IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LAURENCE GOLDEN,

Respondent.
_____/

Case Number: 72,026

The Florida Bar Case Number: 88-50,761 (17c)

ANSWER BRIEF OF THE RESPONDENT

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RULES REGULATING THE FLORIDA BAR

STATEMENT OF THE CASE

Respondent accepts Complainant's Statement of the Case and therefore omits same pursuant to Rule 9.210(c).

Respondent would like to point out that the transcript of the hearing conducted on September 22, 1988 before the Referee is replete with typographical and syntactical errors that render parts of the transcript virtually incomprehensible. That notwithstanding, it appears that the transcript of the hearing is as a whole sufficiently intelligible for purposes of these proceedings.

STATEMENT OF FACTS

The Statement of Facts presented by The Florida Bar is accurate but incomplete. Consequently, the Petitioner accepts the Statement of Facts expressed in the initial Brief of The Florida Bar with the following supplemental information:

That although the respondent settled his client's personal injury claim for $3,100.00, with Respondent netting $1,240.00, the full amount of $3,100.00 was repaid by the Respondent, resulting in a windfall to his client or the insurance company depending on ones perspective.

The Referee found that the Respondent violated the disciplinary rules stated in The Bar's Complaint but stated:

> Although the Complaint alleges a total of five violations, the Respondent's misconduct is a singular event occurring on April 1, 1986. (Report of Referee, p.1)

The Bar urged the Referee to recommend disbarment. The Referee flatly rejected their claim and instead recommended that the Respondent be suspended from the practice of law for a period of twenty four months retroactive to February 3, 1988. The referee further recommended that Respondent take and pass the ethics portion of the Florida Bar Examination prior to reinstatement, and that upon reinstatement, the Respondent be placed on probation for a period not to exceed twelve months.

SUMMARY OF ARGUMENT

The Referee, after conducting a hearing, admitting documentary evidence, and testimony from several witnesses, including the Respondent, flatly rejected the Complainant's position that disbarment is the appropriate discipline. Those findings come before this Court with the presumption of correctness, and if the Referee's finding of fact are supported by the evidence, they should be upheld. The recommended discipline of two years suspension, etc., should also be upheld because there exists precedential support for the recommendation, and the burden rests squarely upon the party seeking review to demonstrate that a Report of a Referee sought to be reviewed is erroneous, unlawful, or unjustified. The Petitioner completely fails to sustain it's burden.

ARGUMENT

REFEREE'S FINDINGS IN DISCIPLINARY PROCEEDING COME TO THE SUPREME COURT WITH A PRESUMPTION OF CORRECTNESS AND SHOULD BE UPHELD.

The report of the Referee should be adopted, and the recommendations therein approved by this Court. Respondent's initial Brief wholly fails to demonstrate that the Referee's Findings of Fact are unsupported by the record and likewise fails to demonstrate that the recommended discipline is erroneous. Rule 3-7.6(c)(5) states:

> Burden. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a Referee sought to be reviewed is erroneous, unlawful, or unjustified.

Put another way, and as stated in The Florida Bar v. Hirsch, 359 So. 2d 856, (Fla. 1978):

> The fact finding responsibility in disciplinary proceedings is imposed on the Referee and his findings should be upheld by the Supreme Court unless clearly erroneous or without support in evidence...
>
> Referee's findings in disciplinary proceedings come to the Supreme Court with a presumption of correctness and it is Petitioner's burden to establish that the Referee's findings of fact are wholly without support in the record

The Referee's Findings of Fact are supported by the evidence. The Referee's Report lists ten mitigating circumstances. (Report of the Referee, page 3):

1. Respondent has no previous disciplinary record.

2. Respondent has made full restitution to the

insurance company of $3,100.00 although Respondent received only $1,240.00.

3. Respondent's profit was minimal, if at all. Testimony of an attorney suggests that the claim had at least a "nuisance value" settlement worth of $3,100.00 which could have been obtained without the misconduct.

4. Respondent has made full and free disclosure during the disciplinary proceedings and has acknowledged his guilt in the Circuit Court before the Referee.

