IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JAMES T. GOLDEN,

Respondent.

_____/

Case No.: 73,747
[TFB Case No.: 89-30,909 (09B)]

ANSWER BRIEF OF RESPONDENT

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SYMBOLS AND REFERENCES

The Complainant will be referred to in this Brief as "Complainant," "The Florida Bar," or "The Bar." The Respondent Golden will be referred to as "The Respondent."

Respondent will use the following abbreviations:

"T-" refers to the transcript of the proceedings before the Referee.

"A-" refers to the Appendix to Complainant's Initial Brief.

STATEMENT OF THE CASE AND FACTS

By Order entered September 22, 1988, this Court ordered Respondent suspended from the practice of law for 90 days. The Order provided that the suspension take effect October 24, 1988. Said Order contained no specific provision precluding the Respondent from accepting new clients or undertaking new legal business during the 30-day period before his suspension became effective.

On or about February 21, 1989, based upon the Affidavit of Isaac Mitchell and the Affidavit of Judge George E. Sprinkel, IV, the Florida Bar filed its Motion For Order to Show Cause as to why the Respondent should not receive further discipline by being held in contempt of this Court for violation of the Order of Suspension. Said motion for Order to Show Cause alleged that "the Respondent attempted to represent Mr. Mitchell in court on December 16, 1988, at which time the presiding judge notified Mr. Golden that he was aware of Mr. Golden's current suspension from the Florida Bar." The Motion further alleged that Respondent accepted $800.00 from MItchell as legal fees and had failed to refund the same **or** continue the representation after January 22, 1989, date of his reinstatement to the Florida Bar. (A-1,2) (Emphasis supplied)

The Respondent filed his "Response to Motion to Show Cause" in which he denied that he had engaged in the practice of law by representing Mr. Mitchell during his suspension. (A-3)

The matter came on to be heard before a Referee. Testimony was taken and at the conclusion, the Referee rendered his report.

(A-1) The report found that the Respondent:

1. Knowingly and improperly continued to practice law during the suspension period by representing Mr. Isaac Mitchell in traffic court in Orange County.

2. That "Respondent also appeared in traffic court with Mr. Mitchell on yet another occasion during his suspension."

3. Respondent "failed to advise Mr. Mitchell of his suspension status at any time."

4. "Respondent accepted the $800.00 from Mr. Mitchell as legal fees for the traffic court representation. To date, Respondent has failed to refund Mr. Mitchell his fees."

5. Respondent has failed to demonstrate any remorse for understanding of his wrongdoings in these proceedings. The Referee recommended that Respondent be suspended from the practice of law "for no less than one year, with proof of rehabilitation required before he is allowed reinstatement into the Florida Bar." **(A-2)**

The Florida Bar Board of Governors reviewed the matter and directed Staff Counsel to file its Petition for a Review seeking an

Order of Disbarment.

Respondent filed his Petition for Cross-Review seeking a reversal of all of the recommendations of the Referee.

Certain facts are uncontradicted by any of the witnesses. These facts are:

1. Mitchell was charged with two traffic offenses in Orange County and his first conference with the Respondent was on October 16, 1988, prior to effective date of the suspension. (T-8)

2. Mitchell wanted the case continued until January, 1989 because he did not want to run the risk of spending the Christmas holidays in jail. (T-19-22)

3. Respondent advised Mitchell that he could not try the cases until January. (T-26,27) In this regard, Mitchell testified that Respondent told him the reason he could not try them until January was because Respondent "was tied up." (T-27) Respondent testified that he told Mitchell that he could not try them until January was because he was suspended from practicing law. (T-58) Respondent agreed to handle both cases for a fee of $900.00 each and on the 26th Mitchell paid Respondent $600.00. (T-9)

4. Respondent prepared a Written Plea of Not Guilty and a Request for Continuance in each case (T-31) and caused the same to be filed. (T-20,21) Said pleadings were prepared for the signature of Isaac Mitchell, and the signatures appearing on them are the signatures of Isaac Mitchell. (T-21) Although while

admitting the signatures were his, Mitchell denied that he signed them. (T-20,21-25)

5. Approximately two weeks after the initial conference on October 16, Mitchell paid Respondent an additional $200.00. (T-10) The pleadings in each of said traffic cases provided that all further pleadings be forwarded to Mitchell at his home in Orlando.

