IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. 84,641

THE FLORIDA BAR,

Complainant,

vs.

EDWARD C. VINING, JR.,

Respondent.

◆

ON PETITION FOR REVIEW

◆

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RESPONDENT'S. EDWARD C. VINING, JR., ANSWER BRIEF and INITIAL BRIEF ON CROSS-PETITION

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INTRODUCTION

The parties will be designated herein as Complainant and Respondent or by proper name for the purposes of clarity.

All the testimony relative to the Referee's findings and recommendations was heard March 18 and 19, 1995. The transcript of the testimony comprises three volumes. Since the pages are consecutively numbered 1 through 421, the Respondent will refer to the transcript as "Tr." followed by the appropriate page number.

All other transcripts will be designated by date and page number.

The Appendix to Respondent's Brief will be referred to as "App." followed by the page number. The Florida Bar's Initial Brief will be referred to as "Br." followed by the page number.

Respondent will follow the references in the Initial Brief of The Florida Bar as closely as possible in order to preserve continuity.

REPLY TO THE CASE AND THE FACTS

The Respondent will accept the Statement of the Case and Facts set forth in the Florida Bar's Initial Brief (Br.1-7), with the following additions, corrections and objections:

The Florida Bar, in setting forth the Statement of the Case and Facts (Br.1-7) has relied solely upon the Findings of Fact prepared in the Referee's Report dated February 12, 1997 (App.1-6) rather than the record testimony. These factual findings by the Referee include matters that are incomplete, inaccurate and raise inferences that were not necessary to the Referee's finding of guilt. In relying upon the Findings of Fact, The Florida Bar has unilaterally determined that the factual findings of the Referee in paragraphs 8, 14, 20 and 25 through 30 set forth "ethical violations" (Br.4). The Referee, however, determined that the ethical violation against Mr. Vining was that he "went about" collecting funds in which he thought he had a legitimate claim without noticing his client or her new counsel and that he failed to give notice to his client about a February 24, 1984 motion (App.7) but found no other violations as to each of the additional acts set forth in The Florida Bar's complaint.

In order to "fill in the blanks", it is necessary to look at the testimony and evidence presented at the hearing before the Referee (Tr. 1-421). The Florida Bar presented three witnesses: Eva Martyn and attorneys Richard Katz and H. James Catlin. Mr. Vining, in addition to his own testimony, presented testimony from Federal Judges Peter T. Fay and Shelby Highsmith and attorneys Cromwell Anderson and Hugh Culverhouse.

Mr. Vining agreed to represent Mrs. Martyn in a divorce proceeding beginning in 1981. His fee was a contingency based upon the property distribution Mrs. Martyn would receive and a reasonable fee for the balance of the proceedings involving alimony (Tr. 181-182, 299). Regardless of whether or not the contingency was initially for 25% and changed to one third of the monies received as property distribution (as noted by the Referee in paragraph 4 of the Report, App.2)[1/], Mrs. Martyn paid, without objection or qualification, the agreed upon amount from the monies she received from the trial court as and for property distribution (Tr. 182-183). The trial court, although awarding Mrs. Martyn monies for property distribution, did not award Mrs. Martyn alimony or fees and an appeal was necessary.

Mr. Vining's successful appeal of the trial court's failure to award alimony, fees and costs resulted in a hearing wherein the trial court awarded, on April 28, 1983, $104,000.00 in lump sum alimony to Mrs. Martyn, $26,250.00 for fees in the trial court, $7,500.00 for fees in the appellate court, $1,372.11 for costs incurred in the trial court and $100.00 for costs in the appellate court (Tr.305, 308). At that point in time Mr. Vining had rendered a bill to Mrs. Martyn for $55,000.00 plus $15,000.00 for the appeal, plus costs. Mrs. Martyn had paid approximately $36,000.00 on account of that statement (Tr.308). The amount of fees awarded was just about half of the fees

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[1/] The Referee fails to clarify the fee arrangement but only refers to the contingency agreement based on "the judgment plus costs". The contingency agreement was not illegal nor in violation of the Rules Governing the Florida Bar as long as it was based on the marital distribution of assets (Tr.299). The total judgment(s) obtained by Mrs. Martyn for alimony and property distribution totaled $212,578.80 and Mrs. Martyn only paid a contingency based on the first judgment of $108,578.80.

requested and set forth in the supporting affidavit by Mr. Vining (Tr.307-308).[2/] The trial court entered the final order for fees and costs in the name of Mr. Vining in accordance with Florida Statutes §61.16 (Tr.309). The Referee, contrary to the assertions by The Florida Bar, found no ethical violation as to this proceeding. In fact, the Referee mused, at pages 398-399 of the transcript:

> ...in every attorney's fees case I've ever had before me, I've never had a lawyer volunteer to the Court that they had or had not been paid by their client.

The two Orders relative to the lump sum alimony and attorney fees were appealed by Mr. Martyn and on July 28, 1993, he posted a single supersedeas bond in the amount of $160,105.43 by depositing said sum with Florida National Bank (Tr.68, 31 I). The appeal of the alimony was favorably decided for Mrs. Martyn and the appeal of the Order Awarding Fees was dismissed by motion (Tr.312). When the appeal as to the fees was dismissed, Mr. Vining entered into an agreement with counsel for Mr. Martyn, approved by the Court, to have his Order Awarding Fees satisfied from the monies held by Florida National Bank (Tr.69, 313). The stipulation included a direction to Florida National Bank to issue the check in the names of Mr. Vining and Mrs. Martyn although Mrs. Martyn had no interest in these monies (Tr.313). At this time there was

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[2/] Paragraph 8 of the Referee's findings (App.2) infers that some violation of the Rules Regulating the Florida Bar occurred when Mr. Vining did not disclose the fee arrangement that he had with Ms. Martyn to the trial court. The only testimony of such a "violation" came from the unqualified and unsupported statements of Mr. Katz (Tr. 67, 124). According to Mr. Katz, testimony as to what was paid by Mrs. Martyn was material to the determination of fees by the trial court (Tr.127). The legal import of this assertion will be argued, *infra*. Similarly, Mr. Katz's statement that the Order Awarding Fees should not have been entered in Mr. Vining's name (Tr.71) will be discussed and authorities presented, *infra*.

no dispute between Mr. Vining and his client, Mrs. Martyn. **The** check was issued for $35,222.11 plus accrued interest (Tr.314).

