referee conducted another hearing to determine an appropriate discipline. The discipline which was recommended to this honorable court by the referee was a suspension from the practice of law for a period of three months with an automatic reinstatement, probation for a period of one year with a quarterly report to The Florida Bar on the status of each case and payment of costs. (See Report of Referee)

On April 2, 1988, the respondent filed his petition for review. The brief was due no later than May 2, 1988, which was 30 days after the petition was filed. The brief was not mailed until May 16, 1988, fourteen days after it was due, and not received by The Florida Bar until May 18, 1988. No request for extension of time to file the initial brief was made, and no explanation of the tardiness was made at the time the brief was filed.

STATEMENT OF FACTS

The Florida Bar considers that the Statement of Facts contained in respondent's initial brief is not sufficient and needs supplementation for adequate understanding. It should be noted that nearly all of the facts in this case were admitted by respondent in his Response to the Bar's Requests for Admission. (B-Ex 1,2) The balance of facts established by court pleadings were admitted into evidence by the referee during trial. In addition, the referee took judicial notice of two appellate decisions involved in this case.

Respondent was retained in late 1981 to represent Lee Whack, as personal representative of deceased, Sylvia Whack, in a medical malpractice suit (TI p.93). Ms. Whack died of cardiac arrest on November 12, 1979, after giving birth by Caesarean section. Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561 (Fla. 5th DCA 1984). (Judicial notice taken at referee hearing).

The defendants in the suit were Seminole Memorial Hospital, Inc., Dr. Vincent Roberts, Dr. Stephen R. Phillips, both individually and as a partnership, and Thomas Richards C.R.N.A., individually and as an employee of Seminole Memorial Hospital, Inc. (B-Ex 1 and 2)

On November 18, 1981, a complaint was filed in the circuit court in the Eighteenth Judicial Circuit alleging negligence on the part of all defendants and alleging that the doctors committed medical malpractice. (B-Ex 1,2 and 3) Roberts and Phillips filed motions to dismiss on November 25, 1981. (B-Ex 1 and 2) On March 17, 1982, the court entered an order granting the motions and directing the respondent to file an amended complaint within twenty days. (B-Ex 4) The respondent failed to file either the amended complaint or a motion for extension of time within this time period. He did not file a motion for extension of time until April 13, 1982. (B-Ex 5) The respondent's motion was granted and the amended complaint was finally filed on April 30, 1982. (B-Ex 7)

The defendants again moved the court to dismiss this complaint, or in the alternative, to strike or for a more definite statement in a timely manner. (B-Ex 9,10,11,12,13) On May 12, 1982, Roberts and Phillips served a motion to compel discovery and alleged the respondent failed to answer interrogatories and comply with their request to produce, both of which were served on December 11, 1981. (B-Ex 14)

On May 25, 1982, a hearing was held before Judge Davis on the pending motions. He orally ordered the respondent to file a second amended complaint within twenty days and to comply with

discovery by July 1, 1982, and gave notice of his intention to recuse himself. Whack I, supra, at 563. On June 3, 1982, he entered an order of recusal (B-Ex 15). On June 10, 1982, he issued a written order nunc pro tunc May 25, 1982, incorporating the matters contained in his oral order of May 25, 1982, granting the motion to dismiss filed by Roberts, Richards and Phillips. (B-Ex 16) The respondent was allowed twenty days to file a second amended complaint. Roberts' and Phillips' motion to compel discovery was granted and the respondent was ordered to comply by July 1, 1982.