6. Sometime after November 12, 1988 (T-39) Mitchell went to Respondent's office and left a note for him. He had tried to get Respondent on the telephone for almost three weeks and Respondent's telephone was not functioning. He had gone by the Respondent's office and found that it was closed and unlit. (T-37,39)

7. A hearing was scheduled before Judge Sprinkel in December on Mitchell's Motion for Continuance. Shortly before the hearing, Respondent attempted to call Judge Sprinkel on the telephone to advise him that he was suspended from practicing law; he represented Mitchell, and that if the matter was continued until January, after Respondent was automatically reinstated, he would represent Mr. Mitchell. The purpose of this was, by such testimony, to assure the judge that the Motion for Continuance was made in good faith. (T-59,60) Instead of talking to Judge Sprinkel, he talked to Judge Sprinkel's Legal Assistant because she would not let him talk to Judge Sprinkel. Respondent testified that he told the Legal Assistant, Ms. Eveland, that he was suspended and the purpose of his call, "not because I am trying to represent him, but because I need somebody to know that he is asking for a continuance because I can't represent him until

January. (T-60) As to this incident, Ms Eveland testified as follows:

"Question: I'm sorry, I'll speak up. Can you tell us what happened on that date when he telephoned?

"Answer: Well, I just remember Mr. Golden called concerning someone who had a traffic case. And Mr. -- I can't remember the particulars. (T-71) ***

"Question: Ms. Eveland, do you recall whether or not Mr. Golden ever told you he was suspended during that telephone call?

"Answer: I think when he called me I asked him if he was an attorney, and he said he was. And I had -- it seems like I remember seeing his name on a suspended list, and I asked him about that, and he told me that he was only calling as a friend. And I said, 'Well, you know, you cannot be representina this defendant.' And he said that, You know, it was not on that basis.

"When I aot off the phone I told Judae Sprinkel about it....."

8. The following day, the day after calling Ms. Eveland, Respondent accompanied Mitchell to the hearing before Judge Sprinkel. Except for the Affidavit of Judge Sprinkel which is

factually silent as to what occurred, the only testimony is that of Mr. Mitchell which was as follows:

> "Question: How did you find out that Mr. Golden's license was suspended?
>
> "Answer: I don't know the judge name, but they was talking about something about some Florida Bar. I didn't know anything about, you know, what they was talking about. Then he asked Mr. Golden t leave out the court because, you know, he shouldn't be in there. So when he left out he told me his license suspended." (T-11,12)

It is obvious, however, from this testimony and from Judge Sprinkel's Affidavit that Respondent was not given any opportunity to do anything -- Judge Sprinkel advised him that he was suspended and should leave the courtroom. Thus, in Judge Sprinkel's Affidavit, he does not state that Respondent on that occasion engaged in the practice of law. Thus, said Affidavit partially reads as follows:

> "On December 16, 1988, James T. Golden appeared in my court, Winter Park, Florida. He was clearly there to provide legal representation to Mr. Mitchell. I informed Mr. Golden that I was aware that he was under suspension and had no authority to represent clients."

No facts are stated in said Affidavit upon which the conclusion of Judge Sprinkel was based.

9. Mitchell filed his Complaint with the Florida Bar sometime after January 19, 1989. (A-2) Mitchell did not employ successor counsel until after the Complaint with the Florida Bar was filed. (T-35)

The following testimony is conflicting:

> 1. Mitchell testified that the only time that the Respondent accompanied him to court was at the hearing before Judge Sprinkel on Respondent's Motion for a Continuance. (T-11,28,29) Respondent testified that he accompanied Mitchell to a hearing before Judge Rodriguez on the second traffic charge, Mitchell had asked him to do so because he had no proof without Respondent that he needed a continuance until January. (T-59) And he accompanied Mitchell so that if there was a question as to whether or not the continuance was a legitimate continuance Respondent could say, "I am suspended; I am the attorney; I am the reason." (T-59-53) Judge Rodriguez testified that the Respondent accompanied Mitchell to the hearing but that Respondent did not represent himself to be a lawyer and that Judge Rodriguez did not think

that he was a lawyer. **(T-56)**

2. Mitchell testified relative to the failure of the Respondent to refund the $800.00 fee as follows:

"Question: Did Mr. Golden return your money?

"Answer: No. He sure didn't.

"Question: Did you request him to:

"Answer: One time.

"Question: What was his response?

