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JUN 22 1998

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IN THE SUPREME COURT OF FLORIDA

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

85,235

EDWARD C. VINING, JR.,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

\_\_\_\_\_ /

ON PETITION FOR REVIEW

\_\_\_\_\_

INITIAL BRIEF OF PETITIONER

\_\_\_\_\_

EDWARD C. VINING, JR.  
25 S.E. Second Avenue, Suite 527  
Miami, Florida 33131  
Telephone: 305/374-7684  
Petitioner

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PRELIMINARY STATEMENT

For the purposes of this brief, the following persons/entities will be referred to as follows:

1) Petitioner, Edward C. Vining, Jr., *the individual*, (Respondent below) will be referred to as "Vining."

2) The Edward C. Vining, Jr., P.A., a Florida corporation, will be referred to as the "Vining P.A."

3) The Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building will be referred to as "the Ingraham Building."

4) Byte International Corp. will be referred to as "Byte"

References to three (3) trial transcripts used in this Brief will be made as follows:

T. 4/11/97 at Page \_\_\_\_\_

T. 10/24/97 at Page \_\_\_\_\_

T. 10/31/97 at Page \_\_\_\_\_

References to the appendix attached to/accompanying this brief will be designated as "Appx."

STATEMENT OF THE CASE AND FACTS

In November of 1991, the Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building ("the Ingraham Building"), through its manager, Robert Gusman, employed the services of attorney Edward C. Vining, Jr., a sole practitioner (not a P.A.) to represent the Ingraham Building in connection with its complaint that one of its tenants, Byte International Corp., whose store was located in the Ingraham Building arcade, was selling computers and related merchandise in violation of its lease with the Ingraham Building. The Ingraham Building had previously warned Byte International to cease and desist from the sale of computers but Byte steadfastly refused despite the fact that other tenants were complaining about such sales.

Robert Gusman employed the services of attorney Edward C. Vining, Jr. to take the necessary steps to cause Byte International to comply with the provisions of its lease with the Ingraham Building and to cease selling computers and related products. Vining wrote a letter to Byte dated November 8, 1991 making a demand upon Byte to cease and desist from the sale of computers. (Respondent/Vining's Exhibit 3). Byte continued to sell computers and the Ingraham Building, through Robert Gusman, authorized the filing of the lawsuit against Byte to enforce the provisions of the lease which precluded Byte from the sale of computers.

In early 1992, Vining filed a suit entitled *Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building vs. Byte*

*International Corp., a Florida corporation*, Case No. 92-7021 CA 08 and served the summons and complaint upon Byte. Byte filed an answer and a counterclaim generally alleging that the Ingraham Building was conspiring against Byte and that the request to cease selling computers was a subterfuge.

The case was hotly litigated, was transferred from county to circuit court, a demand for jury trial was made by Byte, a series of depositions were taken, interrogatories submitted and production demanded.

The trial was set for the week of November, 1992 (T. 4/11/97 at Page 60) however, but by that time, Byte had exhausted its stalling tactics and agreed to the entry of an order of eviction by which it was forced to vacate the leased premises. The agreed order of eviction reserved ruling on attorney's fees and costs. (Respondent/Vining's Exhibit 6; T. 4/11/97 at Page 62).

On behalf of his client, the Ingraham Building, Vining caused the matter to be scheduled before the trial court judge for hearing upon application for the award of attorney's fees and costs. An order dated February 9, 1993 was entered finding that the Ingraham Building was entitled to an award of attorney's fees and costs and contained a reservation to determine the amounts at a subsequent date. In the meantime, Byte requested a stay of the proceedings which was granted.

As an aside, at this stage of the Byte proceedings, there is no mention of the Edward C. Vining, Jr., P.A. nor does the name of that corporate entity appear on any pleadings, correspondence, etc.

On February 17, 1993, Byte filed a notice of appeal challenging the February 9, 1993 order finding that the Ingraham Building is entitled to an award of fees and costs from Byte. On March 30, 1993 Byte filed its initial 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. (Bar's Composite Exhibit 1; T. 4/11/97 at Page 22).

On April 16, 1993 (2 days after the April 14, 1993 termination letter), the Ingraham Building's new attorney, Moises Grayson of the firm Blaxberg, Grayson & Singer, P.A. requested Vining to provide of copy of the files. (Bar's Exhibit 3). Thus, in the midst of the appellate proceedings brought by Byte, the Ingraham Building's new lawyer has contacted Vining demanding the files.

Grayson again requested the files from Vining on July 13, 1993 (T. 4/11/97 at Page 94) and subsequently filed a motion for the files which was denied, however, Vining did give Grayson a copy of the files (T. 4/11/97 at Page 96).

At T. 4/11/97 at Page 97 Grayson commented that Vining handled the [Byte] appeal, that Vining was successful in the appeal and, at T. 10/24/97 Page 17, that Vining, "...did win the appeal."

