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)]

COMPLAINANT'S REPLY BRIEF

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar will be referred to as either "The Florida Bar" or "the Bar". James T. Golden will be referred to as "the respondent" or "Mr. Golden".

Abbreviations utilized in this Brief are as follows:

"T- __" will refer to the transcript of the proceeding before the referee on June 14, 1989.

"RR- __" will refer to the Report of Referee as filed dated July 17, 1989.

"A- __" will refer to the Appendix, attached to the Initial Brief of Complainant.

SUMMARY OF MENT

Respondent's attempt to rewrite the referee's findings of facts is inappropriate in this case in that he has failed to demonstrate that the referee's facts meet the stringent test of being clearly erroneous or without support in the evidence. Such a showing is required in order to overcome the presumption of correctness vested in such reports.

The referee is in the best position to determine the truthfulness of the facts and the credibility of the witnesses. Respondent attempts to argue that although he agreed to represent a client, took money from the client for the representation, prepared pleadings for the client's court cases, and appeared with the client in court, he nevertheless did not represent the client. The adage that "if an object looks like a duck, sounds like a duck, and swims like a duck, it usually is a duck", is appropriate here. The Bar's witnesses, including a county judge, his judicial assistant, Mr. Golden's client and the client's friend fully support the referee's finding that Mr. Golden represented Mr. Mitchell during the period in which this Court ordered him to cease his practice as discipline. Nothing less than disbarment is appropriate for this violation, particularly in view of his significantly long and recent discipline record.

ARGUMENT

POINT ONE

THERE HAS BEEN NO SHOWING THAT THE REFEREE'S FINDINGS *ARE* ERRONEOUS OR LACKING IN EVIDENTIARY SUPPORT.

The referee's findings of fact are clearly supported by the evidence. It is well settled that the referee's findings of fact are not subject to a de novo review upon appeal. A referee's findings of fact and recommendations shall be upheld unless they are clearly erroneous or without support in the evidence, The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). In the latter case, the Court went on to address the situation present in the case at hand involving conflicting testimony:

> The evidence presented before the referee boils down to a credibility contest between Stalnaker and Jones. The referee listened to it and observed both of them, and, as our fact finder, resolved the conflicts in the evidence. See The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). Our review of the record discloses support for the referee's findings and therefore, we will not disturb them. at p. 816.

Therefore, respondent's attempt to rewrite the referee's findings of facts in a more favorable manner to himself is inappropriate. The referee's report is well based in facts, testimony, and evidence.

Mr. Golden undertook the representation of Mr. Mitchell pursuant to the following chronology of events:

> September 22, 1988 - Court ordered suspension at 530 So.2d 932 (Fla. 1988)
>
> Mid October 1988 - Mr. Mitchell's first office visit with Mr. Golden, T-7-8.
>
> October 24, 1988 - December 24, 1988 and until payment of costs and 530 So.2d 932 (Fla. 1988): suspension period.
>
> December 16, 1988 - Respondent appeared with Mr. Mitchell in the court of the Honorable George A. Sprinkel, A-2. During the interim of Mr. Golden's suspension, he failed to advise his client, Mr. Mitchell, of his suspension, and otherwise violated his suspension order.

The issue of what constitutes the practice of law is clearly recognized to include actions such as those committed by the respondent. Unauthorized practice of law has been defined as the giving of such advice and performance of such services that affect important rights of persons under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and knowledge of the law greater than that possessed of the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitutes the practice of law, The Florida Bar v. Town, 174 So.2d 395, 397 (Fla. 1965). Merely the act of holding oneself out as an attorney when one is not so licensed has itself

constituted the practice of law, The Florida Bar v. Matus, 528 So.2d 895 (Fla. 1988), The Florida Bar v. Martin, 432 So.2d 54 (Fla. 1983), The Florida Bar v. Moran, 273 So.2d 390 (Fla. 1973). Clearly respondent failed to notify his client of the suspension, itself a violation of the terms of his suspension, Rules Regulating The Florida Bar, Rule 3-7.5(h), T-11-12. He identified himself as an attorney to his client and his friend throughout his suspension period, T-12-12, 43. He gave legal advice to his client regarding the continuance of his criminal cases. He also accepted fees from his client during his suspension period, T-10.

Respondent's assertion that he only appeared in court with Mr. Mitchell in order to somehow verify the fact of his suspension is without credibility. As the referee noted, respondent failed to state such a reason for the continuance in the pleadings he prepared for Mr. Mitchell requesting the continuance, T-64-65. Respondent's personal appearance was totally unnecessary to verify the fact of his suspension but does add to the credibility of Mr. Mitchell's belief that Mr. Golden was authorized to practice law. Additionally, Judge Sprinkel's judicial assistant also testified that Mr. Golden called the judge's office seeking scheduling of Mr. Mitchell's case and identified himself as an attorney until she confronted him with the facts, T-72. In sum, there is abundant clear and convincing

evidence supporting the referee's findings that respondent violated his suspension order and practiced law by representing Mr. Mitchell during the period of his suspension. There is no cause to overturn the referee's findings of fact.

ARGUMENT

POINT TWO

DISBARMENT IS THE APPROPRIATE DISCIPLINE IN THIS CASE GIVEN THE REFEREE'S FINDINGS AND RESPONDENT'S DISCIPLINE HISTORY.

There is no question that attorneys who have engaged in prior discipline proceedings face harsher discipline then if they had no prior discipline record, The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981), The Florida Bar v. Reese, 421 So.2d 495 (Fla. 1982), The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983). In Bern, the attorney was found guilty of entering into a partnership with a client in a situation involving conflict. Although this misconduct was not that egregious per se, the court held that his prior discipline history warranted a suspension with proof of rehabilitation. It is uncontested that Mr. Golden was disciplined for conduct some three times prior to the case at hand. Furthermore, the conduct giving rise to these cases also occurred prior to the case at hand. Additionally, it is noted by Mr. Golden in his answer brief, yet another case of discipline was concluded in September, 1989, with a minor misconduct reprimand for conduct that occurred in July of 1986. Since all of this conduct occurred prior to his conduct in this case, The Florida v. Carter, 429 So.2d 3 (Fla. 1983) is not appropriate here since the incident of misconduct occurred subsequent to the three previous decisions of this court. It is clear that

respondent has failed to take heed of previous discipline orders. It is for this reason that nothing less than disbarment would be appropriate in this case. Disbarment has been held to be previously appropriate by this court for similar misconduct in violating suspension orders, The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978), The Florida Bar v. Blum, 74,079, Supreme Court of Florida, July 26, 1989 (attached), The Florida Bar v. Hartnett, 398 So.2d 1352 (Fla. 1981). Anything less than disbarment would be meaningless to this attorney who refuses to obey suspension orders. Disbarment is necessary to enforce the principles of attorney discipline and the entire judicial system.

CONCLUSION

WHEREFORE, The Board of Governors of The Florida Bar respectfully requests this Honorable Court to accept the referee's report finding respondent guilty of violating the Suspension Order of this Court of September 22, 1988, but to reject the referee's recommended suspension of one year and instead to impose disbarment upon the respondent as well as to order respondent to pay the costs of The Florida Bar in bringing this discipline now totalling $843.90.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief of The Florida Bar has been furnished by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to Richard T. Earle, Jr., Counsel for respondent, at 150 Second Avenue North, Suite 1220, St. Petersburg, Florida, 33701; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 2nd day of January, 1990.

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