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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

EDWARD C. VINING, JR.,

Respondent.

______________________________/

Supreme Court Case No. ~~84,641~~ 85,235

THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The Florida Bar specifically disagrees with the following portion of the statement of facts in the Respondent's brief:

> On April 14, 1993, the Ingraham Building notified Vining in writing that he was not to proceed any further in the county court and circuit court cases. (The Florida Bar's composite Exhibit 1.)

In fact, the letter encompassed all cases in which Vining was counsel in behalf of Ingraham against Byte. The complete text of the letter (The Florida Bar Exhibit 1) which appeared above the signature of Robert M. Gusman follows:

> On behalf of the Ingraham Building, I am advising you that your firm is no longer authorized to proceed in any manner in the above referenced action as legal counsel for the Ingraham Building and _you are hereby discharged from any further work in this case or in any other matters which you may be performing on behalf of the Ingraham Building_.
>
> You are requested to arrange for the delivery of all file documents relating to this case following your receipt of this letter. (Emphasis added).

In addition to the foregoing factual disagreement, The Florida Bar will submit factual distinctions in the context of the argument portion of this brief.

SUMMARY OF ARGUMENT

Respondent presents two arguments. The first argument is that Edward Vining, personally, cannot be found to be in violation of ethical rules if Edward Vining, P.A. is responsible for the egregious conduct. No authority has been advanced by the Respondent in support of his position.

The Rules Regulating The Florida Bar and the pertinent case law specifically reject Respondent's assertion. The applicable authority states that unethical acts perpetrated in the context of the P.A. are the personal responsibility of the individual attorney.

The Respondent also argues that the evidence was not sufficient to establish that Respondent continued to represent a client contrary to the client's wishes. Respondent has failed to meet his burden of proof in that regard.

Respondent was directed by a letter from his client that he was "discharged from any further work in this case or in any other matters." His client obtained new counsel and that fact was known to Respondent. The client did not authorize the appeal pursued by Respondent. Nevertheless, Respondent did not cooperate with requests to deliver files, and persisted with the appeal.

In view of the foregoing, the applicable case law provides

that a six month suspension was appropriate.

ARGUMENT

I. RESPONDENT CANNOT AVOID RESPONSIBILITY FOR ETHICAL VIOLATIONS BY UTILIZING THE P.A. AS A SHIELD

(Rephrasing Respondent's First Point I on Appeal)

Respondent seeks exoneration based upon the involvement of Edward Vining, P.A. He cites no authority in support of his position. In fact, the applicable authority constitutes a direct rejection of Respondent's argument.

First, Rule of Professional Conduct 4-8.6(d) states:

> **(d) Violation of Statute or Rule.**
> A lawyer who, while acting as a shareholder, member, officer, director, partner, manager, agent, or employee of an authorized business entity and engaged in the practice of law in Florida, violates or sanctions the violation of the authorized business entity statutes or the Rules Regulating The Florida Bar shall be subject to disciplinary action.

This Court's ruling was virtually identical in a case decided under the former Rules. This Court stated In the Matter of The Florida Bar, 133 So.2d 554, 556 (Fla. 1961):

> The individual practitioner, whether a stockholder in a corporation or otherwise, will continue to be expected to abide by all of the Rules and Canons of professional ethics heretofore or hereafter required of him. The corporate entity as a method of doing business will not be permitted to protect the unfaithful or the unethical. As a matter of fact, the corporate entity itself will automatically come within the ambit of our jurisdiction in regard to discipline. (Emphasis

supplied).

In a non-disciplinary context, The Third District reiterated the governing rule in Corbett, Killian, et al. v. Merritt, 478 So.2d 828, 833 (Fla. 3rd DCA 1985):

> We are not unmindful that while a law firm practicing as a professional service corporation is governed by corporate law, its lawyers are nonetheless governed by the ethical standards contained in the Code of Professional Responsibility, §621.07, Fla.Stat. (1981). *See In re The Florida Bar*, 133 So.2d 554, 556 (Fla. 1961) ("The individual practitioner, whether a stockholder in a corporation or otherwise, will continue to be expected to abide by all of the Rules and Canons of professional ethics heretofore or hereafter required of him. The corporate entity as a method of doing business will not be permitted to protect the unfaithful or the unethical.")

