IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 67,851
(10A85C45)

v.

VAUGHN C. BRENNAN

Respondent.

_______________________________/

FILED
CLERK, SUPREME COURT
By________
Deputy Clerk

RESPONDENT'S BRIEF IN SUPPORT OF COUNTER-PETITION FOR REVIEW

VAUGHN C. BRENNAN
405 Glenmeade Court
Gretna, Louisiana 70056
(504) 393-1948

STATEMENT OF THE CASE

Following a complaint to The Florida Bar, probably 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 our 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.

The complainant has filed a petition to enhance the penalty of that recommended by the referee, thus has petitioned this Honorable Court for review of its recommendations of penalty. The respondent has joined with the complainant that it is necessary to review the case. In the instant case the petitioner only wishes to enhance the penalty as to the recommendation of the referee, while the respondent wishes a full review into the facts and issues raised in his counter-petition and within this brief. Having done so, the respondent prays that this Honorable Court will find that the respondent is not guilty as to those charges brought against him.

Notification for right to petition for review was received at the respondent's home (Gretna, Louisiana) while he was in Florida on non-associated matters, and was given a deadline to file a petition or response to the complainant's petition by June 2, 1986. The complainant filed a petition and a brief which was received by the respondent May 30, 1986. Complainant has had the advantage of the transcript of the referee hearing dated March 19, 1986, but a copy has not been tendered or received by the respondent. Matters, testimony and material facts at the March 19 hearing are subjected to respondent's memory.

Previously, a motion for re-hearing was filed on March 24, 1986, three days following the submission of the referee's report. The

motion, it can be assumed, is an earlier petition for review. It specifically requests the addition of material facts in evidence that upon close review could materially change the recommendation of the referee. The counter-respondent has neither acknowledged or denied its content, and the matter has not been ruled upon.

On May 19, 1986 John A. Boggs, Esq., Director of Lawyer Regulation for The Florida Bar, notified the Honorable Sid White, Clerk of the Supreme Court, with copies to David McGunegle,Esq., Branch Staff Counsel, to the Florida Bar in Orlando, and to the respondent at his address in Louisiana, that the Florida Bar was filing a petition for review and that the Florida Bar would have until June 2, 1986 to file its petition, further that the respondent, upon receipt of said petition, could file his response to the petition with the filing date also that of June 2, 1986. The content of Mr. Boggs letter was given to the respondent over the telephone while the respondent was in Florida attending a hearing in Tampa. The letter failed to indicate the matter of the petition and the respondent erroneously took the letter to mean that The Florida Bar needed additional information pursuant to respondent's motion of April 24, 1986. Accordingly, respondent on May 29, 1986 filed a response by hand delivery in Tallahassee. The content may be construed as a further continuation of respondent's motion of April 24, and together the content of each filing is being incorporated into respondent's counter-petition filed June 2, 1986.

The respondent seeks an in-depth review of the matter in light of the referee's report failing to note significant facts, that if construed, show that the respondent recognized that he was under a fiduciary duty to protect a legal document, that the 'successor attorney' attempted to obtain said document and accompanying file without proper documentation or release from the client, further during such period, the client had neither attempted to contact the respondent by letter, telephone or visit, although the attorney had his telephone number listed in the local telephone directories, and as required, his proper address and telephone number was duly registered with The Florida Bar in Tallahassee.

Upon review, the respondent seeks total vindication as to the charges brought against him by the Florida Bar.

STATEMENT OF THE FACTS

During the calendar year 1981, Mary Allred was recommended to the respondent by her next door neighbor, Beverly Hill, for the respondent to assist the client with a pending probate matter. At the time, respondent was in temporary quarters occupying space in a former doctor's office which was a part of and adjacent to the doctor's residence in the city of Lakeland. Respondent had lost his office and contents in a fire in December, 1980, and the space was made available to the respondent as an accommodation by the doctor and his family.

Mrs. Allred delivered to the respondent certain papers and a will of the client's mother, Mary E. McKinley, who was deceased, as well as the will of her deceased father. Mrs. Allred instructed respondent to make certain inquiry of the Administrator of Survivor Benefits Section of the State of Florida, and of an attorney in Iowa as to relating matters. This was accomplished after telephone calls and correspondence, with copies having been sent to the client. The respondent had no further duty to the client. No fee was paid, no costs were received to be placed in escrow, and no fee was discussed. However, it was understood a fee would be determined following the work to be performed on a quantum merit basis. Some period of time later the respondent ran into the client, Mrs. Allred, in the front yard of her neighbor, Mrs. Hill, and respondent requested that

the client see him in his office. No specific time was set nor was any specific appointment made, only that the respondent wished to see the client. The purpose of the proposed visit was to determine whether additional work was to be done and to set a reasonable fee for the services performed. Testimony of Mrs. Allred alleged that she had come to respondent's office and finding the office vacant, returned home. Mrs. Allred made no inquiry of the resident of the building, the doctor or his family, who had occupied the structure adjacent to Florida Southern College for in excess of 20 years. She did not consult the Polk County telephone directories or the Florida Bar in Tallahassee as to an address. She further did not consult with Mrs. Hill, her neighbor, who she indicated she saw infrequently, although Mrs. Hill had testified that they saw each other on a weekly basis. The client made no further effort to contact the respondent for any purpose, either in person, by telephone, or by correspondence.

