IN THE SUPREME COURT OF FLORIDA

047

THE FLORIDA BAR,

Complainant,

v.

EDWARD C. VINING, JR.,

Respondent.
_____/

Supreme Court Case
No. 84,641

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ON PETITION FOR REVIEW

ANSWER BRIEF AND REPLY
BRIEF OF THE FLORIDA PAR

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INTRODUCTION

The parties will be designated herein in the same manner as they were designated before the Referee. The Florida Bar was the Complainant and Edward C. Vining was the Respondent.

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent has submitted a mixture of arguments and references to the record under the heading "Reply to the Case and Facts." These matters have been included without any justification for being placed in the Statement of the Case and Facts.

The materiality of the Respondent's detailed recitation of his version of the facts is most elusive. As discussed in more detail in the Argument portion of this brief, it is axiomatic that the Respondent's burden is to prove a lack of competent substantial evidence in regard to the issue of the correctness of the finding of guilt. The Bar is not obligated to try the case a second time, which is apparently what the Respondent seeks to do. Therefore, the Bar will not attempt to respond to each and every reference to the record set forth in the Statement of the Case and Facts portion of Respondent's brief.

In addition, Respondent's recitation of facts should be confined to the issue presented in his brief. Various arguments presented in the guise of the Statement of the Case and Facts are inappropriate. Those arguments which appear in the Argument portion of the Respondent's brief will be addressed by the Bar in the appropriate portion of this brief.

SUMMARY OF ARGUMENT

The Bar has established that both the Florida Standards for Lawyer Sanctions and case law prescribe disbarment for the type of conduct in which Respondent engaged. Aggravating factors provide additional support for that conclusion. The purported distinctions regarding those factors, set forth by Respondent are not tenable.

In regard to the second issue, Respondent has failed to meet his burden of establishing a lack of competent substantial evidence. Most of the arguments set forth by Respondent were not properly preserved below. In addition, the theories currently advanced by the Respondent cannot be sustained by the cases presented as authority.

Respondent sought to exclude the judgment in the Martyn v. Vining case in Martin County on the theory that collateral estoppel could not be substantiated. The Bar, however, did not offer the judgment on the basis of collateral estoppel, but as evidence which the Referee was entitled to consider.

The argument that the Referee arrived at her conclusions solely based upon judgments and a jury verdict is factually untenable. The claim is apparently based upon the erroneous contention that the testimony of Mrs. Martyn and her successor attorney, Rick Katz, should not have been admitted. That argument does not appear to have been preserved below and the case relied

upon by the Respondent does not support that conclusion. The argument also ignores the testimony of a third witness.

Respondent presents two legal arguments, one regarding the existence of a valid assignment, and the second regarding the requirement of notice. Again, these arguments were not properly preserved below, and, further cannot be sustained.

Also, the Respondent's conduct was deemed to be in violation of the Bar rules without regard to the existence of an assignment, or the requirement of notice,

ISSUES FOR REVIEW

I

WHETHER THE REFEREE CLEARLY ERRED BY NOT DISBARRING THE RESPONDENT? (The Bar's Reply)

II

WHETHER THE RESPONDENT HAS FAILED TO MEET HIS BURDEN OF ESTABLISHING A LACK OF COMPETENT, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE FINDINGS OF GUILT? (The Bar's Answer Brief)

I

THE REFEREE CLEARLY ERRED BY NOT DISBARRING THE RESPONDENT.
(The Bar's Reply)

As pointed out in our initial brief, Respondent should be disbarred for either of the two violations of which he was guilty, in accordance with Florida Standards for Lawyer Sanctions. Respondent's Answer is that the Standards **are** not mandatory. However, Respondent fails to justify relaxation of the Standards as they apply to his conduct.

The Bar would submit that Respondent's conduct should be dealt with in terms of the standards.

As the Referee correctly concluded, (Recommendations **as** to Guilt, p. 6), Respondent filed a motion for release of funds on behalf of the Respondent and the wife when he clearly knew the wife opposed the release of those funds.[1] Respondent thereby deliberately deceived the Court and his former client in order to gain his objectives. The Referee also correctly found that Respondent submitted a proposed Order on Stipulation with counsel for Florida National Bank without disclosing to Florida National Bank attorney Catlin or the Court, the controversy surrounding the

[1] Contrary to Respondent's assertion, an adversarial relationship existed as early as 1983 when Mrs. Martyn advised him he was not entitled to additional fees. (T. 3/18/95, p. 72-73).

funds.

Respondent seeks to restrict the Referee's findings to "two specific acts". (Respondent's brief, p. 17 and 18). The assertion is clearly false since the Referee also stated, in regard to the foregoing recommendations:

> "Specifically these acts and those facts contained in this opinion constituted dishonest, fraudulent and deceitful conduct. (Report, p.6; emphasis supplied).