When Mrs. Martyn refused to endorse the check because she believed she had already paid Mr. Vining (Tr.184, 314), Mr. Vining filed a motion to have the check reissued in his name (Tr. 185, 314). In paragraph 14 of the Findings, the Referee found that this motion was filed on February 24, 1984 without notice to Mrs. Martyn and without permission of Mrs. Martyn since Mr. Vining knew she was disputing his entitlement to the monies. It was this motion that formed the basis of the Referee's first determination of guilt (App.6). The record does support and Mr. Vining so testified, that the Motion was sent to Mrs. Martyn as indicated by the "cc" on the office file copy (Tr.368). Mrs. Martyn was still the client of Mr. Vining and no adversarial relationship between the two had yet developed.[3]/ Monies were still owed to Mr. Vining (Tr.308). [4]/ Mrs. Martyn may have believed that Mr. Vining was being paid too much, but she had no interest in the Order Awarding Fees and no interest in the fund created by the supersedas bond when the Order Awarding Fees was appealed. Regardless of how

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[3]/ The Referee's Finding in paragraph 15 (App.3) that Mrs. Martyn discharged Mr. Vining and hired new counsel around February, March, 1984 is inaccurate. Mr. Katz testified that he was hired within a matter of days of Mrs. Martyn learning of the motion which was in "late April or early May of 1984" (Tr.77). Mrs. Martyn never placed a date on when she hired Mr. Katz (Tr.187). No written appearance was filed by Mr. Katz (Tr.77) and the first knowledge of Mr. Katz's representation of Mrs. Martyn came at the time of the hearing (Tr.77-78).

[4]/ Mrs. Martyn could not clearly articulate to the Referee what the fee arrangement was (Tr.201-214). Mrs. Martyn, with some coaxing, acknowledged that Mr. Vining was at least entitled to additional fees for the successful appeal he had handled (Tr.209).

Mrs. Martyn was notified, at the time of the hearing on the motion, Mrs. Martyn was present through new counsel, Richard Katz (Tr.77, 314).

Although no pleadings were filed on behalf of Mrs. Martyn, the judge denied Mr. Vining's motion upon the suggestion by Mr. Katz that these monies involved a "fee dispute" (Tr.77-78, 314-315). Mr. Vining prepared and filed a Notice of Charging Lien against Mrs. Martyn's interest in the total supersedeas bond (Tr.315318). Thereafter, on June 11, 1984, Mr. Vining entered into a stipulation which allowed the substitution of Mr. Katz as attorney[5]/ for Mrs. Martyn and acknowledged Mr. Vining's charging lien on the supersedeas bond posted for the orders on lump sum alimony and attorney fees. (Tr.78-79, 319-321).

Mr. Vining then filed a lawsuit against Mrs. Martyn for additional attorney's fees owed to him for the work on Mrs. Martyn's behalf. The lawsuit sought fees in excess of the monies paid by Mrs. Martyn and the Court's Order Awarding Fees. Mrs. Martyn counterclaimed (Tr. 85, 326-334). The verdict was returned in favor of Mr. Vining for $8,000.00 (Tr.83, 329). Although Mr. Katz personally felt that the $8000.00 verdict was a substitution for the $35,222.11 awarded to Mr. Vining by the trial court (Tr. 133), Mr. Katz knew that the lawsuit was for additional monies and the jury was aware of the Order Awarding Fees and the payment made by Mrs. Martyn to Mr. Vining (Tr. 132).

As Mr. Vining explained to the Referee, Mrs. Martyn did not understand that the Order Awarding Fees was a determination by the trial court as to how much Mr. Martyn was to pay Mrs. Martyn's attorney and the court's ruling did not have any impact on the

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[5]/ See footnote 3, *supra*.

fees agreed to or owed between Mrs. Martyn and Mr. Vining (Tr.362, 387). In fact, Mrs. Martyn testified that Mr. Vining was not entitled to anything more since it was one divorce and she paid him one contingency fee (Tr.201-214). Contrary to the clear record before the Referee, Mrs. Martyn stated that there was never any agreement that the funds she was to receive were to be split into two categories, i.e., property distribution and lump sum alimony (Tr.202), and Mrs. Martyn refused to answer questions directly relating to whether she thought Mr. Vining was entitled to additional fees for the two appeals and subsequent hearing awarding her lump sum alimony (Tr.209).

During the time the law suit by Mr. Vining was proceeding, Mr. Vining sought court permission to satisfy his Final Order Awarding Fees from the supersedeas bond (Tr.80). Mr. Katz was present, an attorney for the Estate of Mr, Martyn was present, and an attorney or officer from Florida National Bank was present (Tr.80-81). In response to an ore tenus motion made by Mr. Katz, the trial court stayed execution on the final order until the lawsuit between Mr. Vining and Mrs. Martyn was concluded (Tr.81, 137).

Through the time the $8,000.00 judgment was rendered, no proceedings were undertaken by Mrs. Martyn to invalidate the Final Order Awarding Fees. Nothing in the jury verdict indicated that any affirmative relief sought by Mrs. Martyn regarding the Order Awarding Fees was granted.

The judgment rendered in accordance with the verdict was paid by Mrs. Martyn and Mr. Vining executed a satisfaction of that judgment (Tr.90). At the same time,

February 17, 1987, Mr. Vining agreed to execute a release of lien prepared by Mr. Katz (Tr.90). The Release of Lien was directed to the Charging Lien filed by Mr. Vining and the stipulation approved by the court on June 11, 1984.

It is the intent and interpretation of this Release that gives rise to the Referee's second determination of guilt (App.6-7).

After the Release was signed, the Estate wanted a satisfaction from Mr. Vining before releasing the entire supersedeas fund, which satisfaction Mr. Vining refused to give (Tr.94-95). Mr. Vining signed the Release of Lien to allow Mrs. Martyn, since she had satisfied the $8,000.00 judgment, to receive those monies from the supersedeas that were designated as her lump sum alimony and to return the stale check previously made out jointly to Mr. Vining and Mrs. Martyn. Mr. Vining did not release or assign, nor did he intend to release, assign or satisfy, his rights pursuant to the Order Awarding Fees (Tr.336-339).

The Estate, the Bank and Mrs. Martyn's attorney, Mr. Katz, entered into a stipulation on October 21, 1987, that by January 29, 1988, if the dispute between Mr. Vining and Mrs. Martyn was not concluded and a satisfaction received for those monies, the remaining supersedeas bond held by Florida National Bank would be placed into the registry of the court in Martin County so that the Estate could be closed (Tr.9596).

Between February, 1987 and January, 1988, Mrs. Martyn and her attorney did nothing to change the status of Mr. Vining's rights created by the Order Awarding Fees nor did Mrs. Martyn ssek to obtain the remaing funds posted for the initial supersedeas

bond. The Order Awarding Fees remained untouched. It was not changed, assigned, transferred or satisfied (Tr.357). Mr. Vining, however, continued to inquire from the Bank if his monies were still there and in December, 1987, filed suit against the Bank to satisfy the Order Awarding Fees (Tr.340) after receiving a letter from the Bank, addressed to him, regarding the release of the funds (Tr.352-353).

Mr. Vining obtained a default against the Bank, but by that time, pursuant to the October stipulation, the Bank had placed the monies in the registry of the court. Mr. Catlin was hired by the Bank (Tr. 158). Mr. Catlin testified that he was told by Mr. Vining that Mr. Vining represented the wife[6]/, was awarded fees and could not get the fees out of the registry of the court without a disclaimer from the Bank as to the Bank's interest in those monies (Tr.159). According to Mr. Catlin, he was not informed of any dispute between Mr. Vining and Mrs. Martyn and he had no knowledge of any claim Mrs. Martyn had made to the monies (Tr.74). In order to settle the law suit, Mr. Catlin entered into a stipulation with Mr. Vining to have the monies released to Mr. Vining in exchange for a satisfaction (Tr.347). This stipulation was submitted to the trial court for signature and the monies released on or about March 30, 1988 (Tr.98) and a satisfaction given (Tr.356-357). However, it is clear from the documents that Mr. Catlin executed, that there was a clear reference to the October stipulation between the Bank, Mrs. Martyn and the Estate (Tr.345-347)[7]/.