It is amply clear that the Respondent's argument is legally incorrect and frivolous.

II. RESPONDENT HAS FAILED TO MEET HIS BURDEN OF PROVING THAT THE REFEREE'S FINDINGS WERE CLEARLY ERRONEOUS. A SIX MONTH SUSPENSION IS APPROPRIATE DISCIPLINE.

(Rephrasing Respondent's Point II on Appeal)

Respondent argues that there was insufficient proof that he was guilty of violating Rule 4-1.16 by continuing to represent the Ingraham Building after receiving the April 14, 1993 termination letter; or that he violated Rule 4-1.2(a) in that Respondent failed to abide by his client's directives.

As stated in The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994):

> ...this court's review of a referee's findings of fact is not in the nature of a trial de novo. The responsibility for finding facts and resolving conflicts in the evidence is placed with the referee. *The Florida Bar v. Hoffer*, 383 So.2d 639 (Fla. 1980). The referee's findings "should not be overturned unless clearly erroneous or lacking in evidentiary support." *The Florida Bar v. Wagner*, 212 So.2d 770, 772 (Fla. 1968); *The Florida Bar v. Neely*, 502 So.2d 1237 (Fla. 1987). Further, rule 3-7.6(k)(1)(A) of the Rules Regulating The Florida Bar provides that the referee's findings of fact as to items of misconduct charged "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." *See The Florida Bar v. Hooper*, 509 So.2d 289 (Fla. 1987).

An examination of each rule and the evidence presented at the final hearing clearly reveals that Respondent has not met his burden. Rule of Professional Conduct 4-1.16 provides:

RULE 4-1.16 DECLINING OR TERMINATING REPRESENTATION
(a) When Lawyer Must Decline or Terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:...(3) the lawyer is discharged.

Robert Gusman informed the Respondent, in a letter dated April 14, 1993, that he, Vining, was "discharged from any further work in this case or in any other matters which you may be performing on behalf of the Ingraham Building." (The Florida Bar Exhibit 1). Respondent obtained new counsel after sending the discharge letter (T. 31). The new counsel, Moises Grayson, sought to obtain the files in the pending cases by correspondence dated April 16, 1993 and July 13, 1993. (T. 93-95). Respondent did not comply with either request and, therefore, Grayson filed a motion in the Circuit Court to compel production of the files (T. 95). Shortly after the denial of the motion, Respondent delivered file copies to Grayson. (T. 91). However, Respondent continued to represent the Ingraham Building in regard to the pending appeal. (T. 72).

Respondent was clearly uncooperative in regard to facilitating any transition to new counsel and failing to withdraw as required by the rules. Consequently, Grayson's knowledge of the status of the appeal at a particular point in time referred to by the Respondent is immaterial.

By continuing to pursue the appeal, the Respondent increased his billing of Gusman. He utilized that billing to offset $13,000 which he owed Gusman for rent. (T. 32, 33, 105).

Gusman testified that he was initially unaware of the appeal but learned about it after the fact. (T. 30). Note the following questions addressed to Gusman and the answer.

> Q. Did you authorize him to him (sic.) continue with the appeal?
>
> A. No ma'am. I did not.

Respondent seeks to authorize his pursuit of the appeal on the basis that success on the appeal excuses the ethical violation. He provides no authority in support of that proposition.

Respondent mentions in his brief that at some point in time, Gusman no longer wished to proceed with his Bar complaint. Here, again, Respondent presents an argument without regard to applicable authority. Rule 3-7.6(j) states:

> **(j) Complaining Witness.** The complaining witness shall have no rights other than those of any other witness; the complaining witness has no right to be present during a hearing or trial but may be called upon to testify and produce evidence as any other witness. Neither unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise, or restitution will excuse failure to complete any trial. (emphasis added)

It is clear from the foregoing that the changing posture of

the complaining witness, including the desire to cease pursuit of the issues, is of no importance.