5. There exists evidence of remorse, especially through the testimony of witnesses called on Respondent's behalf.

6. Finances permitting, Respondent has continuously undergone rehabilitative psychological therapy for his emotional disorder.

7. At the time of the incident Respondent was suffering from a depressive-reactive-syndrome.

8. Respondent's conduct represents an isolated incident in an otherwise professional and ethical practice.

9. There has been no violation of the attorney-client relationship.

10. Punitive measures have already been imposed.

Evidence of circumstance number one is found on page 30, line 22 of the transcript. Additionally, undersigned requests this Court to take judicial notice of the fact that the Respondent has no previous disciplinary record.

Evidence of circumstance number two exists on page 29 of the

transcript.

Evidence of circumstance number three exists on the following pages of the transcript: page 28, line 5; page 45; page 46, line 3.

Evidence of circumstance number four may be found on the following pages of the transcript: page 23, line 21; and page 28, line 5.

Evidence of circumstance number five may be found on the following pages in the transcript: page 28, line 8; page 43, line 12; page 52, line 17; and page 69.

Evidentiary support for circumstance six may be found on page 30, line 3 of the transcript.

Evidentiary support for circumstance seven may be found on the following pages of the transcript; page 24; page 50; page 54, line 14.

Evidentiary support for circumstance eight may be found on the following pages of the transcript: page 27, line 18; page 40, line 16; page 61, line 12.

Support for circumstance nine may be found on page 29, lines 1 through 25.

Evidentiary support for circumstance ten exists on the following pages of the transcript: page 31, line 3; page 43, line 15; page 52; and page 4; and Section V of the Report of the Referee.

The disciplinary recommendation of the Referee is supported by ample case law. This Court in The Florida Bar v. Greene, 515

So.2d 1280 (Fla. 1987) stated that discipline for unethical conduct by a member of The Florida Bar should serve three purposes:

> First, the judgment 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 judgment 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 judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The criminal sanctions previously imposed upon the Respondent are severe. On December 18, 1987, the Honorable Daniel M. Futch, Jr., placed respondent on probation for a period of three years with a special condition that he refrain from the practice of law during his probationary period. Although the special condition may be unenforceable as discussed below, the Respondent must still countenance the embarrassment and degradation of reporting to felony probation, and continuous supervision by the Department of Corrections for three years.

In The Florida Bar v. Craig, 361 So.2d. 138 (Fla. 1972), the Respondent was convicted of the felony of attempted bribery of a police officer. This Court termed his conduct "reprehensible". In imposing discipline of nine months probation and a public reprimand, this Court stated:

> ...where it appears that Respondent has recognized his mistake, rehabilitated himself, and will be able to resume the

> pratice of law commensurate with the high standards of the profession...a public reprimand is sufficient punishment.

The Respondent here has acknowledged his mistake and made serious efforts at rehabilitation.

In The Florida Bar v. Kauffman, 498 So.2d 939 (Fla. 1986), the Respondent forged various documents with the intent of deceiving a Circuit Court Judge. The Referee recommended that the Respondent be found guilty of engaging in conduct involving dishonesty, fraud, or misrepresentation; engaging in conduct that adversely reflects his fitness to practice law; and intentionally prejudicing or damaging a client during a professional relationship. Notwithstanding these serious transgressions the Respondent was suspended for thirty days followed by two years probation. It also should be noted that the Respondent had previously received a private reprimand from a grievance committee in an unrelated matter.

In The Florida Bar v. Michael J. Jahn, 12 FLW 319, Case No. 68,279, June 25, 1987, the Respondent pled nolo contendere and was adjudicated guilty of delivery of cocaine to a minor, a first degree felony and possession of cocaine, a third degree felony. The convictions were based on two sperate incidents. The Respondent was sentenced to four and one half years incarceration. The Referee, finding that the Respondent was a recovering addict recommended suspension for three years. The Bar petitioned for review but the Referee's recommendation was deemed entirely reasonable and approved by this Court.

Additionally the Bar's Petition for Review urged the Court to adopt an automatic disbarment rule whenever an attorney is convicted of a felony. This Court rejected their suggestion out of hand, choosing to instead review each case solely on the merits presented therein.