Respondent did not file the second amended complaint until June 18, 1982. (B-Ex 18) Following an order of reassignment, Judge Salfi permitted the late filing and gave the respondent twenty days in which to file the responsive pleadings. (B-Ex 27)

On October 21, 1982, Roberts and Phillips served a motion for imposition of sanctions. (B-Ex 21) They alleged the respondent had failed to comply with Judge Davis' June 10, 1982, nunc pro tunc order. On November 17, 1982, the court granted the motion and imposed the sanction of involuntary dismissal of the second amended complaint. (B-Ex 1,2) Respondent filed a motion for reconsideration which was denied on May 11, 1983. In addition to the Motion for Sanctions, all the defendants filed respective motions for summary judgment and Richards' and

Seminole Hospital's were granted on May 16 and 24, 1983, respectively. (B-Ex 27,28, and 29) The respondent appealed the court's orders on June 13, 1983. On September 27, 1984, the Fifth District Court of Appeals upheld Judge Salfi's dismissal of the claims against Roberts and Phillips but reversed the decision of summary judgment as to Richards and Seminole Hospital. Whack I, supra.

On October 16, 1984, Richards filed his second motion for summary judgment based upon the respondent's failure to respond to either set of his requests for admission filed on January 22, 1982, and July 20, 1982. (B-Ex 31) On January 23, 1985, Seminole Memorial Hospital filed its second motion for summary judgment. (B-Ex 33) On November 9, 1984, respondent filed a motion to permit late filing of the response to the requests for admission. (B-Ex 32) However, on February 20, 1985, Judge Salfi granted Richards' motion for summary judgment. (B-Ex 34) He denied Seminole Memorial Hospital's motion for summary judgment on May 30, 1985. (B-Ex 35)

On March 22, 1985, the respondent filed an appeal of Judge Salfi's ruling. (B-Ex 36) The initial brief was due on June 3, 1985. He filed a motion for extension of time on or about June 24, 1985. (B-Ex 1,2) On July 16, 1985, the court granted an extension of time through July 17, 1985. (B-Ex 1,2) On July 19,

1985, the respondent requested a second extension of time until July 19, 1985, and submitted his initial brief. (B-Ex 1,2) On September 17, 1985, the court ordered, sua sponte, that the respondent show cause why the appeal should not be dismissed for failure to file a record on appeal. (B-Ex 1,2)

On March 20, 1986, the court upheld Judge Salfi's order of dismissal of the claims against Richards. Whack v. Seminole Memorial Hospital, Inc., 487 So.2d 1091 (Fla. 5th DCA 1986).

The case against Seminole Memorial Hospital remains open to date, but has not progressed to trial as the respondent has been unable to locate an expert witness willing to testify. (TI pp. 93-94)

SUMMARY OF THE ARGUMENT

Contrary to the assertions made in the initial brief of the respondent, the findings and recommendations of the referee have more than ample evidence in the record to support them. Thus, they cannot be overturned.

The disciplinary sanction recommended by the referee is the most appropriate measure for the circumstances of this case. The time taken to prosecute this case by The Florida Bar is not inordinate under the circumstances and does not require mitigatory measures in regard to the discipline.

Argument

Point I

THE EVIDENCE RELIED UPON BY THE REFEREE ESTABLISHES BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT NEGLECTED HIS CLIENT'S CASE.

The respondent asserts that none of the facts relied upon by the referee establish neglect. It is the position of The Florida Bar that repeated neglect of matters entrusted to him by his client was clearly established by the evidence in the record of the referee hearing.

On March 17, 1982, the court entered an order granting motions of defendants Roberts and Phillips for dismissal. The court also ordered that should respondent desire to file an amended complaint, he must do so within twenty days. (B-Ex 4) Twenty-seven days later, on April 13, 1982, the respondent filed a motion for extension of time to file the amended complaint. (B-Ex 5) This was more than twenty days plus mailing time allowed under the Rules of Civil Procedure.

A hearing on the motion was held on April 28, 1982. The respondent filed his first amended complaint April 30, 1982. (B-Ex 7) By order dated April 30, 1982, the court granted him until April 30, 1982, to file the complaint. (B-Ex 8) Thus the record clearly indicates the respondent failed to comply with the court's order that he file his first amended complaint within

twenty days of March 17, 1982. Furthermore, respondent even failed to file a timely request for extension of time.

