

see letter of 12-20-89

FILED
S.D. J. WHITE

DEC 20 1989

CLERK, SUPREME COURT

By _____
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

COMPLAINANT

V.

LAURENCE GOLDEN

RESPONDENT

SUPREME COURT
CASE NO: 73,553

TFB CASE NO:
88-51, 160 (17C)

ANSWER BRIEF OF RESPONDENT, LAURENCE GOLDEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3-8
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>THE FLORIDA BAR V. CARTER</u> 429 So.2d 3, (Fla. 1983)	4,5
<u>THE FLORIDA BAR V. GOLDEN</u> 14 FLW, (June 1,1989)	3
<u>THE FLORIDA BAR V. GOLDEN</u> 544 So.2d 1003, (Fla. 1989)	4,5,8
<u>THE THE FLORIDA BAR V. GREENE</u> 515 So.2d 1280, (Fla. 1987)	6
<u>THE FLORIDA BAR V. MCCLOSKY</u> 130 So 2d. 596, (Fla. 1961)	6
<u>THE FLORIDA BAR V. STERLING</u> 380 So.2d 1295, (Fla. 1980)	7
<u>THE FLORIDA BAR V. WEAVER</u> 356 So.2d 797, (Fla. 1978)	3

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Complainant's Statement of the Case and Facts. The Respondent, however, does not accept the Referee's finding of previous cumulative misconduct and **a** prior disciplinary offense to recommend a harsher punishment. The Respondent likewise does not accept the Referee's recommendation as to discipline.

SUMMARY OF ARGUMENT

The Referee in his report erroneously considered Respondent's other disciplinary action, The Florida Bar v. Golden, 544 So.2d 1003 (Fla. 1989), as cumulative misconduct in order to recommend a harsh discipline.

The conduct of the Respondent which gave rise to the disciplinary charges in the instant case arose prior to the actions of the Respondent for which he was disciplined in The Florida Bar v. Golden, 544 So.2d 1003 (Fla. 1989).

This Court has held in The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983), that it is improper to find cumulative misconduct and hence a harsh discipline for activities which occurred before the Respondent was initially disciplined for unethical conduct.

Based upon the beforementioned, the discipline in this matter should be six (6) months suspension to run concurrent with Respondent's existing three (3) year suspension.

A R G U M E N T

THE DISCIPLINARY RECOMMENDATIONS OF
THE REFEREE SHOULD NOT BE FOLLOWED
BECAUSE REFEREE ERRONEOUSLY
DETERMINED RESPONDENT COMMITTED
CUMULATIVE MISCONDUCT AND A PRIOR
DISCIPLINARY OFFENSE.

There is no question that if a report of Referee is erroneous, unlawful or unjustified, the Court is not bound by the report. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978).

The Referee in his report made the following recommendations as to disciplinary measures to be applied to the Respondent.

I recommend that the Respondent be suspended from the practice of law in Florida for a period of two (2) years, to run consecutive to his current three (3) year suspension in the The Florida Bar v. Golden, 14 FLW (June 2, 1989) for insurance fraud. Cumulative misconduct, as present in this case, warrants harsh discipline. I find that the following aggravating factors are present in this case:

- (a) Prior disciplinary offense
- (b) Dishonest or selfish motive
- (c) A pattern of misconduct
- (d) Refusal to acknowledge wrongful nature of conduct.

The Respondent's behavior giving rise to the offense in the instant case occurred during 1985.

The Respondent's actions in The Florida Bar v. Golden, 544 So.2d 1003 (Fla. 1989), occurred on April 1, 1986.

At the time Respondent committed the actions in the case sub judice, there were no previous disciplinary offenses. Hence, the Referee should not consider an offense committed subsequent to the offense in this cause as an aggravating factor in reaching a disciplinary recommendation. This Court dealt with this same issue in The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983).

In Carter, the Bar brought a two count complaint against the Respondent for failure to maintain complete records of a garage-type sale he held for his client and for failure to promptly deliver to a client funds in the possession of the lawyer which the client was entitled to receive. The Referee recommended a four (4) month suspension with proof of rehabilitation. The Referee apparently considered a previous disciplinary action as cumulative misconduct.