The emphasized passage is important because the Respondent seeks to limit the consideration of his violations to a very narrow viewpoint and argues that, therefore, the Bar cannot refer to repeated deception on the part of Respondent.

However, the "two specific acts" are not limited in scope. As the Referee stated:

> 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. (R. 6, emphasis supplied).

A review of the twenty nine paragraphs of factual findings in the Referee's Report, including citations to the record, reveals that the Referee found evidence of a pattern of deception encompassing a number of deceptive acts in several courts. The Referee also designated the supporting facts in the Report. Also, additional ramifications of Respondent's conduct were identified as matters to be considered. The Report included under the heading of Disciplinary Recommendations a discussion of the impact of Respondent's conduct:

> There was actual financial injury to the client as well as protracted litigation for the client which resulted from the fee dispute and collections efforts by the Respondent. (R. 7).

In regard to the aggravating factors, Respondent argues that a finding that Respondent believed he had a legitimate claim eliminates the factor of dishonest or selfish motive. It clearly does not. As the Referee pointed out, the manner in which Respondent proceeded was dishonest (R. 7) and clearly motivated by selfish interests. Likewise, the 29 paragraphs referred to above

establish the existence of a pattern of misconduct, namely repeated deception and misrepresentation.

Respondent failed to admit his wrongdoing, another aggravating factor. His belief that he had a legitimate claim to the money does not and cannot justify Respondent's behavior. There can be no fault found by the Court with the Referee's statement in paragraph 29, supported by references to the record to the following effect:

> 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) .

The Bar also established that Respondent's substantial experience, and the vulnerability of the victim were applicable aggravating factors. Finally, notwithstanding the limited effort to distinguish The Florida Bar v. Maynard, 672 So.2d 530 (Fla. 1966) and The Florida Bar v. Simons, 521 So.2d 1089 (Fla. 1988), those cases, cited in our initial brief, call for disbarment.

THE RESPONDENT HAS FAILED TO MEET HIS BURDEN OF ESTABLISHING A LACK OF COMPETENT, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE FINDINGS OF GUILT. (The Bar's Answer Brief).

The burden of proof before this Court is upon the Respondent who has Petitioned for Review of the Referee's Report. The Florida Bar v. McLure, **575** So.2d 176 (Fla. 1991). The Report is, of course, presumed to be correct and will be upheld unless clearly erroneous or lacking competent substantial evidence. The Flora Bar v. Marable, 645 So.2d 438 (Fla. 1994). Respondent has failed to meet his burden of proof and has failed to overcome the presumption of correctness.

Respondent's argument is based, in part, upon The Florida Bar v. Thomsoq, 271 So.2d 758 (Fla. 1973). Respondent's suggestion is that all of the testimony of Mrs. Martyn and her successor attorney, Rick Katz, should be disregarded on the basis of the authority of that case. First, it does not appear that this matter was preserved below and is, therefore waived. City of Lake Worth v. First National Bank of Palm Beach, 93 So.2d 49 (Fla. 1957). Second, Respondent's broad interpretation of Thompson would dictate that no party to **a** dispute, or that party's attorney, could testify **because** of bias, (It would, of course, also mandate that

Respondent's testimony could not be considered because of bias).

Thompson, as interpreted by Respondent, would dramatically alter our legal system. The reality is, however, that Thomsson involved a rather extreme circumstance, and applies to a particular witness. The pertinent facts in that case, as stated by the Court follow:

> The witness' interest in the outcome of the divorce proceeding exceeded that of Thomson, as she was living with Thomson's client at the time of the final hearing and married the following day. She has subsequently become totally disenchanted with both her husband and Thomson, having divorced her husband following the filing of charges of a sex crime against him, and having stated that she was a friend of Thomson's ex-wife and would not mind seeing him disbarred (at 759).

Thomson, cannot be applied carte blanche to every witness who is partisan to any degree. The factors cited by the Court do not apply to this case. The Thomson court designated those unique facts:

> Considering the great interest of the witness in the outcome of the divorce, the admitted penchant for perjury, the animosity voiced for Thomson, and lack of any other evidence, a finding of guilt of the act charged cannot be upheld. (Emphasis supplied, at 760).

Respondent also cites The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970) for the irrelevant proposition that some serious Bar

offenses should not be based upon "the testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances." (At 594, emphasis supplied).

The Bar presented more than one witness and amply supported its charges with other facts and circumstances. That irrelevant argument is followed by another, namely that the existence of defense witnesses, including judges (who testified as character witnesses) and were not witnesses to any of those events, should be considered as a vindication of the Respondent (R. Brief, p. 27). That contention is obviously absurd.

