IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

VAUGHN C. BRENNAN,

Respondent.
_____/

CASE NO. 67,851
(10A85C45)

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF THE CASE

Following a complaint to The Florida Bar, probable cause was found by the Tenth Judicial Circuit Grievance Committee "A" on August 14, 1985. The Bar's complaint was filed November 5, 1985 and Final Hearing held March 19, 1986. The referee's report dated April 21, 1986 was thereafter filed.

In that report, the referee recommends respondent be found guilty of violating Disciplinary Rules 1-102(A)(6) and 6-101(A)(3) of The Florida Bar's Code of Professional Responsibility. He predicates the former violation on respondent's failure to keep his client informed of his location and the latter on respondent's refusal, without sufficient justification, to communicate with successor counsel in this matter or to turn over requested documents for some sixteen months. The referee further recommends that the respondent be found not guilty of violating Disciplinary Rules 7-101(A)(1) for intentionally failing to seek the lawful objectives of his client and 7-101(A)(2) for intentionally failing to carry out a contract of employment. As discipline, the referee recommends the respondent be publicly reprimanded and placed on probation for a period of

one year. During that period, the respondent is to pay the costs of these proceedings now totalling $1,011.30 and keep the Bar informed at all times of his current business and residential addresses.

At their May 1986 meeting, the Board of Governors considered this case. They approved the referee's findings of fact and recommendations of guilt and/or innocence. However, the Board believes the referee's recommended discipline is erroneous and unjustified under the circumstances here present. Specifically, this is respondent's disciplinary history which consists of two prior public reprimands. The Board of Governors of The Florida Bar seeks review by this Court and urges it adopt the discipline of a suspension for at least four months with proof of rehabilitation required prior to reinstatement in a public opinion order and tax costs now totalling $1,011.30 against respondent with interest accruing at the legal rate beginning 30 days after this Court's order becomes final.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND AND PROBATION FOR A PERIOD OF ONE YEAR IS UNJUSTIFIED AND ERRONEOUS GIVEN RESPONDENT'S PRIOR DISCIPLINARY RECORD OF TWO PREVIOUS PUBLIC REPRIMANDS AND WHETHER A SUSPENSION FOR AT LEAST FOUR MONTHS WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS THE JUSTIFIABLE AND APPROPRIATE DISCIPLINE GIVEN THE PRINCIPLE OF CUMULATIVE DISCIPLINE.

STATEMENT OF THE FACTS

In early 1981, Mary Allred contacted the respondent for the purpose of representing her and her sister in a matter connected with the death of their mother, Mary E. McKinley, who died in 1980. Mrs. Allred took to the respondent certain papers and documents for him to review to determine what was necessary to be done in connection with possible improper deposits of retirement benefits from the State of Florida to the deceased mother's account in Iowa. Those deposits then totalled approximately $800.00. Mrs. Allred wished for the respondent to communicate with the parties in Tallahassee and Iowa on the problem. She also wanted him to take whatever other steps were necessary to handle the situation. She delivered to him both the wills of her deceased mother and father as well as other papers. No probate of either estate was necessary.

The respondent agreed to assist Mrs. Allred and did correspond with a law firm in Iowa which was involved in that state and with the administrator of Survivor Benefits Section of the State of Florida in March 1981. He did not make a fee arrangement with the client. He did not ask for nor was he tendered a fee. After the initial correspondence with copies to Mrs. Allred, the

the initial correspondence with copies to Mrs. Allred, the respondent undertook no apparent further efforts in her behalf, although it is uncertain what else he was to do. At that juncture, the problem was not resolved and the Iowa account remained open.

Approximately six months later, Mrs. Allred attempted to contact the respondent. She met him by chance at her neighbor's house and made an appointment to see him. When she arrived at the appointed time, she found not respondent's office, but rather a vacant building where the office had formerly been. From this time until June of 1983 the respondent moved his office at least twice more, and at no time did he correspond with Mrs. Allred as to his new locations.

On June 23, 1983, Mrs. Allred contacted another attorney, Jon Anderson, who attempted to contact the respondent to secure the file. He followed up his conversation with letters dated July 11, 1983, August 9, 1983, November 16, 1983 and September 17, 1984. He also attempted to contact respondent by telephone on occasion without success (Final Hearing transcript pp. 43-44,

hereinafter T.). The only response he received from the respondent was the latter's September 24, 1984 letter requesting written authorization in order to release the file. This was the first time Mr. Anderson was notified by the respondent or his office that written authorization was necessary. However, there is a file note indicating a call on the subject in January, 1984 which Mr. Anderson denies he received (T. pp. 44-45). Mr. Anderson secured the written authorization on December 27, 1984 from Mrs. Allred and Mrs. White. The latter lived out of state and the authorization was taken when she return for a vacation at the end of the year. Mr. Anderson forwarded the written authorization to the respondent who furnished the file with the appropriate papers in January 1985.

At the time of respondent's September 24, 1984 letter, his business address was still in Lakeland, Florida. In October, he moved to Louisiana, took the file with him, but did not advise either Mrs. Allred or Mr. Anderson of relocation, although he maintained a local mailing address.

