IN THE SUPREME COURT OF FLORIDA

The Florida Bar,

Complainant,

v.

Vaughn C. Brennan,

Respondent.
_____/

Case No. 67,851
(10A85C45)

COMPLAINANT'S REPLY BRIEF

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PREFACE

The respondent has raised several issues. They will be addressed briefly as necessary.

ARGUMENT

WHETHER RESPONDENT'S SEVERAL ARGUMENTS HAVE MERIT AND WHETHER THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND AND PROBATION FOR A PERIOD OF ONE YEAR IS ERRONEOUS AND UNJUSTIFIED 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.

ARGUMENT

RESPONDENT'S SEVERAL ARGUMENTS DO NOT HAVE MERIT AND THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND AND PROBATION FOR A PERIOD OF ONE YEAR IS ERRONEOUS AND UNJUSTIFIED 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.

In his first point, respondent essentially argues the referee did not make certain findings he wished to see in the report. It is the referee who is the finder of fact in these matters. It has long been settled that those findings are given the same presumption of correctness as a civil trier of fact. The findings are both presumed correct and will be upheld unless they are clearly erroneous or lacking in evidentiary support. See The Florida Bar v. Fields, 482 So.2d 1354, 1359 (Fla. 1986); The Florida Bar v. Hecker, 475 So.2d 1240, 1242 (Fla. 1985); The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980); and The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978). In reviewing a disciplinary case, the court views the report and the record. If the recommendation of guilt is supported by the record, the court imposes an appropriate penalty. The referee is the fact finder and properly resolves conflicts in the evidence before him. Hoffer, supra, at 642.

In essence, respondent wishes to rewrite portions of the referee's report setting forth his version of events with which the referee apparently did not agree. The Bar concurs that the authority, written or otherwise from a client, is the accepted means to transfer a file. However, for whatever reason, the question of authority was not conveyed to Mr. Anderson until respondent's September 24, 1984 letter. Respondent notes that Mr. Anderson failed to follow up after his third letter in November 1983. Query: How many letters must you write and how many telephone calls must you make in an attempt to effectively communicate? Next, the delay until December 1984 in forwarding the requested authority to respondent was caused by the out-of-state sister not coming to Florida until Christmas.

Respondent also wishes augment findings of fact not made by the referee from conflicting testimony in the record. The Florida Bar would object to any consideration and inclusion of a letter dated May 24, 1986 and an affidavit dated May 28, 1986 of Pauline Mann Brennan which was returned to her by the Clerk of the Court on June 9, 1986 but which was also argued for in paragraph four of respondent's Counter-Petition for Review. Respondent had ample opportunity to call his ex-wife as a witness

in his behalf at the final hearing and chose not to do so. Accordingly, it is far too late to attempt to include her testimony by way of a self-serving letter and affidavit when she did not appear in front of the referee and was not available for cross-examination. Furthermore, the apparent January 1984 memorandum is part of composite Exhibit Two. He also had benefit of respondent's and Mr. Anderson's testimony on the subject. (T. pp. 41-45, 55-58) If the signal was sent in January 1984, it obviously was not received by Mr. Anderson. Otherwise his September 17, 1984 letter makes no sense. Further, if sent, respondent's office made no further effort to follow up on the matter.

With respect to keeping clients advised of an attorney's location, should the client have to chase down the attorney to whom he or she has entrusted their affairs? Obviously, the answer is no. The responsibility rests with the attorney to keep his clients reasonably informed of his business location. Furthermore, Fla. Bar Integr. Rule, art. II, paragraph 6 requires each member of The Florida Bar to keep the Bar informed of his record bar address.