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[6]/ Mr. Vining denied telling Mr. Catlin that he was **presently** representing Mrs. Martyn (Tr.381).

[7]/ As the Referee noted in the Report (App.6), "an attorney is responsible for the pleading he or she signs." Mr. Caitlin certainly should have been aware of the contents

Twenty three months later, in February, 1990, Mr. Vining got served with a law suit claiming fraud and conversion of Mrs. Martyn's funds (Tr.359). A verdict, later reduced to judgment, was entered against Mr. Vining for $60,700.00 in compensatory damages and $60,000.00 in punitive (Tr.104-106). The judgment further reflected the trial court's determination, non-jury, that Mr. Vining committed extrinsic fraud on the court (Tr. 107-11 0).[8/]

Other than Mr. Katz identifying the verdict, the judgment and the affirmance by the Fourth District Court of Appeal, there is no independent evidence in this record indicating the grounds or basis for the decisions, rulings and judgments. Nevertheless, the Referee's determination of guilt was based, in most part, on those conclusions made by Judge Kenney as set forth in paragraph 29 of the Report (App.5).

The Referee determined that Mr. Vining violated Rule 4-8.4(c) and Rule 4-8.4(d) by (1) filing a motion on February 24, 1984 in the name of the Mrs. Martyn without her consent or knowledge; and (2) submitting a proposed stipulated order on March 30, 1988 to the trial court to withdraw funds from the registry without notice to Mrs. Martyn (App.6-7). The record before the Referee is void of any evidence that Mrs Martyn had a right to notice of the March 30, 1988 stipulation or that Mrs. Martyn had any interest

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of the stipulation he signed and the reasons and necessity for its execution.

[8/] At the inception of the hearing relative to these proceedings, Mr. Vining filed a Motion in Limine to exclude, as evidence, the final judgment from Martin County Circuit Judge Scott M. Kenney, dated January 4, 1994 (Tr.4-9). The motion was granted (Tr.12), but later reversed (Tr.26) and the judgment was allowed into evidence (Tr. 108).

in the Order Awarding Fees.[9/]

The Referee recognized that Mr. Vining "felt he had a legitimate claim in these monies" (App.7). In fact, Mr. Vining candidly told the Referee that he had no intention to convert funds not belonging to him, had no intent to defraud Mrs. Martyn, and had no intent to harm Mrs. Martyn (Tr.360). Mr Vining has also paid Mrs. Martyn approximately $300,000.00 towards the satisfaction of the judgment entered against him in the 1990 lawsuit (Tr.360).

The Referee recommended a suspension for a period of thirty six (36) months(App.7). The Florida Bar is seeking disbarment. Mr. Vining is seeking review of the Referee's findings of guilt and the recommendation of a three year suspension.

[9/] The record shows that there was no attempt by Mrs. Martyn or Mr. Katz to collect the monies segregated as part of the supersedeas bond for the Order Awarding Fees and at no time did Mrs. Martyn or Mr. Katz seek judicial intervention in obtaining an interest in the Order Awarding Fees or even file a claim of lien as to those funds.

POINTS ON APPEAL

ISSUE:

WHETHER THE REFEREE ERRED IN FAILING TO RECOMMEND THAT THE RESPONDENT BE DISBARRED?

ISSUE OF CROSS PETITION:

WHETHER THERE WAS SUFFICIENT EVIDENCE FOR THE REFEREE TO DETERMINE RESPONDENT GUILTY AND THEREAFTER RECOMMEND A THREE YEAR SUSPENSION?

SUMMARY OF THE ARGUMENT

The Florida Bar filed a complaint against Mr. Vining, an attorney practicing law since 1959. The Referee determined that Mr. Vining violated Rule 4-8.4(c) and Rule 4-8.4(d) by (1) filing a motion on February 24, 1984 in the name of the Mrs. Martyn without her consent or knowledge; and (2) submitting a proposed stipulated order on March 30, 1988 to the trial court to withdraw funds from the registry without notice to Mrs. Martyn (App.6-7). The Referee recommended a thirty six month suspension. The Florida Bar is seeking disbarment. The Referee's Report noted that the two incidents of misconduct determined to have been committed by Mr. Vining involved the "the way he went about" collecting funds to which he believed he was legitimately and legally entitled. The record does not support The Florida Bar's position that Mr. Vining should be disbarred.

The Referee, in determining guilt, merely adopted a judgment entered in a civil action without any determination that the underlying facts were proven by clear and convincing evidence. The determination of guilt made by the Referee is not supported by competent, substantial evidence.

ARGUMENT

I.

THE REFEREE DID NOT ERR BY NOT RECOMMENDING DISBARMENT

The Florida Bar's argument that Mr. Vining should be disbarred is two fold. First that his conduct was "repeatedly deceptive" (Br. II), and second, there are "seven aggravating factors which apply to this case" (Br.12).[10/]

Although *Florida Standards for Imposing Lawyer Sanctions* 5.1 *1(f)* and 6.1 *?(a)* provides disbarment as an appropriate discipline for certain types of violations, disbarment is **not automatic.** **The** *Florida Bar v. Bustamante,* 662 So.2d 689 (Fla. 1995). This court has noted in *The Florida* Bar v. *Calvo*, 630 So.2d 548, 551, n.7 (Fla. 1993):

> The standards are relevant here because they constitute a codification of the Bar and this Court's longstanding customary practices in determining the severity of discipline due. The standards are not ethical standards in themselves, but are mere procedural guides for referees, the Bar, and this Court to use. As such, they are relevant, though not necessarily binding, in all disciplinary cases, including those arising under earlier disciplinary codes.

The circumstances of each case and the individual attorney discipline must be addressed on the merits. *The Florida* Bar *v. Jahn,* 509 So.2d 285 (Fla. 1987).

The merits of this case require examining the Referee's application of both

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[10/] The Florida Bar's contention that the conduct was "repeatedly deceptive" is duplicitous of The Florida Bar's argument that the conduct of Mr. Vining showed a pattern of misconduct and multiple offenses, and will be responded to accordingly.

aggravating and mitigating factors pursuant to Standard 9.0. Such an examination will reflect that the Referee's Recommendation is clearly erroneous or unsupported by the record."/ *The Florida* Bar v. *Niles*, 644 So.2d 504 (Fla. 1994).