"Answer: None at all." **(T-12)**

Respondent testified that immediately after the hearing before Judge Sprinkel, he learned that Judge Sprinkel disposed of the charge before him and the warrant for Mitchell was withdrawn. **(T-61)** Respondent then testified as follows:

"**To** make a long story short, when we left there I said, 'Now what you have paid me is $800.00. You have paid me $800.00 and that is **$100.00** short of what you would have paid me for one case, which was $900.00.' He said, 'Well, that makes us -- that makes me owe you $100.00 for the other case before Judge Rodriguez.' And I said, 'That's it.' Because I didn't think that it would be right to take $900.00 from a case that Judge Sprinkel just dismissed."

SUMMARY OF ARGUMENT

There was no clear and convincing evidence before the Referee that the Respondent engaged in the practice of law during the period of his suspension. The evidence before the Referee relative to the failure of the Respondent to advise Mr. Mitchell that he had been suspended from the practice of law for a period of 90 days was so confused and of such a character that it does not warrant a finding of guilty of said offense of which Respondent was not charged.

The evidence supporting the finding that Respondent had not refunded the $800.00 paid to him by Mr. Mitchell is supported by the evidence, but there was no evidence before the Referee that Respondent had a duty to refund said money.

FIRST POINT INVOLVED

IS THE RECOMMENDATION OF THE REFEREE THAT RESPONDENT BE FOUND GUILTY OF ENGAGING IN THE PRACTICE OF LAW WHILE SUSPENDED FROM THE FLORIDA BAR SUPPORTED BY CLEAR AND CONVINCING EVIDENCE?

ARGUMENT

This case arose in a somewhat unusual fashion. By Order of the Supreme Court entered September 22, **1988,** the respondent was suspended from the practice of law for a period of **90** days which suspensionwould become effective on October 24, **1988,** allowingthe Respondent **30** days to take such action as necessary to protect the interests of his clients.

On or about February **21, 1989,** The Florida Bar, as Complainant, filed in the Supreme Court of Florida its Motion for Order to Show Cause (A-2) which motion alleged that: "Respondent attempted to represent *Mr.* Mitchell in court on December **16, 1988,** at which time the presiding judge notified *Mr.* Golden that he was aware of *Mr.* Golden's current suspension from the Florida Bar." The Affidavit of the Honorable George A. Sprinkel, IV, was appended to said motion as the Florida Bar's Exhibit 2. The Affidavit of Judge Sprinkel stated:

> "On December **16, 1988,** James T. Golden appeared in my court, Winter Park, Florida. He was clearlv there to provide legal representation for *Mr.* Mitchell. I informed Mr. Golden that I was aware that he was under

suspension and had no authority to represent clients. I informed Mr. Golden's client, Mr. Mitchell, of his status and that it would be necessary for him to obtain new counsel."

On or about March 29, 1989, the Respondent filed his "Response to Motion to Show Cause." In said Response, Respondent denied that he continued to practice law after his suspension by attempting to represent Mr. Mitchell in court on December 16, 1988. (A-3)

The above-quoted allegations in the Motion for Order to Show Cause and in Respondent's Answer thereto, framed the main issue in this case which simply was, did the Respondent engage in the practice of law during the period of his suspension. The matter was referred to a Referee based upon the foregoing pleadings.

At the hearing before the Referee, Respondent attempted to represent himself, a task which counsel believes impossible. As a result thereof, the record in this case is far from a model of clarity.

It is the position of the Respondent that there was no evidence before the Referee upon which he could base his recommendation that Respondent be found guilty of engaging in the practice of law while suspended, but if there is such evidence, it was of a character which fell far short of "clear and convincing" which is the degree of proof required in disciplinary actions.

The chronology of events in this case is important. On September 22, 1988, the Supreme Court entered its Order suspending Respondent from the practice of law for ninety days and providing

that Respondent should be reinstated after suspension upon paying the costs of the proceeding. The Order further provided:

> "So that he may close out his practice in an orderly fashion and protect the interests of his clients, Golden's suspension will take effect October 24, 1988. Judgment for costs in the amount of $1,331.41 is hereby entered against Golden for which sum let execution issue."

Said Order did not contain any provision precluding Respondent from accepting new clients or undertaking new legal business during the 30-day period before his suspension became effective. Such a provision is usually contained in orders of suspension. By not including it, it was apparently the intent of the Court that the Respondent could accept new clients and undertake new legal business during the 30-day period, providing that in so doing he would not engage in the practice of law during his 90-day suspension. If such was not the intent of the Court, Respondent was justified in believing it to be.