The main thrust of Respondent's argument is based upon an objection that was never raised before the Referee and is, therefore, waived. City of Lake Worth, supra. Respondent's current argument is that the Referee relied upon the "verdict and judgments in the civil actions filed by Mrs. Martyn against Mr. Vining in 1990." (Brief p. 24). Respondent objected "as per objections raised pretrial," (T. 3/18/96, p. 108).

Respondent's counsel had moved for exclusion pre-trial stating that the order could not constitute the basis for collateral estoppel. (T. 3/18/96, p. 5). The Bar made it clear that the order **was** not being offered for that purpose. (T. 3/18/96, p. 19).

Respondent now raises a different objection to the order.

This objection **was** not presented to the Referee. If this Court considers this argument, it should be noted that it is somewhat elusive, but appears to be, that based upon the authority of The Florida Bar v, Rood, 620 So.2d 1252 (Fla. 1973) every fact offered before the Referee must, in turn, be independently supported by clear and convincing evidence,

If that argument is for any reason considered by this Court, it must be rejected. The question asked by Respondent (page 24) is:

> ... whether The Florida Bar carried its burden or did the Referee rely upon evidence that did not meet the burden of clear and convincing.

There is competent, substantial evidence in the record to support the conclusion that the Bar met its burden.

The Bar was required to establish that the conclusions in this **case** were established by clear and convincing evidence. To the extent that an order in another case was utilized as evidence, it serves to provide evidence that could be considered to be clear and convincing evidence of the conclusion for which it **was** offered and any related testimony could be considered for the same purpose.

The Respondent asserts that the finding of dishonest fraudulent and deceitful conduct was based upon the facts in paragraphs 28 and 29 of the report, which were, in turn, merely

based upon ‘verdicts" and "judgments in a civil case." The argument is clearly fallacious,

Respondent ignores the supporting evidence including the testimony of H. James Catlin. Catlin's testimony was essentially unrefuted and undisputed.

The pertinent questions and answers follow:

> Q. What did he tell you?
> A. He told me that he had represented Mrs. -- whatever her name is -- Eva Martyn?
> Q. Correct.
> A. That he was the wife's lawyer and he got a judgment for attorney's fees against the husband, money had been posted in the bank and the bank had put the money into the Registry of the Court and it was his money.
> He said he couldn't get it out, that the Clerk claimed that until the bank disavowed any interest in the money, that he couldn't get it out. He was frustrated and so he filed a lawsuit down here.
> He said, "If you get the money out, there would be no problem."
> All he needed was an acknowledgment that the bank claimed no interest in the money.
> Q. What would he do if he obtained that acknowledgment, according to his conversation with you?
> A. The way the conversation went is that he wanted to do a stipulation. I wanted to have the default judgment set aside before we would talk any further (T. 3/18/96, p. 159) .

The stipulation was Respondent's idea (T. 3/18/96, p. 160). Respondent failed to advise Catlin that he (Vining) no longer represented Eva Martyn, and failed to tell him that Eva Martyn

claimed an interest in the money held by the bank. (T. 3/18/96; p. 160). Catlin was shocked, dismayed and embarrassed when the bank was sued because of the stipulations. (T. 3/18/96, p. 163).

The final judgment in the Dade County suit wherein Eva Martyn successfully sued the Respondent for civil fraud, theft, conversion, etc. was introduced into evidence (T. 3/18/96; p. 108). The facts established by Catlin's testimony are consistent with the findings of fact in the Dade County case. The Judge in that case concluded that "extrinsic fraud" was committed by virtue of the stipulation and the resulting order.

The findings of fact which were read into the record also stated that:

> "Defendant Vining 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 County Circuit Court Judge Mark A Cianca on March 30, 1988 (attached hereto is Exhibit A and hereinafter referred to as the March 30, 1988 order) ."
> "That submission to the Court by Defendant Vining 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 or 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 through 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 consistently had done in the past" (T. 3/18/96, pps. 108-110).

Respondent has provided a quote taken out of context from The Florida Bar v. Rood, supra. 1252, 1255, in which the Judge reviewed findings of fact in the underlying case and found them to be supported by clear and convincing evidence. That statement, however, does not establish a limiting doctrine nor a requirement of a similar specific finding. Rather, the Rood case reiterates a doctrine of broader admissibility of evidence in Bar cases. The Court specifically held that:

> Referees are authorized to consider any

> evidence, such as the trial transcript or judgment from the civil proceed-at they deem relevant in resolving the factual question. (At 1255; emphasis supplied).

The Referee in this case appropriately considered the judgment, the findings of fact and the fact that a jury decided after hearing all of the evidence, that Respondent was guilty of civil theft and conversion.

