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., REPLY BRIEF IN SUPPORT OF CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF CITATIONS

REPLY TO STATEMENT OF THE CASE AND FACTS

The Florida Bar' s Answer and Reply brief takes issue with Respondent's Statement of the Case and of the Facts. *Rule 9.270, Florida Rules of Appellate* Procedure required Respondent to set forth the record testimony in support of his Cross Petition and in response to The BAR'S Statement of Facts in its initial brief which completely omitted any record references and relied solely upon the Referee's Report. The BAR'S indignation is misplaced in light of the fact that the BAR'S Statement of the Case and Facts both in its Initial Brief and its Reply and Answer Brief is contrary to *Fla.R.App.P.* 9.270. "The clear implication [of *Rule* 9.2101 is that our rules of appellate procedure place a square obligation upon appellant [in this case, The BAR] to provide the court with a full and fair statement of facts," *Thompson v. State, 588* So.2d 687 (Fla. 1 st DCA 1991).

The BAR has failed to designate any areas of disagreement with Respondent's statement, and since, as the Committee Notes emphasize, "[i]t is unacceptable in an answer brief to make a general statement that the facts in the initial brief are accepted, except as rejected in the argument section of the answer brief," Respondent will specifically object to those factual statements relied upon by the BAR in its argument:

1. The BAR attempts to bolster the credibility of Richard Katz by noting at page 17 of its Reply Brief that Mr. Katz did not represent Ms. Martyn in the civil law suit for theft and conversion. This is incorrect. Mr. Katz did not personally try the case because he became the key witness. Mr. Katz did prepare and file the lawsuit and remained on all the pleadings, including the amended final judgment and mandate. (Bar

Exhibits 1, 2, 3).

2. The law suit by Ms. Martyn against Respondent was filed in Martin County and not Dade County as alleged by the BAR at page 15 of its Reply Brief. (Bar Exhibit 1).

3. Although the BAR, at page 18 of its Reply Brief, states that Ms. Martyn had paid Respondent in full, there is no record cite. The BAR also notes that Ms. Martyn had no notice of the motion and did not authorize same. In fact, Ms. Martyn and her counsel, Richard Katz, appeared at the hearing (Tr.77, 314).

POINT ON 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 ON THE CROSS PETITION

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.

REPLY TO ARGUMENT ON CROSS PETITION

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

The **BAR** has misconstrued Respondent's argument. The BAR does not have to try its case "a second time"[1/], but the BAR had an obligation to prove its initial case by clear and convincing evidence. The Florida Bar *v. Niles,* 644 So.2d 504 (Fla. 1994); *The Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970).

Respondent contends that the Referee's and the BAR'S reliance on the judgment from a circuit judge in Martin County does not satisfy or meet the burden of "clear and convincing".

The Referee in its findings of fact, quoted from the Martin County Judgment. The BAR, in its Initial Brief, quoted from the Martin County Judgment. In its Reply Brief, the BAR now argues that there was independent testimony from three witnesses to support the Referee's findings of fact. Nonetheless, the testimony of two of the witnesses, Ms. Martyn and Mr. Katz, had to be viewed in light of their bias and animosity. In relying upon *The Florida Bar v. Thomson,* 271 So.2d 758 (Fla. 1972), the Respondent never suggested that there should be a change in the legal system or applied to every witness carte *blanche*. However, it is the function of the Referee to evaluate the credibility of witnesses and one standard to apply to witnesses such as Ms. Martyn and Mr. Katz is their extreme bias especially in light of the general

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[1/] Reference to page 1 of the Bar's Reply Brief.

testimony of Mr. Katz. What the BAR overlooks in characterizing the Respondent's reliance upon *The Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970) as irrelevant, is that the chronology of events and general factual background, for the most part, are not disputed. The Referee had to determine if the events described gave rise to a violation of the Rules Regulating The Florida Bar. The testimony of Mr. Catlin and Mr. Katz could lend no corroboration to the matters ruled upon by the Referee, to wit, that the Respondent's conduct was for the purpose of deceiving the court as determined by the Martin County judgment.

What is an irrelevant proposition is the BAR'S assertion that the Respondent waived his right to have this Court review the Referee's reliance on and weight to given to the testimony of the BAR'S witnesses. Throughout the proceedings, the Respondent objected to the irrelevant and immaterial testimony of the BAR'S witnesses.

Similarly, the BAR attempts to utilize the case of City *of* Lake *Worth v. First National Bank in Palm* Beach, 93 So. ,2d 49 (Fla. 1957) to argue that this Court should not review the sufficiency of the evidence relied upon by the Referee as it related to the Martin County judgment in determining the guilt of the Respondent. Prior to the commencement of the proceedings before the Referee, the Respondent filed a Motion in Limine to exclude the Martin County judgment (Tr.5). The BAR offered the judgment as "one piece of evidence" (Tr.19). The Respondent objected to the judgment when it was again offered during the proceedings (Tr. 108). At the conclusion of the hearing, the Respondent filed various motions and memorandum again referring to the Referee's error in allowing the verdict and judgment from Martin County to be placed

into evidence.

The Respondent properly and fully preserved this matter for review by the Court, especially in light of the Referee's Report, which, utilized the judgment in a matter consistent with "collateral estoppel". The BAR may posture as much as it wants, but the reality of the situation is that the Referee accepted the Martin County judgment as the "truth of the situation" and did not just accept the judgment as any other piece of evidence. The Referee simply did not make any findings that the facts set forth in the Martin County judgment were proven by clear and convincing evidence... and there are no independent facts or evidence in the record to support such a finding. Compare *The Florida Bar* v. *Rood,* 620 So.2d 1252 (Fla. 1993).[2/]

The BAR, in its Reply Brief sets forth the testimony of Mr. Catlin in support of the Referee's Report. What is obvious, is that Mr. Catlin only testified that Respondent told him he **had** represented Ms. Martyn, not that he does represent her. A further misstatement of the facts by the BAR is its convenient refusal to acknowledge that the monies were transferred from the Bank to the registry because the Respondent's Order was still outstanding, and this was done by stipulation, without notice to the Respondent, between Mr. Katz and the attorney for the Bank (Tr.9596).

The Florida Bar still has not shown that it produced any witness or evidence, during the proceedings, 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

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[2/] It is the Respondent's contention that the *Rood* case does require independent evidence to support findings by a trial judge in order to avoid a collateral estoppel situation as discussed in *Stogniew* v. *McQueen*, 656 So.2d 917 (Fla. 1995).

assigned his interest in the Order Awarding 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 BAR in its Reply Brief has raised argument never made part of the proceedings before the Referee. The argument, however, does not fit the facts. In December, 1987, after receiving notification from the Bank that monies were being held to satisfy Respondent's Order, the Respondent sued the Bank for those monies (Tr.352-353). Mr. Catlin, representing the Bank, released the court funds in satisfaction of the lawsuit (Tr.374). There was nothing sinister about the stipulation and there is nothing in the Florida Rules of Procedure requiring the Respondent to notify Ms. Martyn of his lawsuit with the Bank.

The findings of fact by a Referee should **only** 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,** and the witnesses presented cannot be considered as corroborating evidence.

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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By: _____
RHEA P. GROSSMAN
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DATED: October 14, 1997.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished this 14th day of October, 1997, by U.S. Mail, postage prepaid, to: Billy J. Hendrix, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, 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 P. GROSSMAN