On October 16, 1988, (T-8) while still lawfully engaged in the practice of law, Respondent undertook to represent a Mr. Mitchell in two traffic court cases in Orange County. (T-9) Mitchell did not want to run the risk of being in jail in the month of December, and wanted the trials set later in January. (T-19,20,21,22) Respondent could try the cases anytime after January 25, the termination of his suspension. On the same day, October 16, 1988,

(T-20,21) Respondent, in each case, drafted a "Written Plea of Not Guilty, Waiver of Personal Appearance, and Request for a Continuance." The basis for said request was that "The Defendant seeks private counsel to represent him in this matter, and is securing the funds for such representation....." Said pleading was signed by Isaac Mitchell, pro se, and requested that all further pleadings be mailed to him at his home at 1605 South 37 Street, Orlando. (A-3) Said pleadings were promptly filed with the Clerk. (T-21) Admittedly, drafting of the pleadings and filing the same with the Clerk constituted the practice of law, but all was accomplished prior to the effective date of Respondent's suspension and while he was legally capable of practicing law. Mitchell, personally, had the responsibility of securing the continuances.

Sometime in December, the date being uncertain, one of the cases against Mitchell was set for hearing before Judge Jose Rodriguez, on the Defendant's Motion for Continuance. Mitchell was concerned about going to court and asking for the continuance, having no proof that he needed a continuance until January. (TR-59) Respondent accompanied Mitchell to the hearing before Judge Rodriguez at the request of Mitchell, so that he could "be there so that if there was a question as to whether or not the continuance was a legitimate continuance, I could say I am suspended; I am the attorney; I am the reason." (TR-59-63) Respondent did not accompany Mitchell for the purpose of advocating the granting of the continuance or to perform any other legal

service, but simply to serve as a witness, if such service was needed, to establish the need for the continuance. What occurred on this occasion is best set out in the testimony of Judge Rodriguez wherein he testified as follows:

> "What I recall was that a continuance was being requested by the defendant. It struck me odd because I did not know who you were and I didn't know that you were a lawyer. At that point I figured that perhaps you might have been, you know, as, I think as a reverend, you might have been helping someone out who was a member of your congregation. It wasn't until later that I received a Florida Bar notice stating that you had been suspended.
>
> "Under no circumstances did you represent yourself to be a lawyer to me. And to the best of my recollection, I seem to remember that either the prosecutor made the request or had voiced no objection on behalf of the defendant to make that continuance.
>
> "I remember you were there because it was like -- it was really why is this individual here? He's not -- to my knowledge, I don't know whether he is a lawyer or not and, you know, again, the continuance is being placed on the record on behalf of the defendant.

(TR-53)

"Question: Did Mr. Golden stand up before the Court with his client?

"Answer: No.

"Question: Not in your case. Thank you.

"Answer: No. As a matter of fact, I don't think that he was -- I don't think that he was wearing a jacket, which probably, if any discussions were held may not have been.

"I do not recall because I -- Well, I know for a fact that there was no notice of appearance filed by Mr. Golden on behalf of the Defendant. That's why my -- you know, what is this individual doing here, he's not a lawyer. Because he really wasn't -- to me, he wasn't representing himself as a lawyer for the defendant." (TR-56)

Mr. Golden didn't consider himself as acting as a lawyer representing Mr. Mitchell at the hearing before Judge Rodriguez. It would certainly seem that if the Respondent did not believe that he was representing Mitchellat the hearing before Judge Rodriguez, and if Judge Rodriguez did not believe that Respondent was acting in said capacity, and if the Respondent took no affirmative action to hold himself out as an attorney, he was not engaging in the practice of law.

In his findings of fact, the Referee simply found that

"Respondent also appeared in traffic court with Mr. Mitchell on yet another occasion during his suspension." (TR-52-57) He did not find and could not have found, based upon the evidence, that in so attending traffic court before Judge Rodriguez, Respondent was engaging in the practice of law.

The second occasion when Respondent took any action relative to Mr. Mitchell, was a hearing on another traffic charge involving Mitchell held before Judge Sprinkel. This was a hearing on Mr. Mitchell's Motion for a Continuance of the case pending before Judge Sprinkel. The Defendant, Mitchell, requested the Respondent to accompany him to this hearing. Respondent agreed to do so for the sole purpose of assuring Judge Sprinkel, as a witness, if the question came up, that he was suspended from the practice of law until January, but that he had agreed to represent Mr. Mitchell in that case and if the judge saw fit to continue the hearing, he, the Respondent, would be present representing the Defendant. (TR-59) To accomplish this, the Respondent attempted to so advise the judge by telephone, not for the purpose of advocating a continuance, but for the purpose of assuring the judge that Mr. Mitchell's Motion for Continuance was made in good faith. When he attempted to contact Judge Sprinkel, he could not get by the judge's Legal Assistant. The following is the testimony of Ms. Eveland, the Legal Assistant:

> "Well, I just remember Mr. Golden called concerning someone who had a traffic case. And Mr. -- I can't remember the particulars."