It is alleged that on June 23, 1983 Mrs. Allred contacted another attorney, Jon Anderson, Esq., an associate in the law firm of Lane, Trohn, Bertrand & Williams, P.A., a firm employing eighteen lawyers. It is alleged by Mr. Anderson that he had contacted the secretary of the respondent where-in he requested that the respondent transfer the file to him. Mr. Anderson failed to give authorization yet alleged that he had stated that the client (s) were in his office at the time. The respondent does not know directly of his

telephone call other than his secretary's report to him, and has at no time been in contact with him by telephone. Mr. Anderson addressed three letters to the respondent, July 11, 1983, August 9, 1983, and November 16, 1983. In each instance Mr. Anderson failed to provide written authorization or any other authority that he in fact was acting at the bequest of the client. He further, during testimony, admitted that he had not instructed the client to personally seek the file or resolve any matter of understanding or fee-indebtedness with the respondent. Respondent did not respond to these letters in written form. Nor did he write to the client.

In January (January 4, 1984) respondent requested his secretary to notify Mr. Anderson's office that we were awaiting written authorization for the file and the will to be transferred to Mr. Anderson. A letter was written, and the file was prepared for mailing. A memo to the file stated: "Hold file for mailing until authorization is received to release documents to JHA." Handwritten by the secretary, "Called and requested letter to release," signed PB, January 4, 1984. The file remained available until September 17, 1984, when Mr. Anderson sent a threatening letter to respondent to turn over the file, citing the letters sent, and that he had turned over the matter to the grievence committee. He further threatened that if the documents had not been delivered within ten days, he stated he was authorized to and would file an appropriate legal action to do so.

Mr. Anderson then addressed each member of the 10th Judicial Circuit Grievance Committee as to the following alleged facts:

1. He had, without success, been able to obtain certain original documents and sources of information from respondent on the request of the client.

2. Mr. Anderson faslely stated that the respondent had been retained to administer the estates of two decedents.

3. He falsely stated that the respondnet, "had taken no action" and "did not communicate with his client."

4. He further falsely stated that the respondent "declined to answer their telephone calls" or "respond to the inquiries concerning the status of the matters."

5. He then indicated that, "the matter was simple, uncomplicated and could be handled with a minimum of expense. The only thing required for this to be acomplished was the cooperation of Mr. Brennan in returning the documents supplied to him by the clients."

6. He again stated falsely that the respondent had failed to return the clients telephone calls or otherwise respond to these requests.

7. He further claimed to have attempted to telephone the respondent and falsely stated that his telephone messages had not been returned.

Mr. Anderson's letter was responded to on September 24, 1984, his letter having been received on September 21, wherein he was re-

minded that the file had been prepared for forwarding since January 4, 1984 only awaiting "Mrs. McKinley's daughter's proper authorization to release the items which were given to me by a third party. I will be most happy to mail the documents to you upon some written authorization that you are the proper person to maintain said file. According to a note in my file, this authorization was requested by phone to your office at the time the papers were assembled for you."

On October 11, 1984 respondent acknowledged Mr. Anderson's complaint and copy of respondent's September 24 letter was returned with the statement, "enclosed you will find a copy of my recent letter to him on this matter. I have had no response from Mr. Anderson, nor have I any proof, either written, oral or otherwise, that he has the legal right to said file. I have not heard from his alleged client, nor from any other party establishing that he has any authority to request said file. The file was originally brought to me by the personal representative of the deceased and I have had no request nor authority from her for said release. A close examination of the file shows clearly that it has been ready for transfer to Mr. Anderson since January of this year. We would like to honor his request if he will follow appropriate decorum for such a request with necessary proof that he is entitled to the documents. However, I will not be intimidated by his forwarding <u>his</u> request to the grievance committee as I believe it is my duty to

protect the files of my clients from inappropriate access. I therefore enter this, my grievance against him for his unprofessional behavior, and respectfully request that the committee instruct him in the proper handling and transfer of legal documents."

Respondent continued to retain the legal documents belonging to Mrs. Allred. No notification came from her purporting that a change of counsel was necessary or that I should forward the wills and file to Mr. Anderson. Respondent further received no instruction by the court or the Florida Bar to turn over the documents to Mr. Anderson without proper authorization.

Mr. Anderson then communicated with the respondent four months later when he denied that an authorization had ever been requested. Further, in stating so, the request was a fabrication. He enclosed an authorization and an affádavit signed by Mrs. Allred and her sister, Mrs. King.

The affadavit alleged that Mrs. Allred had gone to respondent's office and he had moved. That she could find no information as to his address, that she (we) were never notified of any change. That the respondent never again called us, (we) no longer knew how to contact him and that in June, 1983 they were present in Mr. Anderson's office when Mr. Anderson requested the documents by telephone in a call to respondent's office.

Having received the long-awaited authorization, respondent promptly forwarded the documents to Mr. Anderson by certified mail.