In The Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957), this Court found that a felony conviction for filing false and fraudulent income tax returns justified suspension for two years. Likewise, in The Florida Bar v. Pryor, 330 So.2d. 697 (Fla. 1976), this Court held that suspension was sufficient to discipline an attorney who had been adjudicated of five federal charges of knowingly making false statements to a grand jury investigating corrupt practices in the government and was sentenced to two years incarceration.

In The Florida Bar v. Silverman, 196 So.2d 442 (Fla. 1967), the Respondent was found guilty of forging certain mortgages, releases, satisfactions, assignments and affidavits and using the forged documents to obtain substantial sums of money from one or more persons, including a client, and thereafter converted to his own use some $12,000.00 dollars. This Court holding that the Respondent was repentant and had done all within his power to rectify his previous transgressions suspended the Respondent from the practice of law for one year. Justice Ervin, in his dissenting opinion expressed that a public reprimand and one year probation was sufficient.

In The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982), the Referee found Respondent guilty of conspiracy to import fifteen thousand pounds of marijuana and recommended disbarment. This Court, citing circumstances surrounding the incident including cooperation and restitution rejected the Referee's recommendation and suspended the Respondent for a period of one year.

In The Florida Bar v. Finkelstein, 13 FLW 234, Case Number: 71,514, March 24, 1988, this Court approved a consent judgment in which the attorney was given a one year suspension followed by three years probation. Respondent previously entered a no contest plea in Circuit Court to charges of possession of illegal drugs and a misdemeanor charge of driving under the influence, and was sentenced to five years probation and a withheld adjudication.

In The Florida Bar v. Simmons, 391 So.2d 684 (Fla. 1980), the Respondent was found guilty by a Referee of engaging in conduct involving dishonesty, fraud deceit, or misrepresentation; engaging in conduct that is prejudicial to the administration of justice; and which adversely reflects his fitness to practice law, by virtue of his advise to clients to testify under oath to facts known to the Respondent to be false, and to additionally fabricate false evidence to support that testimony. The Respondent was suspended form the practice of law for a period of three months and received a public reprimand.

In The Florid Bar v. Thomson, 271 So.2d 758 (Fla. 1973), the Respondent was convicted of two counts of obtaining property in

return for a worthless check in Palm Beach County; convicted in Polk County of three counts of issuing a worthless check; and found guilty of knowingly using perjured testimony of a corroborating witness in an uncontested divorce action in Brevard County. This Court stated that "Not only a wrong, but a corrupt motive must be present to authorize disbarment" and thereby imposed a two year suspension from the practice of law.

The above-mentioned cases reflect conduct more reprehensible than that of the Respondent herein, and yet the sanction of disbarment was not imposed. In light of this fact, as well as the mitigating circumstances found by the Referee, and supported by the record, disbarment in this case is clearly inappropriate.

The Florida Bar states in their initial Brief that the Referee's recommendation that the Respondent be suspended for a period of twenty-four months is inconsistent with the special condition of probation that he not practice law for a period of three years, imposed by the criminal court at sentencing. Respondent suggests that this Court, pursuant to Article 5, Section 15 of the Florida Constitution of the State of Florida has exclusive jurisdiction to discipline members of the Bar, rendering the probationary special condition void and unenforceable, and subject to being stricken upon motion and hearing.

The Bar cites several cases in support of their contention that disbarment is the appropriate sanction to be imposed. All eight cases cited by the Petitioner are easily distinguishable

and reflect conduct by the respective Respondents that is much more egregious than in the case sub judice. The first case cited by The Bar is The Florida Bar v. Hosner, 13 FLW 551 (September 16, 1988), wherein the Respondent was found guilty before a Referee of conduct involving moral turpitude, dishonesty, fraud and misrepresentation, and ultimately disbarred. However, Mr. Hosner was convicted of fourteen felony charges of assisting in the preparation of false income tax returns after a jury verdict of guilty, and convicted of one count of using the United States Mail to commit fraud after a plea of guilty. No mitigating circumstances were recited and the Referee's recommendation was that of disbarment.