The Court in rejecting the Referee's recommendations considered that the actions giving rise to the second offense actually occurred before the first offense, hence there was no cumulative misconduct. The Court stated:

"Ordinarily a finding of guilt on additional charges would warrant a heavier and more substantial penalty, But the activities complained of in this case do not fall within the category of cumulative misconduct since the instant misconduct occurred prior to our decision in the previous case. The prior decision could not, therefore, have deterred his conduct in this case". Florida Bar v. Carter, 429 So.2d at 4.

Since the Respondent's conduct in the instant case occurred before the conduct Respondent was suspended for in The Florida Bar v. Golden, 544 So.2d 1003 (Fla. 1989), Respondent committed no prior offense or misconduct.

It follows that the Referee's findings of cumulative misconduct and a prior disciplinary offense should not be considered by this Court.

If this Court precludes the Referee's finding of

cumulative misconduct and a prior disciplinary offense, the discipline in this matter should not be as harsh as recommended by the Referee.

This Court in The Florida Bar vs. Greene, 515 So.2d 1280 (Fla. 1987), stated that attorney discipline 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".

In The Florida Bar vs. McClosky, 130 So.2d 596 (Fla. 1961), the Respondent was charged with improperly disbursing funds entrusted to him as an escrow agent.

In finding that the Respondent did not gain from the wrongful disbursement, the Supreme Court ordered a six (6) months suspension.

Likewise, in the case sub judice, the Respondent in no way financially gained from returning his client's money back to his client.

In The Florida Bar v. Sterling, 380 So.2d 1295 (Fla. 1980), the Respondent represented a buyer in a real estate transaction and agreed to act as escrow agent and hold a Five Thousand (\$5,000.00) Dollar deposit. After the buyer defaulted, the attorney wrongfully returned the deposit to his client without the consent of the seller. The Court issued a public reprimand for the Respondent's breach of fiduciary obligation to the seller. Both of the above mentioned cases deal with conduct similiar to the Respondent's actions.

The cases cited by the Complainant in her initial brief all concern instances of previous cumulative misconduct and disciplinary offense. Since the Respondent has not committed any prior misconduct before the instant case he should not, therefore, be subject to the harsher discipline.

At the time of this offense, the Respondent was going through a very difficult period in his life. **As**

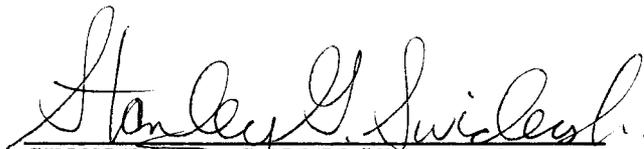
this Court is aware from the mitigating circumstances found by the Referee in The Florida Bar v. Golden, 544 So.2d 1003 (Fla. 1989), the Respondent was undergoing rehabilitative psychological therapy for the emotional disorder, depressive-reactive syndrome. This was brought on by the suicide of his girlfriend.

Respondent as it currently stands will not be able to practice law until 1991. Any discipline in this case should run concurrent with Respondent's present discipline.

C O N C L U S I O N

Based upon the foregoing, Respondent respectfully requests this Honorable Court to disregard the Referee's findings of cumulative misconduct and a prior disciplinary offense and to impose a six (6) month suspension to run concurrent with Respondent's present three (3) year suspension.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Reply Brief of Laurence Golden, Respondent was mailed this 18th day of December, 1989 to: Jacquelyn P. Needelman, Esquire, Bar Counsel, The Florida Bar, 211 Rivergate Plaza, 444 Brickell Avenue, Miami, Florida, 33131; John T. Berry, Esquire, Staff Counsel, The Florida Bar, Tallahassee, Florida, 32399 and John F. Harness, Jr., Esquire, Executive Director, The Florida Bar, Tallahassee, Florida, 32399.


STANLEY G. SWIDERSKI, ESQUIRE
~~STANLEY G. SWIDERSKI, ESQUIRE~~