The matter having been referred to the 10th Judicial Circuit Grievance Committee, was heard on August 14, 1985, on the eve of the respondent's final hearing of dissolution of marriage. Due to the emotional trauma a hearing of this degree creates, the respondent did not call his secretary and former wife to testify, but did present a copy of the file into evidence including his former secretary's memo of having contacted Mr. Anderson's office in January, 1984 requesting proper authorization before the file could be turned over. Mr. Anderson's former secretary, Toni K. Adkins, testified that she had received no telephone request from respondent's office to provide written authorization. Yet, Ms. Adkins acknowledged on respondents questioning her, that there were many other secretaries in the firm who answered the telephone for other lawyers at various times,with whom Mr. Anderson was associated. Ms. Adkins was not available for testimony at the March 19 hearing before the referee, yet her testimony was included for consideration.

At the March 19 hearing Mrs. Allred acknowledged that respondent's contractural responsibility had been met by respondent's having made the inquiries that she had requested.

Mr. Anderson acknowledged that he was not sure but he had thought he had instructed the client to procure the file and the wills from the respondent.

On April 21, 1985 the referee found and recommended that the respondent be found not guilty of violating disciplinary rule 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. The referee, however, found that the respondent should be found guilty of violating disciplinary rule 1-102 (A) (6) for failure to keep his client informed of his location and rule 6-101 (A) (3) that on respondents refusal, without sufficient justification, to communicate with successor counsel or to turn over requested documents for some sixteen months.

The referee recommended that the respondent receive a public reprimand and be placed on supervised probation for a period of one year as provided in rule 11.0 (1), for violation of disciplinary rules 6-101 (A) (3), and 1-102 (A) (6) with conditions of probation being:

a. Payment of all costs assessed against him in this disciplinary proceeding. An amount later determined to be $1,011.30, (with interest accruing at the legal rate beginning thirty days after this Court's order becomes final, unless a waiver is granted by the Board of Governors of the Florida Bar.)

b. Keep the Bar informed at all times of his current business and residential addresses.

The referee finally stated, "any harsher recommendation would be disproportionate to the acts committed by the respondent in view of the totality of the circumstances."

On April 24, 1986 respondent submitted his motion for rehearing that noted that material facts had not been included in the referees statement of facts and if reviewed, the Court could conclude that the respondent was not guilty of the two violations as recommended by the referee.

On May 27, 1986 David McGunegle,for the Florida Bar, filed a petition with oral argument requested, for the Court in its review, to enhance the penalty due to the respondent's prior history of disciplinary action. On May 29, 1986, the respondent filed his response erroneously as to his belief that additional information was required pursuant to his April 24 motion for rehearing. Both the April 24 and the May 29 motions as to material facts not included in referees report are noted in the following seetion requesting that the Court review the totality of the referee's factual basis and include the missing material facts in its determination.

RESPONDENT'S REQUEST THAT REFEREE'S FACTUAL BASIS BE ENLARGED TO INCLUDE MISSING MATERIAL FACTS AS DEDUCED DURING REFEREE HEARING AND CONSEQUENCES AS TO STATEMENTS OF LAW RESULTING IN REFEREE'S CONCLUSION

The following is the composite of respondent's motion for rehearing and his response to the request from The Florida Bar for additional information as filed on May 29, 1986 and it is to this content that the respondent prays that the referee's factual basis be enlarged to include missing material facts, that if reviewed, should conclude that the respondent has studiously resisted attempts to have the respondent violate his fiduciary responsibility in protecting a legal document from a member of the Florida Bar without proper authorization having been given, although threatened with action by the Grievance Committee, further Court action, and a claim for malpractice to be paid by respondent's insurance carrier.

Respondent, in review of the facts as stated, takes issue with certain material facts not stated in the report of the referee:

a. In the instant case the referee fails to note that in the request on the part of counse, Jon Anderson, Esq., that Mr. Anderson demanded the forwarding of the file to him from the respondent, but at no time did he show any authority from the client that the client had engaged him. Further, during the same period the client made no telephone call to the respondent, nor forwarded any written request to have the respondent act as a result of Mr. Anderson's request.

b. The referee failed to acknowledge the listing of the respondent in the telephone books commonly available for the citizens of Polk County, Florida.

c. The report fauther fails to acknowledge that the client was not damaged by any undue delay on the part of the client not to have had the file forwarded to the successor attorney, Mr. Anderson.

d. That Mr. Anderson, following his letter of November 16, 1983 failed to further follow-up his interest to obtain the file until his letter in September, 1984 to each member of the 10th Judicial Circuit Grievance Committee, some ten months later (without written authroization.)

e. That in respondent's letter of September 24, 1984 to Mr. Anderson, Mr. Anderson failed to respond to that letter until January 2, 1985 when he had prepared for the client's signature a self-serving affidavit signed and dated December 27, 1984. The record will reflect that immediately upon receipt of the written authorization the file was forwarded to Mr. Anderson by certified mail.

f. That Mr. Anderson's letter sent to each member of the Grievance committee indicated falsely and maliciously that I, as counsel, had accepted the responsibility of the client without performing in any capacity, when at hearing the client, Mrs. Allred, reported that not only had I written, or otherwise communicated (also by telephone) the object of her interest, but that she had received copies of my correspondence in her behalf. She either had failed to inform Mr. Anderson of these letters, or Mr. Anderson improperly stated a falsehood.

g. The affidavit as prepared by Mr. Anderson dated December 27, 1984 and signed by Juanita King and Mary Allred states falsely:

(1) Paragraph 4, "Late in 1981 or early in 1982, having not heard from Mr. Brennan....." when in fact she acknowledged in having received copies of correspondence, and if I am correct in my memory, of having seen this counsel in my office on one other occasion.