Finally, Mrs. Allred was able to solve the problem by herself sometime in 1984.

SUMMARY OF ARGUMENT

The referee recommends respondent be found guilty of violating Disciplinary Rule 1-102(A)(6) for failing to keep his client informed of his business location. He also recommends he be found guilty of violating Disciplinary Rule 6-101(A)(3) for refusal without sufficient justification to communicate with successor counsel and turn over documents belonging to Mrs. Allred for over a year.

As discipline, he recommends he receive a public reprimand and be placed on probation for a year even though respondent has received two previous public reprimands. Discipline is cumulative and subsequent misconduct should call for stricter discipline even where the misconduct is not serious. Given the principle of cumulative discipline, the referee's recommended discipline is erroneous and unjustified. The appropriate measure of discipline is a suspension for at least four months with proof of rehabilitation required prior to reinstatement.

ARGUMENT

THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND AND PROBATION FOR A PERIOD OF ONE YEAR IS UNJUSTIFIED AND ERRONEOUS GIVEN RESPONDENT'S PRIOR DISCIPLINARY RECORD OF TWO PREVIOUS PUBLIC REPRIMANDS AND A SUSPENSION FOR AT LEAST FOUR MONTHS WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS THE JUSTIFIABLE AND APPROPRIATE DISCIPLINE GIVEN THE PRINCIPLE OF CUMULATIVE DISCIPLINE.

This is a very simple case which absent respondent's prior disciplinary record probably would call for certainly no more than a public reprimand. The respondent undertook to straighten out a minor problem involving improperly deposited retirement benefits deposited in the decedent's out of state bank account in early 1981. He was paid no fee at that particular time, nor did he make a firm arrangement for one. He wrote the initial correspondence, but apparently did nothing further to straighten out the situation. He also received many papers including a couple of wills from his client. She lost contact with the respondent due to him moving his offices for various reasons within the Polk County area. Finally, she sought and secured Mr. Anderson in

late June 1983 to intercede in her behalf. He was unsuccessful in having the respondent turn over the papers or advise why he would not do so until late September 1984 when the respondent for the first time requested written authorization. Once this was supplied, the papers were turned over. Meanwhile, the client was able to resolve the problem herself.

As noted by the referee, the respondent has violated two of the Disciplinary Rules of The Florida Bar's Code of Professional Responsibility. He has violated Disciplinary Rule 6-101(A)(3) for refusing to communicate without sufficient justification with his successor counsel and turn over to same the requested documents from late June 1983 until September 24, 1984 when he requested written authorization in a period of approximately fifteen months. I do note that the referee mentions sixteen months and considers the period to conclude with surrender of the documents. In any event, the respondent simply failed for whatever reasons to advise Mr. Anderson he wanted written authorization until the September 24, 1984 letter.

The referee also recommends he be found guilty of violating 1-102(A)(6) for other misconduct reflecting adversely on his fitness to practice law by failing to keep his client reasonably informed of his location. When Ms. Allred arrived to keep her appointment in the Fall of 1981, she found only what had been respondent's office and no note giving directions to his new location. He did not forward any written communication to her advising her of his new locations when he moved and she lost track of him. It was only after she sought the services of Mr. Anderson in June 1983 that respondent was contacted, and then it took at least another fifteen months for the respondent to divulge the reason he was retaining the file.

Absent a prior disciplinary history, the referee's recommendation clearly would be appropriate. As this court stated in The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980) at page 1223, "Public reprimand should be reserved for such instances as isolated instances of neglect, The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979);...." Although the factual situations vary, public reprimands were issued more recently in

The Florida Bar v. Chase, 467 So.2d 983 (Fla. 1985) and The Florida Bar v. Merrill, 462 So.2d 827 (Fla. 1985). The former was partly due to the attorney's failure to properly supervise a nonlawyer member of his staff and the latter involved neglect of three separate legal matters. A public reprimand also issued in The Florida Bar v. Shannon, 398 So.2d 453 (Fla. 1981) wherein the attorney had neglected a matter entrusted to him which caused prejudice to the client. None of the attorneys involved had prior discipline. Neglect has formed the basis for suspension in cases, particularly if prior discipline is present. In The Florida Bar v. Kates, 387 So.2d 947 (Fla. 1980) an attorney was suspended for three months and one day requiring proof of rehabilitation for neglecting to advise or assist his personal representative client resulting in her removal and loss of a fee. He also had improperly commingled $74.50 given in costs and failed to keep proper trust account records. He had been previously suspended for 90 days for neglect in a separate case.