The first aggravating factor is the existence of a prior disciplinary record. In contrast, the absence of a prior disciplinary record is a mitigating factor. The Referee specifically found that Mr. Vining did not have any prior disciplinary convictions nor disciplinary measures (App.7). The Florida Bar's reliance upon a private reprimand, entered in 1980 and predicated upon conduct that occurred in the late 1970's, is without merit (Transcript, December 13, 1996, page 12; Br.6, 12). The Referee properly relied upon *Standard 9.22 (a),* which provides that prior disciplinary offenses are not to be a mitigating factor:

> . . . provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct **shall** not be considered as an aggravating factor. [emphasis added]

The Florida Bar has given no legal reason or argument why the Referee should have considered the 1980 private reprimand as an aggravating factor, or why this Court should do so now.

The second aggravating factor is the existence of a dishonest or selfish motive. Conversely, the lack of a dishonest or selfish motive is a mitigating factor. Although The Florida Bar considers Mr. Vining's "relentless effort to get these monies" as an indication that he had a dishonest or selfish motive (Transcript, December 13, 1996,

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[11]/ The Florida Bar only addresses the "seven aggravating factors" without reference to the various mitigating factors considered by the Referee (Br. 1 l-l 5).

page 12; Br.6, 14), the Referee made a factual finding that Mr. Vining "felt he had a legitimate claim in these monies" and that Mr. Vining had "an 'indicia of entitlement' to the monies" (App.7). The record testimony, which the Referee had a right to accept and rely upon, showed that Mr. Vining had no intention to convert funds not belonging to him, had no intent to defraud Mrs. Martyn, and had no intent to harm Mrs. Martyn (Tr.360).

The Florida Bar complains, as another aggravating factor, that Mr. Vining did not and has not admitted the wrongful nature of his conduct (Transcript, December 13, 1996, page 15; Br.6, 12). This, however, can not be the basis for an aggravating factor because, as previously noted, the Referee made a factual finding that Mr. Vining "felt he had a legitimate claim in these monies" and that Mr. Vining had "an 'indicia of entitlement' to the monies" (App.7). Mr. Vining testified that he did not believe he violated any Rules Regulating the Florida Bar because he sought to collect his own funds. He admits that had ha been paid in full for all the monies due him for fees earned in the Martyn divorce, he would have been wrong to collect additional monies from the supersedeas bond (Tr.371-379). So, too, Mr. Vining believed that the Motion of February 24, 1984 was sent to Mrs. Martyn as indicated by the "cc" on the office file copy (Tr.368) although the Referee made a factual determination contrary to Mr. Vining's testimony.

The Florida Bar's assertion that there was a pattern of misconduct and multiple offenses which are aggravating factors, is inaccurate as determined by the Referee's Findings. Contrary to the position of The Florida Bar, Mr. Vining was neither "extremely

persistent in violating" his obligation to his client, nor did he "repeatedly conceal his activities from his client" (Br.13). The Referee found two specific acts by Mr. Vining which violated two Rules of Conduct. The first act, set forth in paragraph 14 of the Report, involved the February 24, 1984 motion to have the check reissued in the sole name of Mr. Vining (App.3, 6). The second act is the submission of a stipulation for an order dated March 30, 1988, releasing the funds to Mr. Vining without notice to Mrs. Martyn (App.5,6). The Florida Bar, however, argues to this Court that "[Mr. Vining] filed a motion to obtain funds in his client's name when his client opposed the release of those funds. He neglected to advise the court that he had been paid attorney's fees. Ultimately, he obtained funds which had been placed in the Court Registry without advising Mrs. Martyn that he was seeking to do so, and by concealing his former client's opposition for the court" (Br. 1 l-l 2).

The Florida Bar's insistence that Mr. Vining violated a Rule of Conduct when he failed to tell the trial court, during the hearing for fees, that he had been paid a sum of money from Mrs., Martyn and when he had the Order Awarding Fees placed in his name, is unfounded. It is unrebutted that Mrs. Martyn authorized Mr. Vining to seek fees in the trial court after the reversal of the trial court's order denying her alimony and fees (Tr.183, 209). Although an attorney in a dissolution proceeding can not apply for awards of fees in his own name, under Florida Statutes 567.76, an attorney may enforce, in his own name, an award of fees to a party where the trial court entered an order indicating that payment of fees is to be made directly to an attorney. *MacLeon* v. *Hoff*, 654 So.2d 1250 (Fla. 2nd DCA 1995). The trial court entered an Order Awarding

Fees against Mr. Martyn and in favor of Mr. Vining. **At the time of this hearing and subsequent order, there was no fee dispute. In fact there is nothing in the record which indicates that Mrs. Martyn in anyway opposed the Award of Fees. She only became chagrined about the Order when she unilaterally decided Mr. Vining had been paid enough.** Mrs. Martyn's agreement with Mr. Vining is not and was not a material issue which needed to be brought to the attention of the judge. In fact, a trial court was not obligated to include, nor did it, all of the fees agreed to be paid to Mr. Vining by Mrs. Martyn in the award made against Mr. Martyn.[12]/ Reich v. Reich, 652 So.2d 1200 (Fla. 4th DCA 1995), compare Carlson v. Carlson, 639 So.2d 1094 (Fla. 4th DCA 1994). Mrs. Martyn's fee agreement with Mr. Vining did not, nor should it, impact on the trial court's decision to set a reasonable fee to be paid to Mr. Vining by Mr. Martyn. Levy v. Levy, 483 So.2d 455 (Fla. 3rd DCA 1986). Regardless of the "opinions" of Mr. Katz (Tr.67, 124) and the position of The Florida Bar, the Referee found no ethical violation regarding the application for fees and the subsequent award of the fees.

The Referee found only two specific acts by Mr. Vining which violated the rules of conduct. Neither of these acts involved numerous violations nor did the acts occur over an extended period of time.

The first act, set forth in paragraph 14 of the Report, involved the February 24, 1984 motion to have the check reissued in the sole name of Mr. Vining (App.3, 6). Mr.

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[12]/ Mr. Vining testified that only about half of hours he spent on the proceedings between Mr. and Mrs. Martyn were awarded by the trial court (Tr. 308).

Vining filed a motion to have the check reissued in his name (Tr. 185, 314). In paragraph 14 of the Findings, the Referee found that this motion was filed on February 24, 1984 without notice to Mrs. Martyn and without permission of Mrs. Martyn since Mr. Vining knew she was disputing his entitlement to the monies. It was this motion that formed the basis of the Referee's first determination of guilt (App.6). Mr. Vining believed that the Motion was sent to Mrs. Martyn as indicated by the "cc" on the office file copy (Tr.368). Mrs. Martyn was still the client of Mr. Vining and no adversarial relationship between the two had yet developed. Monies were still owed to Mr. Vining (Tr.308). Mr. Vining, in accordance with Florida Statutes §61.16, had a right to pursue the collection of those fees **awarded to him,** in his own name. Even assuming that Mr. Vining committed an ethical violation and he failed to notify his client that he was seeking to have the supersedeas paid to him in satisfaction of his award, Mrs. Martyn was "somehow" notified, she and her new counsel were present at the time the motion was scheduled for hearing (Tr.77, 314).