On May 4, 1982, Phillips and Roberts, both individually and as a partnership, and Richards moved the court to dismiss the first amended complaint. (B-Ex 9 & 10) A hearing was held on May 25, 1982, during which Judge Davis orally granted the motions and again allowed the respondent twenty days in which to file a second amended complaint if he so desired. (B-Ex 16) The judge orally admonished the respondent to file the complaint in a timely manner as he had failed to do so with the first amended complaint. (B-Ex 17) Respondent assured the court he would do so. (B-Ex 17) Although the proceeding was not transcribed, counsel for the defendants Roberts and Phillips made note of the Judge's remarks in their motion for entry of final judgment dated June 15, 1982. (B-Ex 17) Judge Davis issued his written order on June 10, 1982, nunc pro tunc May 25, 1982, which contained his order granting the respondent twenty days to file the second amended complaint. (B-Ex 16) He did not repeat the oral admonition for timeliness addressed to the respondent.

Respondent did not file the second amended complaint until June 18, 1982. (B-Ex 18) Following an order of reassignment, Judge Salfi permitted the late filing. (B-Ex 27)

On November 17, 1982, the court granted defendants Roberts' and Phillips' motions for imposition of sanctions for failure to comply with Judge Davis' order of June 10, 1982, relating to filing answers to interrogatories which had been propounded under certificates dated December 11, 1981. The court dismissed the complaint against Roberts and Phillips. Although respondent then filed a motion for reconsideration, the court denied it.

Upon appeal of that decision, a panel of the District Court of Appeals for the Fifth District upheld the lower court's dismissal as to defendants Roberts and Phillips. The appellate court, in making its decision, severely criticized respondent, saying, "[t]he record clearly shows that appellant's counsel acted with willful disregard of the court's authority and gross indifference to an order of the court. Appellant made no showing that he either attempted to comply with the discovery order or communicated any explanation or excuse to the court by the time of the hearing." Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561, 564 (Fla. 5th DCA 1984).

Such conduct is proven by clear and convincing evidence, primarily by admission of the respondent and by court documents. The dismissal of an action against two out of four defendants in a malpractice case, not on the merits of the case but because of

a failure to follow court orders and rules of procedure, is unmistakable evidence of neglect of a client's case.

Moreover, the case against a third defendant, Mr. Richards, was later dismissed by the court on a motion for summary judgment. The motion was bottomed on the fact that it was not until November 9, 1984, some 841 days after service of defendant's second request for admissions and 1021 days after service of defendant's first set of requests for admissions that the respondent finally got around to filing a motion to permit late filing of admissions never answered.

The court, finding that "...there was no clerical error, brief delay or excusable inadvertence in plaintiff's failure to respond to requests to admit for in excess of two(2) years," granted the motion for summary judgment. Whack v. Seminole Memorial Hospital, Inc., 487 So.2d 1091, 1092 (Fla. 5th DCA 1986).

On appeal, a panel of the Fifth District Court of Appeals affirmed the order saying, "[w]e note that by a slow but certain attrition the plaintiffs continue to lose defendants to take to trial." Whack II, supra at 1092.

The respondent feels aggrieved that the courts did not specifically find neglect at the time the cases against four out of the five defendants were dropped. The simple answer to that is it was not necessary to find neglect to take the actions the courts took. However, the absence of a specific finding of neglect does not negate the existence of neglect.

The simple fact is that the evidence before the referee clearly and unmistakably establishes neglect and the referee properly found neglect on the part of this respondent.

A referee's findings of fact are presumed correct and will be upheld unless they are clearly erroneous or without support in the evidence. The Florida Bar v. Vannier, 489 So.2d 896 (Fla. 1986); The Florida Bar v. Lipman, 497 So.2d 1165 (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). Hoffer, supra, at 642, teaches that it is the responsibility of the referee as the finder of fact to resolve conflicts in the evidence before him. It is the responsibility of this court to review the referee report and the record and impose appropriate discipline.