Finally, the Bar is not asserting nor did the referee find that an attorney must surrender a file to another attorney if there is a question of outstanding fees, retaining liens, or like matter. The point here is respondent knew in the middle of 1983 that another attorney had been approached by the clients and yet failed to either surrender the file as requested or to otherwise properly communicate his position to the inquiring attorney for over a year. The referee's findings with respect to this matter are that respondent refused without any sufficient justification to communicate with the successor counsel and turn over the requested documents. Had he communicated his desire in first contact or responded to any of Mr. Anderson's three letters in 1983 and phone calls, this would not have been the case. Respondent has raised nothing in his first issue which calls for rewriting the referee's report.

In point two, respondent complains Bar Counsel presented his prior history at the final hearing instead bifurcating the proceedings. This was done only with respondent's prior permission at the hearing. (T. p. 109) Moreover, respondent had already brought his history to the referee's attention through his letter dated January 26, 1984 enclosing a lengthy memorandum

dated January 20, 1986 to the Bar Counsel, where he discussed his prior disciplinary cases at length. As a result, the referee was well aware of respondent's prior disciplinary history even prior to the hearing.

The Bar does not know why the respondent chose not to call certain witnesses. Respondent appears to misunderstand the Bar's position once a finding of probable cause is made. Bar Counsel, acting at the direction of the Board of Governors, is charged with the duty of prosecuting cases where probable cause is found. With respect to helping an attorney who has gone astray, the Bar has established various programs in recent years in the area of law office management as well as drug and substance abuse. Further, most grievance committees or members of the Bar would offer assistance to those who need it in various phases of their practice. However, it remains extremely difficult to help those who do not ask for assistance.

Respondent's point three with respect to whether the successor attorney had a right to expect forwarding of the file without written authority again raises a question of fact which has been resolved in the referee's findings in this particular

matter and partly addressed in point one above. They should not be rewritten. Simply put, respondent knew Mr. Anderson had been contacted by the clients well over two years after they had first gone to him. He failed despite telephone calls and at least three letters to him in 1983 to effectively and adequately communicate his position to Mr. Anderson. Had he done so, there would have been no complaint to The Florida Bar. Note that when he did communicate by his September 24, 1984 letter, steps were taken to secure the necessary authorization. Concededly, it was slightly delayed to the fact one sister resided out of state and did not venture to Florida until Christmas time.

In point four, respondent reiterates certain matters which were covered in his first point. He also suggests the file was inactive and that he had accomplished all he had been hired to do. He also suggests that the client was avoiding him. This is simply nonsense. If the file was inactive, he certainly had undertaken no steps to advise the client of his efforts and that he believed that his part had been concluded. Further, the client certainly did not think it was inactive and undertook several unsuccessful attempts to contact him. Finally, the client certainly was not avoiding the respondent or shirking her

responsibility with respect to any particular bill. (T. pp. 13-19, 26-29, 35-37) The point is the client could not locate Mr. Brennan in a reasonable fashion and ultimately went to another attorney in an attempt to contact her former attorney. Had she believed he had accomplished what he had been requested to do for her, clearly she would not have undertaken the efforts to contact him or contacted Mr. Anderson. This was not a question of an unpaid fee, but rather of lack of communication between the respondent and his client as well as the other attorney.

Respondent's last point merely argues that he should be exonerated from the charges. The Bar and referee's positions are clear. The Bar respectfully submits that not only should the referee's findings of fact and recommendations of guilt be upheld, but that discipline is erroneous and unjustified under the circumstances whereby the respondent has been disciplined on two prior occasions by public reprimands. Given the principle of cumulative discipline, the appropriate measure of discipline in this case is the suspension for a period of four months with proof of rehabilitation required prior to reinstatement and payment of the costs now totalling $1,011.30.

CONCLUSION

WHEREFORE, THE FLORIDA BAR respectfully prays that 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, 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Reply Brief have been furnished by mail to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Reply Brief has been furnished by mail to Vaughn C. Brennan, 405 Glenmeade Court, Gretna, Louisiana 70056, and a copy of the foregoing Reply Brief has been mailed to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 this 20th day of June, 1986.

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