(2) And by paragraph 5 suggested, "Mr. Brennan never again called us, and we no longer knew how to contact him." It was reported during hearing, and substantiated by Mrs. Beverly Hill, that she had seen this counsel in the front yard of her neighbor, Mrs. Hill, and that it was Mrs. Hill who had recommended Mr. Brennan,who was aware of his whereabouts.

h. That Judge Adams, holding further in his facts, did not indicate that the file had been prepared for transfer to Mr. Anderson as of January 4, 1984.

i. That included as an exhibit with this brief, Mrs. Pauline Brennan, the former wife and secretary of the respondent, has addressed the issue of her knowledge of the request for the file and subsequent events, and of the alleged presence of the clients in the office of Mr. Jon Anderson.

The holding on the part of the referee seems to indicate that it is the duty on the part of counsel to send some form of communique to each and every client, although it does not indicate whether the client be an active or non-active client at the time, of counsel having moved, although it is standard practice to request the telephone

company to intercept the old telephone number and indicate to the caller that the number has been changed, and that it is the practice of the Florida Bar to demand that the "Bar" be informed of any move on the part of counsel. It is the understanding of this counsel/ respondent that the issue of keeping the Bar informed was not an issue in this case as to present address and telephone number.

The holding seems to indicate that another attorney is duty bound to comply with any request made by another attorney even though no authority is indicated other than his self-serving statement that he now represents the client. This counsel takes issue with this holding, as it is his belief that he has no responsibility to another attorney unless the authority is clearly stated, showing the appropriate authority.

The holding could further be interpreted to indicate that if an attorney requests a file from another attorney, and if the attorney is duty bound to acknowledge the attorney's request and forward the file, then the initial attorney may be unable to properly collect any outstanding fee that is then due and owing. It is the understanding of this counsel that a file belongs to that attorney until such time as the client has satisfied any outstanding indebtedness. In the instant case Mr. Anderson's testimony was that either he was unsure that he had suggested the client seek the file from the respondent, or that he had failed to make such request of the client. This counsel/respondent believes that a dangerous precedent would be formed if the holding is as noted in the last two paragraphs.

DID BRANCH STAFF COUNSEL BREACH RESPONDENT'S RIGHT TO A FAIR HEARING AND DETERMINATION WHEN HE DID NOT FOLLOW PROCEDURE AND BIFURCATE THE HEARING BEFORE THE REFEREE BY STATING THAT THE BAR WANTED A MINIMUM OF SUSPENSION FOR FOUR MONTHS BEFORE GUILT OR INNOCENCE COULD BE DETERMINED? FURTHER, DOES BRANCH STAFF COUNSEL HAVE A CONFLICT OF INTEREST, AS WITH HIS ASSIGNMENT HE IS AS DUTY BOUND TO PROTECT THE RIGHT OF A BAR MEMBER WHEN THAT BAR MEMBER IS ACCUSED AS HE IS TO PROSECUTE FOR VIOLATION (S) OF ETHICAL BEHAVIOR?

In the instant case following the taking of testimony, Branch Staff Counsel asked the respondent whether a communique as to an explanation of respondent's history sent to him had been forwarded to the referee? Upon confirming that it had, the Branch Staff Counsel made his request as part of his closing statement. Upon being inquired as to why the request for a four month suspension, Branch Staff Counsel replied that any suspension over three months would require evidence of rehabilitation, and that upon completion of suspension, when petition to restore full rights of practice could be filed, the matter could be delayed for another nine months. Branch Staff Counsel contends a suspension with rehabilitation is in order due to two prior public reprimands with no consideration as to the merit of those reprimands reviewed later in this brief. Respondent contends:

a. That if a holding of guilt, suspension, not of four months but of a possible year or more is severe, unconsionable and far beyond the propriety of the issue.

b. That in the instant case great prejudice was created by Branch Staff Counsel's revelation of a desire for suspension, clouding the issue and placing a heavy weight on the referee to determine freely the guilt or innocence of the accused.

c. Respondent contends that Branch Staff Counsel is duty bound to fully explore the facts of the accused as presented by him. In the instant case, the respondent provided a working file with the memorandum, fully supported independently, (attached as an exhibit) by respondent's former wife and secretary, who had intimate knowledge of the sequence of events. Rather than exploring the truth of the issue, Branch Staff Counsel has relentlessly attempted to convict, suspend and make it as difficult as he can for the respondent to practice law, if it be respondent's choice to do so.

d. Branch Staff Counsel knew or he should have known that the accused lawyer had a fiduciary duty to protect a legal document in his possession, and that he, the accused, could not release said document without appropriate authority to do so having been shown.

e. Members of the Bar independently qualify for membership by completing educational requirements and then have their background scrupulously examined. The process is lengthy, difficult and full of stress and a singular achievement. Upon being admitted to practice, the member pays his dues annually, serves on committees, furthers his education in a continual manner and provides pro bono support of society that is rarely known or acknowledged. Yet, this same Bar is the prosecutorial arm of the court, with a policy of encouraging grievances being filed and Bar members being prosecuted by the same group to which they have pledged their allegiance. Rarely is it seen that the Bar actively supports its individual members. No member

assists another member if questions are asked that that lawyer may be off-base, need help or assistance. Rather, it sees a relentless effort to prosecute and to punish as shown by Branch Staff Counsel's petition to enhance the penalty. In the instant case, respondent believes that Branch Staff Counsel has lacked objective and proper treatment of the accused lawyer as the facts within this brief have shown.