The Referee could also consider that the Jury found that Mrs. Martyn was entitled to an award of $60,000 in response to special verdict No. 4 which asked:

> A. "If you find by the greater weight of the evidence that the Defendant, Edward C. Vining, Jr., acted with malice, moral turpitude, wantonness or willfulness or reckless indifference to the rights of Plaintiff, Eva Martyn, what sum of money do you assess in favor of Eva Martyn and against Edward C. Vining, Jr. as punitive damages? Answer in dollars and cents." (T. 3/18/96, p. 106).

Rick Katz, Ms. Martyn's successor attorney testified that he received no notice of the stipulation or hearing which resulted in the disbursal of funds to the Respondent. (T. 3/18/96, p. 98-99). He was not aware that Respondent had received the funds, based upon the stipulation, until 1990 when a representative of his firm was in contact with the office of the Clerk of the Court. (T. 3/18/96, p. 97-8). Katz did not represent Martyn in the subsequent suit against Respondent wherein the jury found Respondent guilty of

civil theft and conversion (T. 3/18/96, p. 105).

Eva Martin also testified. She reviewed Exhibit I, Respondent's Motion for release of the disputed funds which stated:

> Respondent/wife and her counsel move this Court for its order directing the exchange and reissuance of previously issued cashier's check to attorney for Respondent/Wife . . . (T. 3/18/96, p. 185; emphasis supplied).

She was not aware that the motion had been filed and had not authorized the motion. (T. 3/18/96, p. 185). She had paid Respondent in full and he was not entitled to additional attorney's fees. (T. 3/18/96). That was her position throughout the various proceedings and clearly demonstrated her "interest in the funds." (Respondent's brief, p. 25).

In view of the record, it is apparent that the claim that the Referee solely relied upon the judgment and verdict, is pure fantasy.

Respondent presents some additional arguments. The Respondent raises the question of proof of release or assignment of the Respondent's interest in the order awarding attorney's fees. (Respondent's brief, p. 25). The argument ignores the Referee's findings that it was the manner in which the Respondent sought to obtain fees, rather than his right to do so, that is the basis for the conclusions.

If the issue is considered to be viable by this Court, there is, nevertheless, no merit to the argument.

It is well established under Florida law that there is no required form or language in which an assignment must be made. All that is necessary is for the assignor to indicate the intention to presently assign his rights to the assignee. Any words, however informal, showing an intention of an owner to transfer an actionable right will operate as an effective assignment. Boulevard National Bank of Miami v. Air Metal Industries, Inc., 176 So.2d 94, 97 (Fla. 1965) ("Formal requisites of . . . an assignment are not prescribed by statute and it may be accomplished by parol, by instrument in writing, or other mode, such as delivery of evidences of the debt, as may demonstrate an intent to transfer and an acceptance of it." (emphasis supplied). See also Restatement (Second) of Contra- 5423, comment a (1979); Corbin on Contracts, §879 (1951).

By executing the release of lien, delivering the original $35,222.22 check to Martyn's counsel, and agreeing that the check should be reissued to Martyn alone, (T. 3/18/97, p. 90-91) Vining clearly relinquished all right, title and interest in the escrowed funds in favor of Martyn, the sole party entitled to possession of the funds represented by the judgment.

Furthermore, the legal issue of entitlement to notice is not germane to this issue of sufficiency, No affirmative defense has been pled and, therefore, the issue is waived. Davidson v. Fire Protection and Rescue District, 674 So.2d 858 (Fla. 2d DCA 1966).

Assuming that this Court does consider this issue, Florida Rule of Civil Procedure 1.600 provides:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any othe thing capable of delivery, a party may deposit all or any part of such sum or thing with the court upon notice to every other party and by leave of court . Money paid into court under this rule shall be deposited and withdrawn by order of court.

An order of the Court cannot, of course, be obtained ex parte, but must be obtained by filing a motion. R.Civ.Pro. 1.080(a) requires that every paper filed in the action "shall be served on each party." The order approving the stipulation to deposit the funds with the Clerk of the Court was in the case of Charles Martyn v. Eva Martyn, 19th Judicial Circuit Court Case No. 80-816. Ms. Martyn should have been notified of the Motion filed by Respondent to obtain the funds in the Court Registry.

In sum, the Respondent has failed to establish a lack of competent substantial evidence.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's recommendation to suspend Respondent for thirty six (36) months is erroneous and would urge this court to disbar the Respondent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Reply Brief on Petition for Review was forwarded Via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Louis Jepeway, Jr., Attorney for Respondent, at 407 Biscayne Building, 19 West Flagler Street, Miami, Florida 33131, on this 16th day of September, 1997.

Billy J. Hendrix
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