(TR-71)

"I think when he called me, I asked him if he was an attorney and he said he was, and I had -- It seems like I remembered seeing his name on a suspended list, and I asked him about that, and he told me that he was only calling as a friend. And I said, well, you know, you cannot be representina this defendant. And he said that, you know, it was not on that basis.

"And when I got off the phone, I told Judge Sprinkel about it, and then I think the next day Mr. Golden appeared in the Winter Park court before Judge Sprinkel." (T-71-73)

The following day, Respondent accompanied Mr. Mitchell to the hearing before Judge Sprinkel. Judge Sprinkel did not testify at the hearing before the Referee and the only evidence as to what occurred at this hearing is the testimony of the Respondent and, if such be evidence, the Affidavit of Judge Sprinkel. In his Affidavit, Judge Sprinkel stated:

"On December 16, 1988, James T. Golden appeared in my court, Winter Park, Florida. He was clearly there to provide legal representation for Mr. Mitchell. I informed Mr. Golden that I was aware that he was under suspension and had no authority to represent

clients. I informed Mr. Golden's client, Mr. Mitchell, of his status and that it would be necessary to obtain new counsel." (A-2)

This Affidavit is notable in that there are no facts stated which led to the judge's conclusion that the Respondent "was clearly there to provide legal representation for Mr. Mitchell." It is apparent from the Mitchell's testimony that when he, the Respondent, walked into the courtroom accompanying Mr. Mitchell, Judge Sprinkel immediately advised the Respondent that he had been suspended from the practice of law and that he would please excuse himself from the courtroom. (T-12) There is absolutely no evidence in the record that at this hearing before Judge Sprinkel Respondent held himself out as an attorney or took any action of any kind which would lead one to believe that he was engaging in the practice of law. If he did intend to do so, which Respondent says he didn't, he never had an opportunity to accomplish his purpose. The Referee recognized that on this occasion, the Respondent did not engage in the practice of law and did not find that he did so. The Referee found that "The Respondent attempted to represent Mr. Mitchell in court proceedings on December 16, 1988, at which time the presiding judge notified Mr. Golden that he was aware of his current suspension from the Florida Bar. (See Affidavit of the Hon. George A. Sprinkel, IV, attached as Exhibit A)."

The Referee also found that "Respondent failed to advise Mr. Mitchell of his suspension status at anytime." This finding is based upon the testimony of Mr. Mitchell and Shirley Renee

Grant, who was with Mr. Mitchell at the time of the first interview with the Respondent on October 16, 1988, and they so testified. Mitchell further testified that he did not know of the Respondent's suspension until Judge Sprinkel so advised him at the hearing before him. (TR-12) On the other hand, Mitchell testified that for three weeks before November 12 he had tried to telephone the Respondent at his office and the office phone was not functioning, and his office was closed and the lights were off. (TR-36-38) The Respondent testified that on October 24 he closed his office pursuant to the Order of Suspension so as to make certain there would be no basis for believing that he was violating the Court's Order of Suspension. (TR-62)

Human experience must lead to the belief that Mitchell, having paid Respondent $800.00 to act as his lawyer and thereafter suddenly finding that Respondent's telephone didn't work, Respondent's office was dark, unlit and unattended, he, Mitchell, would ask for an explanation, and would conclude that something was wrong.

The Referee further found that:

> "5. Respondent accepted $800.00 from Mr. Mitchell as legal fees for the traffic court representation." (TR-10) Respondent has failed to refund Mr. Mitchell fees." (TR-12)

It is uncontroverted that on October 16 Respondent agreed to represent Mitchell in the two traffic court cases for a fee of $900.00 for each case and that Mitchell at that time paid

Respondent $600.00. Shortly thereafter, Mitchell paid Respondent an additional $200.00. Both the Respondent and Mitchell testified that the only service performed by the Respondent was the drafting of the two pleas and motions for continuance and filing the same and that Respondent refunded none of said $800.00. The only testimony of Mitchell relative to the refund of the money is as follows:

> "Question: Did Mr. Golden return your money?
>
> "Answer: No. He sure didn't.
>
> "Question: Did you request him to?
>
> "Answer: One time.
>
> "Question: What was his response?
>
> "Answer: None at all." (TR-12)

On the other hand, Respondent testified that immediately after the hearing before Judge Sprinkel he learned that in some manner Judge Sprinkel disposed of the charge before him and that the warrant for Mitchell was withdrawn. (TR-61) Respondent then testified as follows:

> "To make a long story short, when we left there, I said, 'Now, what you have paid me is $800.00. You have paid me $800.00 and that is $100.00 short of what you would have paid me for one case, which was $900.00.' He said, 'That makes us -- that makes me owe you $100.00 for the other case before Judge Rodriguez,' and I said, 'That's it,' because

I didn't think that it would be right to take $900.00 for a case that Judge Sprinkel dismissed.