DID THE 'SUCCESSOR ATTORNEY' HAVE A RIGHT TO EXPECT THAT THE ACCUSED ATTORNEY SHOULD ACCEDE TO HIS DEMAND FOR RESPONDENT'S FORWARDING OF FILE THAT CONTAINED IRREPLACABLE DOCUMENTS WITHOUT WRITTEN AUTHORITY TO DO SO? DID THE RESPONDENT HAVE A FIDUCIARY DUTY TO PROTECT SAID DOCUMENTS AND FILE AGAINST ALL THREATS AND AGAINST ALL ACTIONS TAKEN? DOES THE RESPONDENT HAVE A RIGHT TO EXPECT ANOTHER ATTORNEY TO INSTRUCT A POTENTIAL CLIENT TO (a) RESOLVE ANY INDEBTEDNESS WITH THE INITIAL ATTORNEY AND (b) FOR THE CLIENT TO PICK UP THE FILE AND DOCUMENTS RATHER THAN LEAVING IT TO THE INITIAL ATTORNEY TO FORWARD THE FILE TO HIM AGAINST THE INITIAL ATTORNEY'S INTEREST?

In the instant case the successor attorney by letter and telephone call expected that the respondent should simply accede to his demand and forward the file without written authority. The respondent did not know Mr. Anderson but had he known him it still would not have mattered. The respondent had a fiduciary duty, a trust to protect the documents left with him. The question is not what the respondent did, it is rather what Mr. Anderson did or did not do. Mr. Anderson elected to ignore the attorney-client relationship between the client and the respondent. He had either obtained false information from her when his claim to the Grievance Committee stated that the respondent had neither performed or had communicated with the client, a fact that was refuted at hearing, or he just made statements that he knew to be false and malicious. Here the sequence of events smack with 'ignore the responsibility of making payment for quantum merit' , or a fact that was either accepted or encouraged by the successor attorney. Mr. Anderson knew or he should have known that an attorney has a sacred trust to protect a legal document or property left in his trust. Yet every

action suggests of his lack of propriety. Mr. Anderson claims a lack of professional courtesy when the respondent did not respond to his demands. This in itself is not a violation of ethical behavior. Here the accused has no priority of responsibility or contract with Mr. Anderson. If the respondent chooses not to acknowledge Mr. Anderson's letters then that is his choice. But even here the issue is broadened. Mr. Brennan's office contacted Mr. Anderson's office and stated, "send the release, and we will send the file," irrespective of respondent's right to be paid for services rendered. But the dispute between Mr. Brennan and Mr. Anderson is reduced simply to a liars contest. Mr. Anderson claims Mr. Brennan failed to require authorization from the client to have the file transferred to him. Mr. Brennan is supported independently by his former wife and secretary who says to the contrary that she in fact had contacted Mr. Anderson's office and specifically requested that the authorization be sent before the file could be sent. This was immediately followed up with preparing the file for mailing where, as she indicated, it sat on her desk for months awaiting authority from Mr. Anderson.

The truth is it really did not matter. Mr. Brennan could not have released the file without written authorization, for to have done so would have been a severe dereliction of his fiduciary duty, and had he done so he would have been subjected to prosecutorial attack for his action. However, in this case, Mr. Brennan's actions were with total propriety. Here he not only protected the file, but

prepared it for transfer, had it immediately available for mailing awaiting authorization that did not come. He later took the file with him to Louisiana when he relocated so that when authorization was finally sent he was able to send the file.

The record will support that at the Grievance Committee meeting, August 14, 1985, that the respondent dropped his claim of impropriety against Mr. Anderson. It would have been reviewed after Mr. Brennan's hearing. If Mr. Brennan independently released Mr. Anderson to maintain harmony, that does not take away from the impropriety, false statements, or inappropriate actions of Mr. Anderson. But here, to obtain the file, Mr. Anderson had a duty, an unwritten responsibility to have sent the client to the respondent to pick up the file, not the course of action he chose.

Upon review of case law posing the question as to the fiduciary responsibility under attorney/client of an attorney forwarding a will or other instrument upon the request of another without authorization, no cases could be found.

Black's Law Dictionary, 5th edition, defines FIDUCIARY as, "The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires.

A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. As an adjective it means of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence.....A breach of fiduciary responsibility would make the trustee liable to the beneficiaries for any damage caused by such breach."

In Proft v. Shirvanian, (N.J) 160 A 844, the Court held that a court of equity will intervene upon consideration of public policy, to prevent fraud and abuse of confidence and influence by an attorney and to compel fidelity to the client in performance of a fiduciary duty.