Argument

Point II

THE DISCIPLINE RECOMMENDED BY THE REFEREE CONSISTING OF A NINETY DAY SUSPENSION, PROBATION AND PAYMENT OF COSTS IS THE APPROPRIATE DISCIPLINE IN THIS CASE.

Respondent's actions, or lack of action, prejudiced his client severely as one by one the charges against all but a single defendant were dismissed. The respondent admitted at the referee hearing on December 18, 1987, that he forgot to file a response to the defendant's Request for Admission (TI p. 101). He was at a loss to explain why he failed to answer them when he answered a Request to Produce mailed at the same time (TI p. 97). He also admitted he now believes he should have answered the defendant's interrogatories after Judge Davis' May 25, 1982, verbal order. (TI p. 88) He further admitted at the February 5, 1988, hearing that he neglected his practice while he was attending school. (TII pp. 14-16). Respondent was criticized by the appellate court in Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561, 564 (Fla. 5th DCA 1984) for his failure to comply with Judge Davis' order to answer the defendant's interrogatories. The court stated that "[t]he record clearly [showed] that appellant's counsel acted with willful disregard of the court's authority and gross indifference to an order of the court." [Emphasis added.] Contrary to the clerical error in respondent's Argument I, Judge Salfi found "there was no clerical error, brief delay or excusable inadvertence in Plaintiff's

failure to respond to Requests to Admit for in excess of two(2) years." Whack II, supra at 1092.

Respondent's repeated failure to comply with court orders and rules of procedure have resulted in loss of parties for his client to seek action against. This point was noted by the appellate court in Whack II, supra at 1092. Roberts, Phillips, both individually and as a partnership, and Richards have all been dismissed as defendants in the case. The sole remaining defendant is Seminole Memorial Hospital. Respondent was retained in 1981 by Mr. Whack and to date the case has still not progressed to trial. (TI p. 93) This is due in part to the fact the respondent was unable to discover an expert witness willing to testify. However, respondent's failure to comply with court orders and rules of procedure and his apparent inability to manage this type of case added immeasurably to the delay. (TI pp. 93-94) This was within the respondent's power to prevent.

Moreover, the record of this disciplinary case suggests that the respondent may be incorrigible regarding prompt compliance with orders and rules. The initial brief was several days late and without explanation or request for an extension of time.

Respondent argues his conduct warrants a public reprimand rather than a ninety day suspension. Public reprimands are

appropriate for isolated instances of neglect. The Florida Bar v. Welty, 382 So.2d 1220, 1223 (Fla. 1980). Respondent's conduct, however, was not merely an isolated instance of neglect, rather, he repeatedly failed to comply with discovery and to submit pleadings to the court in a timely manner.

Respondent cites The Florida Bar v. Hotaling, 454 So.2d 555 (Fla. 1984) to support his contention that his misconduct warrants a public reprimand. In that case the court found certain mitigating circumstances existed. There was no fraud or deceit involved, the complainants were not entirely credible, there was no prejudice to any of her clients, and she had no prior disciplinary history. Although no fraud or deceit was involved in the respondent's case, his client, Mr. Whack, has been prejudiced in that he may now only proceed against one defendant rather than five. If he should be successful in his action against Seminole Memorial and should the hospital be unable to pay for some reason, Mr. Whack would be unable to proceed against the doctors, their partnership or the anesthetist.

Respondent further contends he should receive a lesser discipline as there were no aggravating factors involved. The Bar submits this statement is not correct. The respondent does have a prior disciplinary history. He was publicly reprimanded

for mishandling trust funds in The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981). The Bar concedes the respondent's second prior offense in The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987), should not be considered as cumulative misconduct as it occurred during the same period of time as the misconduct presently at issue. The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983).

The respondent cites The Florida Bar v. Pritikin, 259 So.2d 138 (Fla. 1972), for his assertion that the discipline in the case at bar should have been made to run concurrently with the discipline in The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987). However, the cases are not analagous. In Pritikin, supra, the facts under investigation arose out of the same general transaction that the earlier Pritkin case had arisen from. That is not the case here. Here, the facts are totally separate from those in Golden, supra. This case has no relationship whatsoever to Golden, supra.