The second act is the submission of a stipulation for an order dated March 30, 1988, releasing the funds to Mr. Vining without notice to Mrs. Martyn (App.5,6). There is nothing in the record that indicates the legal basis for determining that Mrs. Martyn had a right to notice.[13]/ The stipulation of June 11, 1984, that Mr. Vining not seek disbursement of the funds "pending determination of the proceedings between Vining and Eva Martyn pending in Dade County" had expired by its own terms. The Release

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[13]/ The finding by the Referee that the second act is in violation of The Florida Bar Rules is discussed in detail in Issue II, *infra*.

of Lien executed by Mr. Vining on February 17, 1987 did not satisfy or assign his Order Awarding Fees. The stipulation regarding the placement of the monies into the registry of the court was entered without notice to or consent of Mr. Vining. There was no legal impediment to Mr. Vining's execution on his Final Order Awarding Fees. The burden should not been placed on Mr. Vining to tell Mrs. Martyn, who was not his client at the time and with whom there were no open or pending matters in litigation, that he wanted to execute on his Award. The burden was on Mrs. Martyn or her counsel to seek judicial intervention to obtain the funds if she believed they belonged to her or to obtain an order staying execution on the funds. See *Greenbriar Condominium Association, Inc.* v. *Padgett*, 583 So.2d 1100 (Fla. 4th DCA 1991).

Although this Court's scope of review of a referee's recommended sanction is somewhat broader than when reviewing a referee's findings of fact, the findings of fact should be upheld when supported by competent, substantial evidence. *The Florida Bar v. Weed, 559* So.2d *1094, 1096 (1990); see also The Florida Bar v. Bustamante*, *662* So.2d 687, 689 (Fla. 1995). In this situation, the Referee was entitled to accept the testimony of witnesses, and, in fact, should not arbitrarily reject unrebutted testimony. *The Florida Bar* v. *Clement,* 662 So.2d 690 (Fla. 1995). The Florida Bar is not challenging the Referee's findings of fact. The Florida Bar , accepting the findings of fact by the Referee, is taking the position that the recommended discipline is legally inadequate and disbarment is mandated. This Court has determined that even though disbarment may be presumed to be an appropriate punishment, mitigation evidence may rebut such presumption. *The Florida Bar v. Maynard,* 672 So.2d 530 (Fla. 1996).

In reviewing the mitigating factors considered by the Referee and which appear in the record, there is nothing to indicate that Mr. Vining was anything other than cooperative in these proceedings. He disputed that his actions were wrong. However, no specious factual issues or fanciful defenses were employed. Indeed, the answer to the complaint admitted the procedural aspect of The Florida Bar's case while denying that the actions were ethical violations.

Mr. Vining's character and reputation are excellent. The character witnesses, two Federal judges and two practicing attorneys?, were "prominent, sober, and reliable". The testimony presented by these witnesses supports the testimony of Mr. Vining that he acted without malicious or wilful intent. These witnesses and their testimony should be considered sufficient mitigation to The Florida Bar's insistence that Mr. Vining be disbarred. *The* Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989).

Mr. Vining has suffered other penalties and sanctions. He has paid approximately $300,000.00 to Mrs. Martyn as a result of the judgment (Tr.360). Similarly, the procedural history of this proceeding should be considered as a mitigating factor. Since April 29, 1983, when the trial court awarded Mr. Vining fees in the case of *Martyn* v. *Martyn*, Mrs. Martyn never attempted to challenge the amount of fees owed by her to Mr. Vining. The only challenge came by way of an unsuccessful

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[14]/ Federal Judges Shelby Highsmith and Peter Fay, although social friends with Mr. Vining, testified as to his reputation for truth and veracity in the community, based on personal knowledge and what was learned from fellow lawyers and judges (Tr.254-287). Hugh Culverhouse testified that he was not socially friendly with Mr. Vining but met him when Mr. Vining was representing Mr. Culver-house's wife in his own divorce and now recommends clients to Mr. Vining Tr.287-290).

counterclaim in an otherwise successful lawsuit filed by Mr. Vining for additional fees. Mrs. Martyn's sole intent was to obtain the fund set aside as a supersedeas to insure payment of Mr. Vining's Final Order Awarding Fees. Between the time Mr. Vining received the monies from the registry of the court in March, 1988 and the filing of the civil complaint in February, 1990 by Mr. Katz, Mr. Vining was not contacted or notified by Mrs. Martyn or her counsel of any problems or objections. In April, 1990, two months after Mr. Katz filed the civil action against Mr. Vining, Mr. Katz filed, on behalf of Mrs. Martyn, a Florida Bar Complaint by forwarding a copy of the civil complaint. The Florida Bar filed its complaint against Mr. Vining in November, 1994. This unreasonable delay in the institution of these disciplinary proceedings was highly prejudicial to Mr. Vining as all the collateral matters involved in the civil litigation became a part of these proceedings. Lawyer *Sanction Standards 9.32 (l) and (k).*

In light of the Referee's factual findings, the consideration of both aggravating and mitigating circumstances, the case law relied upon by The Florida Bar is factually different from these proceedings and does not support The Florida Bar's insistence that Mr. Vining be disbarred.

In *The Florida Bar v. Thomson, 271* So.2d 758 (1973), the Court did not disbar Mr. Thomson. This Court required that not only a wrong be found, but a corrupt motive be present to authorize disbarment. The Referee clearly found that Mr. Vining did not act from a corrupt motive, but acted in accordance with his belief that he had a legitimate claim to those monies.

Neither the case of *The Florida Bar v. Maynard, 672* So.2d 530 (Fla. 1996) nor

the case of *The Florida Bar v.* Simon, 521 So.2d 1089 (Fla. 1988) is analogous to the present proceedings. The Referee found Mr. Vining guilty of two incidents of misconduct arising out of "the way he went about " collecting funds to which he believed he was legitimately and legally entitled. Mr. Vining did not defraud an insurance company, did not commit any trust account violations and his conduct can not be characterized as extensive or lengthy. There is nothing in the record that would indicate that Mr. Vining has engaged in any pattern of misconduct during the 38 years he has been licensed to practice law in the State of Florida.

Thus, The Florida Bar's Petition for Review should be denied.

ARGUMENT ON CROSS PETITION

II

THERE WAS INSUFFICIENT EVIDENCE FOR THE REFEREE TO DETERMINE RESPONDENT GUILTY AND THEREAFTER RECOMMEND A THREE YEAR SUSPENSION

The Florida Bar must prove its case by clear and convincing evidence. The *Florida Bar v. /Vi/es, 644* So.2d 504 (Fla. *1994); The Florida* Bar *v. Rayman, 238* So.2d 594 (Fla. 1970). The question regarding these proceedings is whether The Florida Bar carried its burden or did the Referee rely upon evidence that did not satisfy or meet the burden of "clear and convincing".