Respondent also seeks to gain support from the ruling of Special Master Farrell, particularly his finding that Respondent had a duty to complete his representation of Gusman/Ingraham. Farrell's recommendations, adopted by the Court, were not binding upon the Bar which was not a party to the proceeding. Res judicata would, of course, require identity of parties and issues. Albrecht v. State, 444 So.2d 8 (Fla. 1984).

Farrell did not consider any possible ethical violations and was not aware of Rule 4-1.16 quoted above which requires withdrawal by an attorney who has been discharged.

The pertinent portions of his testimony follows:

> Q. So when you considered the specific request for fees in those two situations, you were not referred to look at any Rules of Professional Responsibility or any underlying unethical conduct concerning the actions of the lawyers involved in those litigations, were you?
>
> A. Well, I have to split that into two questions.
>
> Whenever I am addressing the matter of fees, I have to take into consideration all applicable standards and rules and so forth. However, the issue -- the second part of it -- of ethical quality or character of any conduct is not a matter for me to be concerned with as such. If there is any question about that, that's a matter for

Grievance Committees and/or Bars or otherwise. (T. 198).

Q. General Master Farrell, are you familiar with Rule 4-1.16 of the --

A. Not by number, no.

Q. Why don't we publish it you can read it -

THE REFEREE: Why don't you let him look at it. That's a good idea.

BY MS. EVANS:

Q. Here it is (indicating).

A. (After examining) Well, I must say if I have looked at this in the last 35 or 40 years, I would not remember when. So the answer to your question is, I am not immediately familiar with it, no.

If you would like, I'll sit here and read it.

Q. Would you, please? Would you read Sub-section A?

A. (After examining) Okay.

Q. Does this rule then state specifically that a lawyer shall not represent a client where representation has commenced and shall withdraw from representation of a client if the lawyer is discharged?

A. (After examining) It appear to have language very close to that which you just recited.

Q. So that would then be a rule you didn't consider when making your decisions on the orders that are Exhibits 11, 12, and 13?

> A. I have no present awareness and I don't think I was aware of that rule at the time, nor indeed do I think it was brought to my attention by anyone. (T. 202-203).

It is clear that Respondent has failed to meet his burden of proving the absence of substantial evidence. Respondent has not established any error regarding the Referee's findings in violation of Rule 4-1.2(a) and 4-1.16(a)(3) of the Rules Regulating The Florida Bar. Respondent has not denied the existence of conflict, violative of Rule 4-1.7(b). Therefore, the six month suspension was appropriate.

In The Florida Bar v. Hayden, 583 So.2d 1016 (Fla. 1991) the Respondent was suspended for six months for bringing contempt proceedings against his client's husband. He did so without his client's consent to gain leverage to collect a fee. The similarities are readily apparent.

In The Florida Bar, In Re Pahules, 334 So.2d 23 (Fla. 1976) the attorney received a three month suspension for a conflict of interest which did not involve dishonesty, fraud or deceit. A three month suspension for conflict of interest was also imposed in The Florida Bar v. Sawyer, 334 So.2d 259 (Fla. 1976).

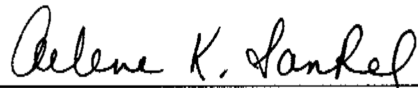
A six month suspension is appropriate in this case in view of the foregoing cases, particularly in view of the existence of

multiple violations and several aggravating factors cited by the Referee.

CONCLUSION

Unless shown to be clearly erroneous or lacking in evidentiary support, a referee's findings of fact are presumed to be correct and should be upheld. The evidence presented to the referee in the instant case supports the rule violations found. Additionally, the law is clear that an attorney cannot avoid responsibility for ethical misconduct by using a P.A. as a shield.

A six month suspension is appropriate discipline for respondent's misconduct and the referee's report should be approved.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing The Florida Bar's Answer Brief was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and that a true and correct copy was mailed to Edward Vining, Respondent, at his record bar address of 527 Ingraham Building, 25 S.E. 2nd Avenue, Miami, Florida 33131, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this 13th day of July, 1998.

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