While in Williams v. Hunt Bros. Construction, Inc., 475 SO2d 738, the second district held that "fiduciary must account for and deliver over property or money of beneficiary client or third party which has been entrusted to him for a particular purpose and which he was required to have held in trust, regardless whether he is an attorney."

Further in Williams, supra, the court held it was irrelevant to attorney's breach of his fiduciary duty whether contractor and its agent should have known that the debt owed to attorney's client, which they entrusted funds to the attorney to settle, had been previously assigned, as the attorney was under a clear and unambiguous

duty to protect contractor's rights under terms of their fiduciary relationship. Citing Quinn v. Phipps, 93 Fla 805, 113 SO 419, 420-421 (1927) our Supreme Court states: The term "fiduciary or confidential relation" is a very broad one. It has been said that it exists and that relief is granted, in all cases in which influence has been acquired and abused - in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informed relations which exist wherever one man trusts in and relies upon another.

In the instant case the accused in recognizing his fiduciary duty, upheld it, in refusing to accede to Mr. Anderson's demands.

IS THE ATTORNEY HOLDING AN INACTIVE FILE DUTY BOUND TO INFORM THE CLIENT OF A PHYSICAL MOVE OF HIS OFFICE WHEN (a) THAT MOVE IS IN THE SAME GENERAL AREA, (b) HIS TELEPHONE NUMBER WAS ALWAYS AVAILABLE THROUGH THE LOCAL TELEPHONE COMPANY, AND (c) HE KEPT THE FLORIDA BAR FULLY ADVISED OF HIS ADDRESS AND HIS TELEPHONE NUMBER?

Here the respondent knows of no rule, decree or authority that states that upon moving his office he must so inform a client, active or inactive, that his office address has been changed. In the instant case not only was a telephone number always available, but that here the client's next door neighbor, having referred the client to the respondent in the first place, was known to have known the location or whereabouts of the attorney. And the record shows that at all times the Florida Bar was notified as to the current address and telephone number of the respondent. Yet the avoidance on the part of the client to see the attorney was to avoid making payment for services rendered. In McGill et al v. Cockrell et al, 101 SO 199 (1924), the court stated....although the letter contained no agreement to pay a certain sum of money for the services to be rendered, the promise to pay a reasonable sum is raised from the agreement to engage the attorneys and their acceptance of employment. The employment of an attorney to render professional services to another is an express and definite agreement, and leaves nothing to be explained by parol testimony.

In an attorney-client relationship, the matter of trust is cut with a two edged sword. The client is as duty bound to the attorney as the attorney is to the client. Here the duty of the client, when a desire was to change counsel, a right the respondent does not dispute, the client should have contacted the respondent, settled the fee, and picked up the file.

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 A JUSTIFIABLE AND APPROPRIATE DISCIPLINE GIVEN THE PRINCIPLE OF CUMULATIVE DISCIPLINE.

The above is the position taken by Branch Staff Counsel as to the basis for his petition to enhance the penalty as recommended by the referee. Branch Staff Counsel states that this is a very simple case which absent respondent's prior disciplinary record would probably call for certainly no more than a public reprimand.

Branch Staff Counsel states, "he wrote the initial correspondence but apparently did nothing further to straighten out the situation." In hearing it was determined that the client had not expected the respondent to make anything other than an initial review of the matter. The contractural relationship ended at that time until such time as the attorney recieved instruction and had agreed to continue or pursue the matter further.

Branch Staff Counsel acknowledges that the respondent received two wills from the client but he fails to acknowledge that there was ever any fiduciary responsibility to protect those wills. He states that Mr. Anderson, as successor attorney, was unsuccessful in having the respondent turn over the papers and incorrectly stated that it was not until late September, 1984 when the respondent for the first time requested written authorization although respondent has consistently maintained that he had in fact requested authorization and Branch Staff Counsel does not state that Mr. Anderson consistently failed to supply such authorization until January, 1985. He does

mention however, that the client was able to resolve the problem herself, although this goes beyond the initial instructions to the respondent.

Branch Staff Counsel refers to the referee having determined that the respondent had violated two disciplinary rules of the Florida Bar's code of professional responsibility. That he 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, as he stated, he requested written authorization in a period of approximately 15 months. He concludes erroneously that the respondent, "simply failed for whatever reasons to advise Mr. Anderson he wanted written authorization until the September 24, 1984 letter." The respondent has consistently maintained and stated, supported by the record and by Mrs. Brennan's affadavit and statement, that Mr. Anderson's office was in fact informed on January 4, 1984 that no file or will would be forthcoming until an authorization was recieved. Further, Mr. Anderson as well as Branch Staff Counsel should have known that the request was unnecessary as the respondent was duty-bound to retain the documents until such authorization, requested or non-requested, was recieved.