In the past, misconduct similar to the respondent's has warranted suspensions. In The Florida Bar v. Rosenberg, 474 So.2d 1175 (Fla. 1985), an attorney was suspended for ninety days for his neglect of a legal matter entrusted to him. His client's suit was dismissed twice for failure to prosecute. He failed to provide his client with copies of pleadings despite repeated

requests. The attorney was also convicted of five misdemeanor charges for housing code violations.

In The Florida Bar v. Mims, 501 So.2d 596 (Fla. 1987), an attorney received a one year suspension for his failure to comply with court orders, failure to appear at a scheduled pretrial conference, and his admitted neglect of his client's case.

The attorney in The Florida Bar v. Collier, 385 So.2d 95 (Fla. 1980) was suspended for a period of sixty days for his failure to properly comply and respond to court orders in a probate case. He was also found to have been extremely dilatory in his administration of the estate.

The goals of discipline are protection of the public, administration of justice, protection of the legal profession, and the creation and protection of a favorable image of the legal profession. The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983); The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984). See also Rule 1-2 of the Rules Regulating The Florida Bar. The respondent does not appear to understand the position his actions have placed his client in. If he loses the last defendant, his client will be unable to pursue his claim for medical malpractice.

Confidence in, and proper utilization of, the legal system is adversely affected when a lawyer fails to diligently pursue a legal matter entrusted to that lawyer's care. A failure to do so is a direct violation of the oath a lawyer takes upon his admission to the Bar. The Florida Bar v. Schilling, 486 So.2d 551, 552 (Fla. 1986). A ninety day period of suspension and one year period of probation is the appropriate level of discipline in this matter.

Argument

Point III

THE TIME REQUIRED TO BRING THIS CASE TO REFEREE HEARING WAS NOT UNDULY PREJUDICIAL TO RESPONDENT

The Florida Bar was made aware of apparent problems in respondent's handling of Mr. Whack's case by letter dated March 24, 1986. (See Appendix Exhibit 1) An investigation was commenced and the matter was forwarded to the grievance committee on May 13, 1988. The probable cause hearing was held on October 28, 1986, and on May 5, 1987, the formal complaint was filed. The matter came before the referee on December 18, 1987. At that time the referee dismissed the respondent's motion to dismiss the complaint for failure to prosecute. A second hearing was held on February 5, 1988, to address the appropriate level of discipline.

The respondent contends he was prejudiced by a delay in the proceedings against him. However, he fails to show in what way he was prejudiced. Perhaps it is irony that he failed to file a response to Requests for Admission for almost three years, resulting in dismissal of the case against Mr. Richards but complains bitterly that The Florida Bar completed its case from start to finish in less than two years. This court has found in the past that a showing of discernable prejudice is necessary to justify finding a referee's report invalid. The Florida Bar v.

Lehrman, 485 So.2d 1276, 1278 (Fla. 1986). In The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970) this court refused to dismiss a case or impose a discipline lesser than that recommended by the referee even though over two years passed between the original act of misconduct and the time the Board of Governors took final action. The Florida Bar has a reasonable time after it gains jurisdiction to proceed against an attorney. The Florida Bar v. McCain, 361 So.2d 700, 705 (Fla. 1978).

CONCLUSION

Wherefore, The Florida Bar respectfully submits that the referee's findings of fact, recommendation of guilt and the recommended discipline are correct, appropriate and should be approved.

Respectfully submitted,

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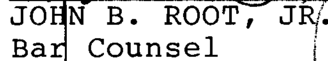
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Answer Brief has been furnished by ordinary U.S. mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by ordinary U.S. mail to James T. Golden, respondent, 1600 West Colonial Drive, Suite 117, Orlando, Florida, 32805 and to respondent at Post Office Box 2202, Sanford, Florida 32772-2202; and a copy has been furnished by mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 2nd day of ~~June~~, 1988.



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