The Referee, in determining that Mr. Vining was guilty of misconduct, found that Mr. Vining "on March 30, 1988 submitted a proposed order and stipulation with counsel for FNB to Judge Mark A. Cianca, without noticing Eva Martyn or her attorney, thereby precluding Martyn from asserting any position she might have in relationship to the monies secured in the registry. Specifically these acts and **those facts found in this opinion constituted dishonest, fraudulent, and deceitful conduct."** [emphasis added]

The "facts" in the Referee's opinion, however, resulting in the determination of guilt, are set forth in paragraphs 28 and 29 (App.5-6). And these paragraphs are based upon the verdict and judgments in the civil action filed by Mrs. Martyn against Mr. Vining in 1990. The Florida Bar introduced these pleadings over the objection of Mr. Vining's counsel and in derogation of the principles of law set forth by this Court in

Stogniew v. McQueen, *656* So.2d *917* (Fla. *1995); compare The Florida Bar v.* Clement, 662 So.2d 690, 697 (Fla. 1995).[15]/

Although the referee is authorized to consider any evidence needed and relevant in resolving factual questions and is not bound by the technical rules of evidence, *The Florida Bar v. Rendina*, 583 So.2d 314 (Fla. 1991), the facts relied upon by the referee must still be proven by clear and convincing evidence. In *The Florida Bar v. Rood,* 620 So.2d 1252 (Fla. 1993) a similar situation faced this Court. The Court affirmed the Referee's Report and stated at 620 So.2d at 1255:

> During the course of E.C. Rood's disciplinary proceedings, the referee reviewed the findings of fact made by the trial judge in *Alverson* v. *Rood* and **found those facts to be proven by clear and convincing evidence. . . .** We have carefully considered the record and the referee's findings and conclude that the referee's recommendation of guilt is supported by competent and substantial evidence. [emphasis added]

In these proceedings, the Referee did not make any finding that the facts set forth in the judgment entered by Judge Kenney were proven by clear and convincing evidence. In fact, Judge Highsmith, in his cross examination testimony to the Referee, explained that the verdict and judgment shown to him by counsel for The Florida Bar did not impact on his testimony because he did not know whether the proper evidentiary standard was applied, that is, clear and convincing (Tr.282).

The Florida Bar did not produce any witness or evidence, other than the verdict and judgments, to show that legally or factually (1) Mrs. Martyn had an interest in the funds; (2) Mr. Vining had released or assigned his interest in the Order Awarding

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[15]/ See footnote *8, supra.*

Attorney's fees; (3) Mrs. Martyn was entitled to notice before Mr. Vining executed on his Order Awarding him fees when the Order was otherwise unencumbered and there were no judicial proceedings or stays of execution in effect. The Florida Bar produced no evidence or witnesses to establish that the verdicts and judgments from the civil case were based on competent and substantial evidence to support the underlying facts. The personal opinions of Mr. Katz as to what he believed should or should not have occurred, does not rise to the level of clear and convincing evidence.

The findings of fact by a Referee should be upheld when supported by competent, substantial evidence. The Florida Bar v. Weed, 559 So.2d 1094 (Fla. 1990). In the present proceedings, the Referee did not make independent findings of facts - **the Referee merely adopted someone's findings without determination that those findings were supported by competent substantial evidence.** The testimony of Mr. Katz and Mrs. Martyn presented to the Referee by The Florida Bar clearly indicates their bias and animosity towards Mr. Vining and should not be the basis for upholding the Referee's findings of guilt. *The Florida Bar v. Thomson, 271* So.2d 758 (Fla. 1972).

Mr. Vining, under oath, denied any wrongful conduct. The burden of proof required is well settled. This *court* in *The Florida Bar v. Rayman, 238* So.2d 594, 597, in quoting from *In re Martin,* 354 P.2d 995, 998, stated:

> The law is well settled in this jurisdiction that the evidence to sustain a charge of unprofessional conduct against a member of the bar, where in his testimony under oath he has fully and completely denied the asserted wrongful act, must be clear and convincing and that degree of evidence does not flow from the

> testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances.

As in the *Rayman* case, the testimony presented to the Referee by Mrs. Martyn and Mr. Katz was evasive and inconclusive. In contrast, Mr. Vining presented testimony of distinguished jurists and attorneys who "declared their full and total confidence in the reliability and integrity of " Mr. Vining. *Rayman*, *238* So.2d at 598.

The Referee's findings of guilt are not supported by competent, substantial evidence and cannot be upheld. *The Florida Bar* v. *Rayman*, 238 So.2d 594 (Fla. *1970); compare The Florida Bar v. Garland, 651* So.2d 1182, 1184 (Fla. 1995).

CONCLUSION

Respondent, EDWARD C. VINING, JR., respectfully prays that this Honorable Court deny the Petition for Review filed by The Florida Bar and grant his Cross Petition for Review and determine that the Referee's Findings of Fact, Recommendations of Guilt and Recommendation of Discipline are unsupported by the record and/or unjustified, erroneous and/or too severe.

Respectfully submitted,

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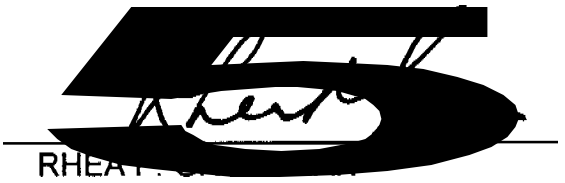
Counsel for Respondent, **EDWARD C. VINING, JR.**

By: _____
RHEA P. GROSSMAN
Florida Bar #092640

DATED: July 31, 1997

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished this 31st day of July, 1997, by U.S. Mail, postage prepaid, to: Randi Klayman Lazarus, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite 211, Miami, Florida 33131; John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.



RHEA

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. 84,641

THE FLORIDA BAR,

Complainant,

vs.

EDWARD C. VINING, JR.,

Respondent.
_____/

◆

ON PETITION FOR REVIEW

◆

◆

A P P E N D I X

TO

RESPONDENT'S. EDWARD C. VINING, JR., ANSWER BRIEF and INITIAL BRIEF ON CROSS-PETITION

◆

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Counsel for Respondent, EDWARD C. VINING, JR.

INDEX TO APPENDIX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	**Supreme Court Case No. 84,641**
Complainant,	
vs.	**The Florida Bar File**
EDWARD C. VINING, JR.,	**No. 94-70,839(11B)**
Respondent.	

REPORT OF REFEREE

I. **Summary of Praceedings:** Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were heard on the following dates: December 15, 1995, May 22, 1995, March 18 and 19, 1996 and December 13, 1996.

The following attorneys appeared as counsel for the parties:

For the Florida Bar Randi Lazarus
For the Respondent Louis Jepeway, Jr.

II. **Findings of Fact as to the allegations contained in the Complaint alleging misconduct of which the Respondent is charged:** After considering all the pleadings and evidence before me, pertinent portions of which are contained below, I find:

1. The Respondent Edward C. Vining, Jr. was a member of the Florida Bar and subject to its jurisdiction and disciplinary proceedings. (Transcript of hearing 3/19/96 p. 297).

2. In 1980 the Respondent was retained by Eva Martyn, (hereinafter referred to as " E. Martyn"), to represent her in Martin County (In Re: Marriage of Charles P. Martyn and Eva Martyn, Case No. 80-816), (hereinafter referred to as the divorce

case). (Transcript 311811996 hearing p. 181).