"I didn't know until after he came out from before Judge Sprinkel what the arrest warrant was for or what the outcome of that was going to be. I did not inquire. I did not even try to do anything that remotely resembled representation."

Mitchell filed his complaint against Respondent with the Florida Bar sometime on or about January 19 because he swore to the facts thereof on January 19. (A-2) In the Complaint, he stated:

"I have no money to retain new counsel to appear in traffic court on my behalf....."

Mitchell testified before the Referee that he did not retain new counsel until after he filed his complaint with the Florida Bar and then he testified as follows:

"Question: When did you retain Robert Mike?

"Answer: It was sometime in January, I think it was.

"Question: Was it before or after you filed this Complaint against me?

"Answer: It was after I filed this Complaint, because I needed someone there with me when I went to court and, you know, you

weren't able to be there with me.

"Question: But when were you scheduled to go to court, in January; is that correct?

"Answer: In January, January 14." (TR-35)

Assuming that the Notary Public made no error in dating his notarization, the Complaint was not filed prior to January 19. It is also apparent, from Mitchell's testimony, that he did not employ another lawyer to represent him before Judge Rodriguez until after the Complaint was filed. As a result, the testimony relative to the case being tried on January 14 must be incorrect. Further, it is reasonable to assume that said case was not tried prior to January 25, because Mr. Mike would have to have an opportunity to prepare for it. The record is unclear as to when said case was tried, but if it was tried subsequent to January 25, it is certainly debatable as to whether Mitchell would be entitled to the return of all or even part of the $800.00.

At the time of the conclusion of the case before Judge Sprinkel, Respondent still had the obligation to represent Mitchell in the case before Judge Rodriguez if said case was continued to January 25 or later, and was entitled to retain the $800.00.

The Respondent submits that the testimony of Mr. Mitchell relative to these two matters (1. Failure to advise Mitchell of his suspension and, 2. Failure to return the $800.00) when consideredinthe overall picture is somewhat incredible, while the testimony of the Respondent conforms to reason.

Normally, an Appellate Court will not review the testimony of witnesses and determine their credibility. However, the testimony of Mr. Mitchell is so confused and so contradictory to some of the facts established by other witnesses that the Court should scrutinize his testimony with great care. Mitchell testified at great length that Respondent accompanied him to court on only one occasion and that was before Judge Sprinkel, and that the Respondent did not accompany him to court before Judge Rodriguez. (TR-27-29) Mitchell was adamant as to this matter and Respondent, on cross-examination, couldn't get him to correct his testimony. Yet, Judge Rodriguez testified that Respondent did accompany Mitchell to the hearing before him. As another example of Mitchell's confused state of mind, he denied that he signed the Written Plea of Not Guilty and Request for Continuance in one of the cases, and the Written Plea of Not Guilty, Waiver of Personal Appearance and Request for Continuance in the other. However, he admitted that the signatures at the end of both of said pleadings were his. (TR-23-25) He gave no explanation for how the signatures could be his and yet he didn't sign the pleadings.

Respondent submits that this Court should, just as a Referee did, ignore portions of Mitchell's testimony as not credible and find that there is no clear and convincing evidence that Respondent did not tell Mitchell on the first visit that he had been suspended and that he failed to refund the $800.00 fee.

In light of all of the testimony, there is not clear and convincing evidence to support the findings of fact of the Referee

and the Court should reverse the Referee and find the Respondent not guilty.

SECOND POINT INVOLVED

UNDER THE FACTS OF THIS CASE, IS THE RECOMMENDATION OF THE REFEREE THAT RESPONDENT BE SUSPENDED FOR ONE YEAR UNDULY HARSH AND PUNITIVE.