Branch Staff Counsel goes on further in making reference to the referee finding that the respondent should be found guilty of violating rule 1-102 (A) (6) by failing to keep his client "reasonably informed" of his location. He states that Mrs. Allred arrived to keep

her appointment in the fall of 1981, when in fact no appointment had been made, only that she should see the respondent in his office. Further, Mr. McGunegle's statement is incorrect as respondent remained at the temporary address following his fire until December, 1981. He alleges that"she found what had been respondent's office and no note giving directions to his new location." If her statement was correct, as previously stated, she could have inquired of the same residence of the doctor who had provided temporary space as an accommodation to the respondent. He states further that she lost track of him, however he states, "it was only after she sought the services of Mr. Anderson in June, 1983 that respondent (actually his office) was contacted." A further fact that the respondent was available to be contacted when Mr. Anderson alleged that he had called respondent's office. Branch Staff Counsel further erroneously states that it took at least another 15 months for the respondent to divulge the reason he was retaining the file.

Branch Staff Counsel then goes into the matter of discipline, "absent a prior disciplinary history, the referee's recommendation clearly would be appropriate, (referee's recommendation of a public reprimand and one years probation)".

In the Florida Bar v. Thompson, 271 SO 2d 758, 310 SO2d 300, the court held that discipline assessed against an attorney should be corrective and the controlling consideration should be the gravity of the charges, the injury suffered, and the character of the accused. Penalty assessed in disciplinary proceedings should

not be made for purposes of punishment and neither prejudice nor passion should enter into determination.

In the instant case Branch Staff Counsel has expressed a specific interest in punishment and his prejudice is clearly shown by his failure to fully examine the claim on the part of respondent or to better evaluate the substantive proof of the exhibits that respondent furnished him, to wit, the claim on the part of respondent's secretary that she had in fact contacted the office of Mr. Anderson requesting that an authorization was necessary before the file would be turned over to him. Branch Staff Counsel recognizes and has known, not connected with this case or any other matter concerning the Bar, that the respondent had some years ago elected to wind down his practice and as it happened, he moved his residence from the state of Florida to the state of Louisiana in November, 1984. He further relates and assumes that the referee, "it appears in making his recommendation he (referee) 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 that he has no intention to continue practicing, but wishes to remain a member of the Florida Bar."

In an effort to support his position to enhance the penalty Branch Staff Counsel states that the referee is in error and his recommendation is unduly lenient in light of respondent's prior disciplinary history. He goes on further to state, "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." Respondent alleges that in Branch Staff Counsel's prejudice and desire for punishment as he states, "clearly, one can return both to the state and to private practice," that would indicate that the respondent must be punished in the event he wished to return to the state of Florida and to practice again. This is not a matter of leaving private practice to spare the respondent from harsher discipline. Further the referee makes no mention or any suggestion in his findings that this consideration is a matter of fact. His only statement was, as relating to penalty, "any harsher recommendation would be disproportionate to the acts committed by the respondent in view of the totality of the circumstances."

It should be noted as this is in the record, that this counsel has studiously maintained and been responsible to his clients since his departure from the state of Florida in November, 1984, by averaging two trips a month to take care of any latent problems or appear at any hearings as was the case this past week. In most instances the personal expense of maintaining these trips was at the expense of the respondent where he has often not been reimbursed for his costs.

The following is the respondent's position with respect to the two prior reprimands that are made reference to by Branch Staff Counsel:

In the Florida Bar v. Brennan, 377 SO2d 1181 (Fla. 1979), for notifying the Court that a criminal client had lied to the respondent in a letter addressed to the Honorable William A. Norris, Circuit Judge. Branch Staff Counsel erroneously states that it involved disclosure of stress evaluation test results to the court without prior knowledge or authorization of the client. The fact was that it was a very poorly drafted letter but the statement itself was true, the client had lied to this counsel and in my evaluation of the case I considered it was essential to notify the court. The reason for the complaint by the felon was that he had recieved a sentence of ten years when I was actively attempting to obtain a sentence of five years. My client, who had taken a motor van at gunpoint from Polk into Hillsborough County, (he was charged with robbery in Polk, and transporting stolen merchandise into Hillsborough County) facing life imprisonment before Judge Norris. The issue was whether a gun was used in the commission of the offense. He had lied to me concerning the possession and use of the weapon, still I fought for him, after the plea, of his getting no more than five years. The fact not brought out was that the mother of the boy, and the boy's grandmother, without my knowledge, advice, or concurrence attempted to see and bother Judge Norris on the Friday preceeding the Monday when he was sentenced. I know that Judge Norris was disturbed by their actions. As a result, I believe, that he recieved ten rather than the five years expected. Immediately prior to final review by the Florida Supreme Court of the disciplinary action I had pled to, I hand-carried to Tallahassee a motion to have my agreement set aside when I discovered that in the pre-sentence

investigation of the client that the probation officer had, in kind, with me, recommended a five year sentence. My motion was denied and I was disciplined. The boy's sentence was later reduced from ten to five years, in large measure due to my efforts, not because of the complaint to the Grievance Committee. The point was, regardless of my feelings about this incorigiab;e individual, I attempted to assist him the best way I or anyone could. Later, it was my understanding that the ABA made a recommendation that it would be permissible to notify the court when a client lies to his counsel.