3. Sometime around 1981, the court in the divorce case entered a final judgment of dissolution of marriage between E. Martyn and Charles P. Martyn and awarded E. Martyn $108.578.80 in marital assets. That court did not enter an award of alimony or attorneys fees. (Transcript 311811996 hearing p. 182).

4. The Respondent and E. Martyn had entered into an oral contingency agreement for attorney's fees for at first 25% and then one third of the amount of the judgment plus costs. (Transcript of 3/18/1996 hearing, p. 181 to 182).

5. The Respondent received from E. Martyn the payment of the one third contingency fee in the amount of $36,000. (Transcript 3/18/1996 hearing p. 183).

6. The Respondent filed notice of appeal on the issue of denial of alimony and attorney's fees on behalf of E. Martyn. (Transcript of 3/18/1996 hearing p. 183).

7. The appellate court issued an order directing the trial court to award alimony and reasonable attorney's fees. (Transcript of 3118 1996 hearing p. 183).

8. A hearing on attorneys fees was conducted around April of 1983, before Judge Vocelle. At the hearing on attorney's fees, the Respondent did not inform the trial court that E. Martyn had paid attorney's fees to the Respondent for the original proceeding. (Transcript of 3/18/1996 hearing p. 183 to 184).

9. Following the hearing on attorney's fees, the trial court entered an order awarding E. Martyn lump-sum in the amount of $104,000 and attorneys fees in the amount of $35,222.11. (Transcript of 3/18/96 hearing p. 68 and Florida Bar exhibit E).

10. Charles Martyn deposited the sum of $160,000 in Florida National Bank (FNB) as a supersedeas bond pending his appeal of the trial court's award. (Transcript of 3/18/96 hearing p. 68 and Florida Bar exhibit F).

11. The parties then reached a stipulation between attorneys for Mr. Martyn and Mr. Vining on behalf of Eva Martyn, that a portion of the money which related to the appeal of the award of attorney's fees and costs, be disbursed in a check made payable jointly to Edward Vining and Eva Martyn. That stipulation was confirmed by

Order of Judge Sharpe. (Transcript of 3/18/96 hearing, p. 69).

12. In November of 1983, FNB issued a check payable jointly to the Respondent and E. Martyn in the amount of $37,264.00. (Transcript of 3/18/96 hearing p. 72).

13. E. Martyn refused to endorse the check when Respondent made a demand for her signature. E. Martyn told the Respondent that she did not feel that he was entitled to those monies and that she felt that she had already paid him for his services for the dissolution. (Transcript of 3/18/1996 hearing p. 184).

14. On February 24, 1984, the Respondent filed a motion before the trial court for exchange and reissue of the check made out to the Respondent and E. Martyn. (See bar exhibit F) That motion was filed without notice to E. Martyn. That motion was filed stating that "Respondent/wife move this court for its order directing the bank..." This motion was filed at a time that the Respondent knew that E. Martyn was disputing the Respondent's entitlement to those sums. (Transcript 3/18/1996 hearing p. 75 and 185 and Court exhibit 1.).

15. E. Martyn discharged the Respondent and hired new counsel in this matter around February March, 1984. (Transcript 3/18/1996 hearing p. 187).

16. In June 1984, new counsel Richard L. Katz made an appearance on behalf of E. Martyn. (Transcript of 3/18/96 hearing p. 59 and 77).

17. Katz then made an appearance on behalf of E.Martyn in the dissolution matter and an order of substitution of counsel was approved by the court, substituting Katz for the Respondent. (Transcript of 3/18/96 hearing p. 78).

18. The court further entered an order stating that:

a. any proceeds either received or receivable pursuant to the Order awarding attorneys fees and suit monies entered April 23, 1983, ($35,222.11) and the order awarding lump sum alimony per appellate opinion entered on April 29, 1983, ($104,000), be attached pursuant to the charging lien filed by Vining;

b. any funds paid or payable pursuant to either of the above-described orders

should not be disbursed until such time as any balance due to Vining for attorney's fees and suit monies had been determined. The court upon ore tenus motion of Katz for E. Martyn stayed it's order "pending the determination of the proceedings between Vining and Eva Martyn pending in Dade County." (See Florida Bar Exhibit G and Transcript of 3/18/96 hearing p. 78 and p. 137).

19. The Respondent filed suit against E. Martyn in Dade County in June of 1984 seeking $75,000.99 in additional attorney's fees over those fees received under the contingency agreement for his efforts in the E. Martyn dissolution case. (Transcript of 3/18/96 hearing p. 79).

20. During the pendency of the Vining v. Martyn suit in Dade County, the Respondent also filed for reissuance of the cashier's check and at a hearing before the trial judge in Martin County, at which Eva Martyn was represented by counsel Katz, that request was denied. (Transcript of 3/18/96 hearing, p. 80).

21. At the conclusion of the Dade County suit, the jury awarded Mr. Vining the sum of $8,000 in attorneys fees. (Transcript of 3/18/96 hearing p. 83).

22. Subsequent to an appeal of that award, E. Martyn satisfied that judgment and the Respondent executed a release of lien on February 17, 1987, which stated "I hereby release all- claim of lien or other interest in any funds held in escrow for the --- benefit of Eva H. Martyn in the above referenced case. A check in the amount of $35,222.11 previously delivered to me, which is payable to Edward C. Vining, Jr. and Eva H. Mar-tyn, may be reissued payable only to Eva H. Martyn. I hereby withdraw from any further proceedings in this matter and do not require that any further pleadings, motions, notices or orders be served upon me." . (Transcript of 3/18/96 hearing, p. 90 and 91).

23. At a subsequent date, Mr. Katz approached the Respondent and asked him to sign a release of satisfaction of the Martin County judgment in his name, which represented the same moneys that were being held in the supersedeas bond, which the Respondent refused to do. (Transcript of 3/18/96 hearing, p. 94 and 95).

24. In the pendency of this action, Charles Martyn had passed away and attorneys for the estate contacted Mr. Katz about disbursing money from the estate in light of the attorney fee dispute and it was agreed that the disputed funds

(approximately $60,791.15) would be deposited in the Martin County Court Registry. (Transcript of 3/18/96 hearing, p. 95 and 96).

25. The Respondent then filed an action against Florida National Bank, represented by James Caitlin, to secure a release for recovery of the funds in the Martin County Registry. In conversations with Mr. Caitlin, the Respondent did no! tell Mr. Caitlin, that he no longer represented E. Martyn and that E. Martyn also claimed an interest in those monies. (Transcript of 3/18/96 hearing, p. 160).

26. A stipulation for payment was entered into by the Respondent and FNB for payment. Based upon that stipulation an order was entered by Judge Cianca on March 30, 1988, ordering disbursal of the funds to the Respondent. (Transcript of 3/18/96 hearing on p. 98).