The second case cited by the Petitioner, The Florida Bar v. Weinsoff, 498 So.2d 942 (Fla. 1986), also provides unpersuasive authority to support their contention that disbarment is appropriate. The Weinsoff case is easily distinguishable because the Respondent therein was adjudicated guilty in Federal Court of one count of conspiracy to commit mail fraud and nine counts of mail fraud. Additionally, the Respondent was sentenced to a three year term of imprisonment and fined $10,000.00 on the former count, and also sentenced to a concurrent three year prison terms on the remaining nine counts. Also, Mr. Weinsoff entered a consent judgment for disbarment before the Referee who recommended acceptance to this Court.

The Bar next cites The Florida Bar v. Haimowitz, 512 So. 2d 200 (Fla. 1987) to support their position. Once again it is

apparent that Mr. Haimowitz's conduct was significantly more reprehensible than Mr. Golden's. Although Mr. Haimowitz was disbarred for activities involving moral turpitude, dishonesty, and fraud, it was based upon his adjudication for six felonies in Federal Court including conspiracy to use the postal service to execute a scheme to defraud, obtaining property be false and fraudulent pretenses, mail fraud, and conspiracy to obstruct interstate commerce by extortion. Noteworthy once again, the Referee recommended disbarment and this Court approved that recommendation concluding that the Petitioner (Haimowitz) failed to show that the Referee's Report and recommendation were erroneous.

In The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981), the respondent therein was disbarred for perpetrating a fraud upon the Court and suggesting the fraud in the first instance. The Referee found the following:

> That Agar... did (1) arrange, either actively or passively, for a witness to falsely testify before a Court of competent jurisdiction, and (2) presented or called a witness on behalf of his client who he had good reason to know would falsely testify before a Court of competent jurisdiction, and (3) as an officer of such Court failed to immediately notify the Judge of that Court of such false testimony or in the alternative to withdraw his prayer for relief.

Mr. Agar entered a plea to the offense of solicitation to commit perjury and was ultimately disbarred by this Court which cited Dodd v. The Florida Bar, 118 So.2d 17 (1960) stating the following:

> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty.

Although Mr. Golden committed a fraudulent act, it was significantly less serious than that of the Respondent in Agar. Mr. Golden did not suborn perjury, and did not suggest or facilitate a fraud during a judicial proceeding.

CONCLUSION

On September 22, 1988, the Referee, Circuit Judge Peter Capua, conducted a disciplinary hearing in excess of two hours at the Dade County Courthouse. Exhibits were received, live testimony of several witnesses, including the Respondent's was introduced, arguments of counsel were had, and memoranda of law submitted. The Referee, after reviewing the transcript of the hearing and the memoranda of law submitted by the respective parties, issued a thoughtful and insightful Report categorically rejecting the Bar's position of disbarment and recommending to this Court that Mr. Golden be suspended from the practice of law for a period of two years with consecutive probation, and other special conditions.

The Referee's findings of fact and recommendation of discipline come before this Court with a presumption of correctness, and should be upheld unless clearly erroneous or without support in the evidence. The Referee's findings are amply supported by the evidence reflected in the transcript of the hearing.

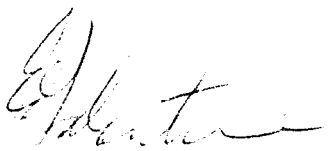
Furthermore, the burden is squarely upon the Petitioner to demonstrate that the Referee's report is erroneous, unlawful, or unjustified. They have wholly failed to do so. The Bar is unable to controvert the findings of fact, and although the Petitioner cites several cases to support their position, none are persuasive because they are easily distinguishable and

the Petitioner's therein were disbarred for conduct significantly more severe than that of the Petitioner herein.

Additionally, the Petitioner has cited numerous cases in this Answer Brief that were previously presented to the Referee that demonstrate precedential support for the Referee's recommendation as to the disciplinary measures to be applied, and accordingly the Referee's Report and reccomendation should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of the Respondent has been furnished by U.S. Mail to Jacquelyn P. Needelman, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Fl 33309 and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl 32399-2300 this 17th day of March, 1989.



EDWARD G. SALANTRIE