In the second case, Branch Staff Counsel indicates, "as a result of the mistake the client recieved an additional two years." Further that this respondent had inadequately prepared and entered a plea on behalf of his criminal client. The facts were these: Willie Towns was on work release, Lakeland. He stole a check from another inmate and attempted to cash it by buying a suit of clothes from Belk-Lindsey in Lakeland's Southgate Shopping Center. Willie pled to a term of five years. It was here that the mix-up occurred. Willie pled to a concurrent sentence with the sentence that had placed him in confinement. I gave Willie some erroneous information stating that his sentence would run concurrent to the expiration of what seemed to be his end of sentence, since he had an EOS date predicated on his work release, not taking into consideration that that date would change when he was returned to general confinement within the Department of Corrections. But where Judge Langston, and I as well, thought that conversation had occurred prior to the plea,

for when I was asked I readily admitted that the conversation had taken place. I later determined that the explanation as to concurrent sentence happened after the plea and was not a factor in Willie Towns decision to plea rather than to stand trial. It was much later again that in a close study of the pre-sentence report that I remembered when the conversation took place. I can still recall speaking to Willie at the foot of the steps in the Hall of Justice in Bartow. Here it had all been harmless error. Later, I filed a motion, submitted a brief, and argued the matter before Judge Strickland. Willie Towns on his own motion, filed a petition for a writ of habeus corpus in the U.S. District Court, middle district of Florida. He supoened me to appear in his behalf. I related the facts as I had recalled the, supporting Willie's position. He was so impressed with my candor that he wrote to the Bar, requesting that the Bar take no further steps to admonish me. Said request was ignored. As already noted, the Supreme Court denied my motion to have my plea set aside inasmuch as the Board of Governors had already passed on the measure being forwarded to the Supreme Court for final adoption.

In the <u>Florida Bar v. Brennan</u> 411 SO2d 176 (Fla. 1982) respondent was reprimanded and placed on probation. Branch Staff Counsel is correct when he stated that I was admonished for having issued an insufficient funds check to a criminal client ($24.00) but the delay in clearing the matter was due to my secretary having inadvertently, without my knowledge, deposited a check that was destined for an inmate into my general account. When the error was

discovered, a check was immediately sent to the inmate that was returned insufficient due to a deposit that had been made that was insufficient making the inmates check insufficient. Respondent was also found to be guilty of failing not to file quarterly trust account reconciliations but that a quarterly trust account reconciliation was not in my records when my trust account was audited as a result of the previous stated $24.00 insufficient check. The Bar auditor, when he arrived at my office, I inquired as to what he wanted to look at. He stated that he wanted to see my last two years trust records. I took him into my library and showed him every trust check I had ever written since my admission to the Bar ten years earlier. The auditor accepting the quarterly report, found nothing wrong with my trust account. This rule had recently gone into effect and I had either overlooked it or misinterpreted its meaning. The above is the substance of my disciplinary history.

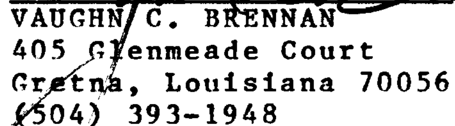
Respondent categorically denies the necessity of enhancing the penalty as prayed for by Branch Staff Counsel.

CONCLUSION

In the instant case the petitioner, The Florida Bar, has petitioned this Honorable Court to enhance the penalty as recommended by the referee. In the interim the respondent had requested and has fone so in this brief to enlarge the statements of facts to include material matters, if under close review, the court would construe that the respondent has not violated the rules of ethical procedure as stated and filed in the Florida Bar's initial complaint. Rather to the contrary, the respondent believes, that he has specifically and correctly challenged the case against him and has shown that rather than violating ethical procedures, he has studiously protected his fiduciary responsibility and as a result, deserves to be vindicated as to the matters under review.

WHEREFORE, the respondent prays that this Honorable Court will review not only the referee's findings of fact, but further enlarge those facts so that the Court may fully determine the guilt or innocence and upon making such determination determine that the respondent is innocent of all charges.

Respectfully submitted this second day of June, 1986.



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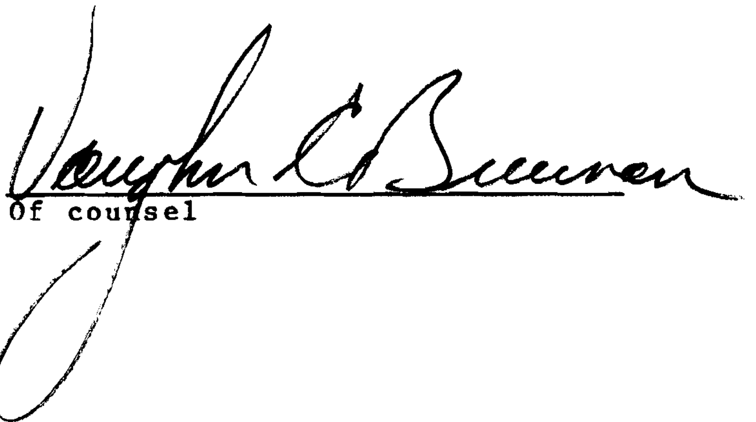
CERTIFICATE OF SERVICE

I hereby certify that the original and seven copies of the foregoing respondent's brief in support of counter-petition for review has been furnished by hand delivery to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32301, with copy to the Florida Bar, Tallahassee, Florida 32301, and by U.S. Mail this 2nd day of June, 1986 to David McGunegle, Esq., Branch Staff Counsel, the Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801.



Of counsel