ARGUMENT

For the purposes of this point, and no other purpose, counsel will assume that some of Respondent's conduct reflected in the record constituted engaging in the practice of law. If such constituted the practice of law, it was indeed a minor infraction of the Order of Suspension. In the Summary of Argument of Complainant's Initial Brief, it is stated:

> "The law in this matter is clear. Disbarment is warranted for wrongfully engaging in the practice of law despite a suspension. Respondent's actions indicate the highest disregard for the court system. Further, Respondent's lengthy prior record indicates that nothing less than disbarment would have an impact on this attorney. Therefor, disbarment is necessary in order to

> fulfill the goals of attorney discipline. The message must be clearly established that attorneys who violate suspension orders face disbarment."

The cases cited by the Complaint for the proposition that the law is clear are The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978) and The Florida Bar v. Hartnett, 398 So.2d 1352 (Fla. 1981).

The Florida Bar v. Hirsch, 359 So.2d 856 is in no way similar to the instant case. In the case of The Florida Bar v. Hirsch, 342 So.2d 970, Hirsch was suspended from the practice of law for three months as a result of his admittedly misappropriating almost $3,311.51 of clients money in his trust fund. The Order was entered on February 17, 1977 and the suspension was effective upon the filing of the decision. Subsequently, Hirsch came again before the Supreme Court of Florida in the case cited by the Complainant. Actually, there were two cases which were consolidated in the case cited. In one case the Referee found that Hirsch engaged in professional misconduct by failing "to diligently prosecute a client's lawsuit although repeatedly requested by the client to do," and that Hirsch made misrepresentations assuring the clients that suit had bee filed and service of process placed in the hands of the Sheriff when no action had in fact been taken. In the second case, the Referee found that after being suspended on April 1, 1987, Respondent undertook to represent a client. He received fees from the client. He drafted pleadings on behalf of the client and he conducted in his office two or more client interviews. For

these two consolidated cases, the Court ordered the Respondent disbarred with the statement that "We are convinced that no lesser penalty than disbarment would impress upon Hirsch his professional responsibility as a lawyer." One of the offenses of which Hirsch was guilty was of a totally different character and of far greater gravity than the offense of the Respondent here.

The same is true of The Florida Bar v. Hartnett, supra. In a prior case, Hartnett was suspended from the practice of law on February 22, **1979** for a period of two years and until he proved rehabilitation. In the cited case, the Court found that Hartnett had actively engaged in the practice of law despite his two-year suspension and then the Court stated: "Respondent did finally appear before this Court in response to the Rule to Show Cause which is actually the sixth such rule issued by this Court between May 16, **1979** and September 26, **1980**. Attempted service for the first five Rules to Show Cause failed, and it is clear from the record that Respondent has, at least on some occasions, avoided service of process. For this conduct, Hartnett was disbarred. There is no similarity between the conduct of Hartnett and Hirsch on the one hand and this Respondent on the other.

In this case, the Referee recommended that the Respondent be suspended from the practice of law for one year. This recommendation was based upon three factors set out in the Referee's Report:

1. The great seriousness of the failure to obey an Order of the Supreme Court of

Florida;

2. The lengthy history of prior discipline which has apparently been insufficient to change Mr. Golden's practices;

3. Golden's failure to demonstrate remorse or understanding of the gravity of his offense.

It is very difficult for counsel to argue the seriousness, or lack thereof, of Respondent's offense because counsel does not believe that there was an offense. However, if the Respondent committed a disciplinary offense, it was technical in nature, unintentional, and of no real significance. If in fact the Respondent engaged in the practice of law during the period of his suspension, the misconduct consisted only of his accepting employment and drafting the pleas of not guilty and the motions for continuance, all of which occurred prior to effective date of the suspension. Counsel suggests that the disciplinary authorities have differed as to the seriousness of the offense. Thus, in closing argument, Staff Counsel recommended that the Respondent be suspended for 91 days which represents the maximum discipline that Staff Counsel believed should be administered. The Referee, completely ignoring the recommendations of Staff Counsel, recommended that he be suspended for a period of one year. The Board of Governors of the Florida Bar looking only at the record, directed that Staff Counsel file a Petition for A Review seeking disbarment. Respondent suggests that if he is in fact guilty of any misconduct he should receive

no more than a public reprimand.

Another basis for the Referee's recommendation was the Respondent's "lengthy history of prior discipline which has apparently been insufficient to change Mr. Golden's practices" are as follows:

1. The Florida Bar v. Golden, 401 So.2d 1340(Fla. 1981) - In this case, Respondent was found guilty of borrowing $3,000.00 from a client and not promptly repaying the same, and of a technical violation of the trust accounting rules. This conduct occurred duringthe years 1978 and 1979. For this misconduct, the Court gave Respondent a private reprimand, the discipline recommended by the Referee, no Petition for Review having been filed by the Respondent.