27. Subsequent to the release of those monies, E. Martyn and her attorney Katz, learned of the release and filed a lawsuit against the Respondent and FNB, alleging fraud on the court, fraud, civil theft, conversion, negligence, gross negligence and a constructive trust action. (Transcript of 3/18/96 hearing, p. 100).

28. That action was tried before Judge Kenney, in September, 1993, and the jury found the Respondent liable to E. Martyn for acts of conversion and civil theft and awarded "$60,700 in compensatory damages and $60,000 in punitive damages. (Transcript 3/18/96 hearing, p. 104 to 106.).

29. In that action, Judge Kenney wrote a final judgment finding that the Respondent "committed extrinsic fraud on the court when he submitted to the court a stipulation for payment dated March 28, 1988, together with a proposed order on stipulation, which order was entered by Martin Circuit Court Judge Mark A. Cianca, on March 30, 1988. The submission was done with the purpose of deceiving the court and to fraudulently conceal material facts from the court, including without limitation, that (A) Defendant Vining had previously executed a release of any interest he had in the very same funds which the March 30, 1988 order allowed to be disbursed to Defendant Vining and (B) Plaintiff Martyn had an interest in the subject funds and was then represented by another attorney who had previously vigorously opposed disbursement of said funds to Defendant Vining. Moreover, Defendant Vining intentionally failed to give proper notice to either Mrs. Martyn of her counsel of his application to the court to have the funds disbursed to him, as was required, so that

Defendant Vining could conceal his receipt of moneys, perpetrated by and thorough his fraud on the court. By virtue of Defendant Vining's wrongful conduct, Plaintiff Martyn was improperly precluded from asserting her opposition to the disbursement of her funds to Defendant Vining. By failing to inform either Plaintiff Martyn and her new counsel of Defendant Vining's efforts to remove the subject funds from this court's registry for the Defendant's sole benefit, Defendant Vining deliberately precluded Plaintiff Martyn from participating in the judicial process and wrongfully precluded her from objecting to the release of the funds to Vining as she had consistently done in the past. " (Transcript of 3/18/96 hearing, p. 107 to 110).

III. Recommendation as to Whether of Not the Respondent Should Be Found Guilty:

As to the Complaint filed by the Bar alleging that the Respondent committed acts of Misconduct I make the following recommendations as to guilt or innocence:

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4 (c); and guilty of violating Rule 4-8.4 (d). The Respondent filed a Motion for Release of funds on February 24, 1984 on behalf of both the Respondent and the wife, when clearly the Respondent knew that the "wife" Eva Martyn, opposed the release of the funds and that the Respondent's act was in clear opposition to Eva Martyn and furthermore that act was done without noticing Eva Martyn as was required.

Further, the Respondent on March 30, 1988 submitted a proposed order on stipulation with counsel for FNB to Judge Mark A. Cianca, without noticing Eva Martyn or her attorney, thereby precluding Martyn from asserting any position she might have in relationship to the monies secured in the registry. Specifically these acts and those facts found in this opinion constituted dishonest, fraudulent, and deceitful conduct. While the Respondent testified that it was a "secretarial mistake" on the pleading which stated "on behalf of Respondent/wife", this referee finds that an attorney is responsible for the pleading he or she signs. The subsequent actions taken by the Respondent, in this matter quickly evaporate the film of "secretarial error" in the style of those pleadings, Courts and attorneys, must be able to rely upon the veracity of pleadings in litigation affecting the rights and responsibilities of the parties.

This referee recognizes that upon the award of attorneys fees Charles Martyn placed monies in the form of a supersedeas bond and that sometime after the appeal of the award of attorney's fees and costs a check was made payable jointly to the Respondent and Eva Martyn. I am further aware that the Respondent felt that he had a legitimate claim in these monies. It is not so much the fact that he sought to collect the monies, as the way he went about it, without noticing Eva Martyn and counsel she retained to oppose the Respondent in his effort to collect those monies. Courts need to be able to rely on having all interested parties before them in adjudicating matters or finality of adjudication may never occur. This is the essence of notice.

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend that the respondent be suspended for a period of 36 months and thereafter until respondent shall prove rehabilitation as provided in Rule 3-5.1(e), Rules of Discipline. I find that the Respondent violated his duty to his client in his effort to collect his fee. There was actual financial injury to the client as well as protracted litigation for the client which resulted from the fee dispute and collection efforts by the Respondent. In mitigation, this referee considered the fact that the check for attorney's fees from Charles Martyn was made out jointly to the Respondent and Eva Martyn thereby giving the Respondent an "indicia of entitlement" to the monies. Additionally, the referee considered in mitigation the award by the jury in Martin County to Eva Martyn against the Respondent, and the fact that the Respondent paid that judgment,

V. Personal History and Disciplinary Record:

After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6 (k)(l) (D), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: unknown

Date Admitted to the Bar: 1959

Prior disciplinary convictions and disciplinary measures: No convictions.

Other persona l data: The Respondent has been having health problems, which

were sufficiently serious to have required hospitalization and postponement of the trial.

VI. Statement of Costs and Manner in Which Cost Should be Taxed: I find the following costs were reasonable incurred by the Florida Bar.

Administrative fee.....$750.00

Court reporter's attendance at referee hearing on January 18, 1995.....$100.00

Court reporter's attendance at referee hearing on February 17, 1995.....$ 50.00

Court reporter's attendance of Richard Katz' deposition taken on March 16, 1995 and transcript of proceedings.. , ... , ... , ... , ... $ 94.43

Court reporter's attendance at referee hearing on March 24, 1995.. . . . . $102.50

Court reporter's attendance at referee hearing on May 22, 1995 and transcript of proceedings $240.50

Court reporter's attendance at referee hearing on July 17, 1995..... $50.00

Court reporter's attendance at Richard Katz's deposition of August 22, 1995 and transcript of proceedings.....$1.00

Court reporter's attendance at hearing on December 19, 1995 and transcript of proceedings $106.08

Court reporter's attendance at telephone conference of February 1, 1996 ..... $ 50.00

Court reporter's attendance at depositions held on March 12, 1996 and March 13, 1996 ..... $277.30

Court reporter's attendance at trial on March 18 and 19, 1996 ..... $1,718.35

Court reporter's attendance at referee hearing on September 27, 1996 ..... $50.00

Court reporter's attendance at referee hearing on December 13, 1996 and transcript of proceedings $135.94

-Mediation Services $1,078.13

Witness expenses.. ..... $939.46

Staff Investigator's fee $882.25

Bar Counsel's costs.. ..... $166.75

TOTAL.. ..... **$6,872.69**

It is recommended that all such costs and expenses be charged to the Respondent.

Dated this 7th day of February, 1997.

Victoria S. Sigler, Referee
County Court Judge

I HEREBY CERTIFY that a copy of the above report of referee has been served on Randi Klayman Lazarus at 444 Brickell Avenue, Suite M-100, Rivergate Plaza, Miami, Florida 33131, Louis Jepeway, Jr., Attorney for Respondent, at 19 West Flagler Street, Suite 407, Biscayne Blvd., Miami, Florida 33130 and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 12th day of February, 1997.

Victoria S. Sigler, Referee
County Court Judge