However, Mr. Brennan comes to this court with prior discipline. He was publicly reprimanded in The Florida Bar v. Brennan, 377 So.2d 1181 (Fla. 1979) when this court accepted his conditional plea. In that particular consolidated case, respondent entered a

plea for improperly handling one criminal case involving disclosure of stress evaluation test results to the court without prior knowledge or authorization of the client and for inadequate preparation in entering a plea on behalf of his criminal client who, when arrested for this crime, was on work release for a previous matter. As a result of the mistake, the client received an additional two years. Respondent was also publicly reprimanded and placed on one year's supervised probation in The Florida Bar v. Brennan, 411 So.2d 176 (Fla. 1982). In that matter he was found to have issued an insufficient funds check to a client of a minor amount and then took over four months to make it good. Respondent was also found to be guilty of failing to file quarterly trust account reconciliations as then required. This court has often stated that discipline is cumulative and further acts of misconduct will result in sterner discipline being meted out by the court. See Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a)(4). In The Florida Bar v. Bern 425 So.2d 526 (Fla. 1982) this court wrote at page 528:

> "In rendering discipline this court considers respondent's previous disciplinary history and increases the discipline where appropriate (seven citations omitted). The court deals more harshly with cumulative misconduct

> than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct."

The Bern case involved failing to provide a proper accounting of monies received and to return $250 due to a client in a business transaction with the client where the attorney had a conflict of interest. Although the referee recommended he receive a public reprimand and be placed on probation, the court disagreed and ordered a suspension requiring proof of rehabilitation primarily due to his prior disciplinary history. He had received a private reprimand in 1975 for two counts of attempted solicitation, another in 1978 for cashing checks for fees he had agreed to hold causing damage to the clients and a public reprimand in 1980 for violations involving soliciting an investor to invest in a company. The prior cases were more dissimilar than similar.

The only issue is the adequacy of the recommended discipline. As noted, absent a prior disciplinary history, the referee's recommendation would be adequate. However, this is not an isolated instance of neglect as noted in Welty, supra. This respondent comes to the court with two prior public reprimands for cases involving dissimilar conduct. The referee was thoroughly aware

of the cumulative discipline principle in this proceeding (T. pp. 110-115). It appears in making his recommendation he placed considerable significance on the fact respondent has moved to Louisiana; that he is currently winding up his law practice in Florida; and that he states he has no intention to continue practicing, but wishes to remain a member of The Florida Bar. The referee also stated in his report that any harsher recommendation would be disproportionate to the acts committed in view of the totality of the circumstances.

The Bar submits that the referee is in error and his recommendation is unduly lenient in light of respondent's prior disciplinary history. Moreover, the Bar does not believe that this court should adopt, as the referee apparently did, that leaving the State of Florida and private practice are reasons to mitigate the cumulative discipline principle. Clearly, one can return both to the state and private practice. The Bar does note promising to leave private practice has at least for one individual spared him from harsher discipline in two cases. See The Florida Bar v. Reese, 263 So.2d 794 (Fla. 1972) and The Florida Bar v. Reese, 421 So.2d 495 (Fla. 1982). In the former case, the court adopted a referee's recommendation of a second public

reprimand partly on that respondent's promise to leave private practice and seek a salaried position with the government. Ten years later, a different referee noted the previous apparent intent in not recommending disbarment in the more recent case wherein the respondent received a maximum three year suspension. The Bar's appeal in the latter case for disbarment was unsuccessful. It also appears that between the second public reprimand and the three year suspension, the respondent also received a private reprimand in 1978. However, the Bar believes that as a matter of policy that removal from the state and promising to leave private practice should not be a mitigating matter per se. The discipline should depend upon the degree of departure from the Code of Professional Responsibility and be augmented where the respondent has been previously disciplined.

The Bar also takes issue with the referee's recommended conditions of probation. If adopted, they are practically without meaning. One merely states he has a year to pay his costs. It is seemingly inconsistent with Section VI which indicates costs are due 30 days from the date the judgment becomes final in this case unless a waiver is granted. Presumably by directing the costs be paid during the period of probation, the referee has put

a time limit on any waiver. Secondly, requiring the respondent to keep the Bar apprised at all times of his current business and residential addresses adds nothing in that each member of The Florida Bar is required to keep the Bar advised of his current mailing address for Bar purposes pursuant to Article II, paragraph six of the Integration Rule. Obviously, it need not be both the residential and business addresses unless they are one and the same. In any event, the conditions of probation recommended by the referee amount to no probation whatsoever.

The Florida Bar submits that the referee's recommended discipline is too lenient and erroneous given respondent's prior disciplinary history. The more appropriate discipline would be a suspension for a period of four months with proof of rehabilitation required prior to reinstatement and payment of the costs. As a suspended attorney, respondent would remain a member of the Bar but without the privilege of practicing until he sought reinstatement and proved his rehabilitation. The Bar urges this court to reject the referee's recommended public reprimand due to the cumulative discipline principle and instead impose a

suspension for a period of four months with proof of rehabilitation required prior to reinstatement and tax costs against the respondent currently totalling $1,011.30.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will review the referee's findings of fact, recommendations as to guilt or innocence, and approve same but reject his recommended discipline of a public reprimand and one year's probation and instead impose a suspension for a period of four months with proof of rehabilitation required prior to reinstatement and tax costs against respondent currently totalling $1,011.30.

Respectfully submitted,

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By David G. McGunegle
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Brief in Support of Petition for Review have been furnished by mail to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Brief has been furnished by mail to Vaughn C. Brennan, 405 Glenmeade Court, Gretna, Louisiana 70056, and a copy of the foregoing Brief has been mail to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 this 27th day of May, 1986.

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