2. The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987) - In this case, Respondent was found guilty of neglecting a client which neglect occurred in approximately 1985. In its Order, the Court suspended Respondent for ten days.

3. The Florida Bar v. Golden, 530 So.2d 931 (Fla. 1988) - In this case, Respondent was suspended for 90 days for neglect of a client which occurred in approximately, 1985.

4. Not mentioned in the Referee's Report or in this record, Respondent received a minor misconduct reprimand from The Board of Governors in September, 1989. In this

case, the Respondent undertook to handle a civil rights case without the requisite skill and failed to associate competent counsel to assist him. In addition thereto, he failed to properly prepare the case for trial. This civil rights case was tried in July, **1986.**

It will be noted that each of the last three disciplinary matters above-mentioned arose out of conduct occurring before **1987** and before the entry of the Order suspending Respondent for ten days. The Court will further note that the first discipline, a public reprimand, was for misconduct in no way similar to the misconduct in the latter three disciplinary proceedings, and further, that the misconduct alleged in the instant case is in no way similar to the misconduct for which he was disciplined previously. Respondent was not a "slow learner" or obstinate. So far as the record shows, he engaged in no misconduct similar to that for which he received his first public reprimand. So far as the record reflects, he has not been guilty of neglecting a client or a case since **1985** or **1986.**

The first Order of Suspension was entered in 1987. There is nothing in this record reflecting that the Court in the pr or disciplinary orders had not secured the attention of the Respondent. Yet, in the Referee's recommendations as to disciplinary measures to be applied, he stated:

> "Such proof of rehabilitation is necessary due to Respondents lengthy history of prior discipline which apparently has been insufficient to chanse Mr. Golden's practices."

In The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983) the Supreme Court stated:

> "The Referee recommended a four-months suspension. This Court has recently publicly reprimanded Carter, The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982), and ordinarily a finding of guilt 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 discipline could not, therefor, have deterred his conduct in this case. In addition, although we find violations of the charges alleged in Counts I and 11, they were either

violations in a technical sense only (Count I) or violations surrounded by mitigating and extenuating circumstances (Count 11). It is the duty of this Court to be fair to the Respondent as well as just to the public...."

The principles thus enunciated are applicable here. The activities of which the Respondent was found guilty in the last three disciplinarymatters, exclusive of the instant case, occurred prior to his first suspension and thus, his first suspension could not have deterred and did not deter him from such activities. Further, the conduct of the Respondent in this case, if a violation of the Code, is of a technical nature only. Staff Counsel, The Referee, and the Board of Governors treated all of the prior disciplinary actions as cumulating to the present case and thus concluded that the prior disciplinary actions did not deter him and gave them full cumulative effect. The Referee found as a fact that:

"Respondent has failed to demonstrate any remorse or understanding of wrongdoing in these proceedings."

This is indeed understandable. The Respondent was representing himself in the proceedings. It was his position then, as it is now, that he had not engaged in the practice of law during the period of his suspension. It would be difficult, if not impossible, for the Respondent to steadfastly and vigorously assert his innocence of the charge on the one hand, and apologize and be

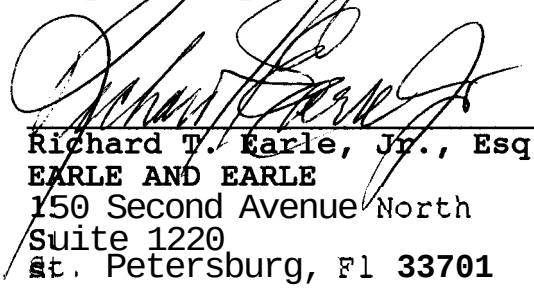
remorseful for having engaged in the practice of law while suspended on the other.

Respondent suggests that if he is guilty of any misconduct, a public reprimand would be adequate discipline to deter him from similar misconduct and would be just to the public.

CONCLUSION

Respondent submits that there is no clear and convincing evidence that Respondent engaged in any misconduct which would warrant disciplinary action and that therefor, this Court should find him not guilty of the offense charged. Respondent further submits that if there is any evidence of misconduct because of the inconclusive nature thereof and because of the nature of said misconduct, Respondent should not be deprived of his means of earning a living by practicing law for any period of time, and that a public reprimand would be an adequate discipline.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 5th day of December, 1989, to:

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