In 1986, a entity known as the Edward C. Vining, Jr., P.A. (the "Vining P.A."), entered into a lease with the Ingraham Building for certain office space. On April 20, 1993 Grayson filed suit on behalf of the Ingraham Building against the Vining P.A. (not the individual) for breach of that lease and delinquent rent.

At that point, the Ingraham Building had not yet compensated Vining, *the individual*, for the services he provided in connection with the Byte litigation. June 22, 1993 and February 8, 1994 (Appx. 8 and 9, respectively) Vining, *the individual*, assigned his claim for fees/costs owed by the Ingraham Building to the corporate entity, the Edward C. Vining, Jr., P.A., and pleaded unpaid attorney's fees as a counterclaim in the litigation brought by the Ingraham Building against the Vining P.A. for breach of lease and delinquent rent. The case went to trial and the Ingraham Building was given a judgment against the Vining P.A. which was off-set to some degree by certain credits given to the Vining P.A. on its counterclaim against the Ingraham Building for unpaid attorney's fees/costs. The Ingraham Building was not satisfied with its judgment against the Vining P.A. and brought supplemental proceedings in an attempt to implead Vining, *the individual*, and to "pierce the corporate veil" in an attempt to prove that Vining, *the individual*, and the Vining P.A. were one and the same entity. An evidentiary hearing was conducted by the court and a judgment for the impleaded party, Edward C. Vining, Jr., was entered. That judgment contains copious findings by the trier of fact that Edward C. Vining, Jr., *the individual*, and the Edward C. Vining, Jr., P.A. were separate and distinct entities, that the Ingraham Building (as well as its present and former managers) were well acquainted with this fact, and the Vining P.A. made no attempt to deceive or evade a creditor and that the Ingraham Building failed to prove that the



formation of the Vining P.A. was for any illegal, fraudulent or other unjust purpose. (Appx. 23-29)

On July 28, 1993, Vining filed an answer brief on behalf of the Ingraham Building in connection with the appeal taken by Byte. Oral argument was held on October 4, 1993 and on November 9, 1993, the Third District Court of Appeal in Case No. 93-348 confirmed the lower court's order February 9, 1993 with an opinion. (T. 4/11/97 at Page 73; Respondent/Vining's Exhibit 7)

On November 8, 1993 - one day before the issuance of the Third District's November 9, 1993 opinion - Grayson filed a motion for substitution. The order allowing the substitution was entered January 28, 1994. (T. 4/11/97 at Page 233; Vining's Exhibit 17).

In the Order entered by the Referee dated January 22, 1998, which is on review herein, the Referee made the curious finding that the Edward C. Vining, Jr., P.A. and Respondent Edward C. Vining, Jr. are one and the same person. The Referee further recommended that Vining be found guilty of violating Rule 4-1.16 because he continued to represent the Ingraham Building after the April 14, 1993 termination letter, that he be found guilty of violating Rule 4-1.7(b) because Vining was represented the Ingraham Building in an appeal when he himself was being sued by and counter-suing the Ingraham Building and was pursuing the appeal without consulting with the Ingraham Building. The Referee recommended a six month suspension. (Appx. 1-7).

It is from that January 22, 1998 order that the Petitioner Edward C. Vining, Jr. seeks to have this Court review.

### SUMMARY OF THE ARGUMENT

As to Point I, Vining urges that the finding by the Referee that Edward C. Vining, Jr., an individual, is one and the same as a corporate entity, the Edward C. Vining, Jr., P.A. is improper and unsupported by the testimony and evidence. Doing so renders certain of the Referee's findings incomprehensible, confusing and fallacious.

As to Point II, Vining urges that under the very unusual scenario of this case, the findings by the Referee that Vining violated certain Bar rules are misplaced and taken out of the context of the actual facts. The six months suspension recommended by the Referee is excessive and, at the very least, should have been mitigated by the abundant character witnesses and the testimony by the complaining witness's own attorney that actions taken by Vining caused no harm to the client. Further, the Referee either overlooked or merely glossed over the obvious fact that the Bar complaint was filed against Vining in order to gain an advantage and leverage against him in an underlying civil action which was concurrently being pursued. As evidence of this fact, there is abundant testimony and evidence that eventually all disputes between Vining, the Vining P.A. and Robert Gusman/the Ingraham Building were amicably resolved and the Bar was advised that the complainant did not wish to pursue the Bar matter.

POINT I

THE REFEREE ERRED IN FINDING THAT THE CORPORATE ENTITY, THE EDWARD C. VINING, JR., P.A., WAS ONE AND THE SAME AS THE INDIVIDUAL, EDWARD C. VINING, JR., AN ATTORNEY-AT-LAW WHO NEVER PRACTICED AS A P.A.

In the January 22, 1998 order, the Referee made the following finding:

2. The Respondent is for the purpose of this proceeding the same as Edward C. Vining, Jr., P.A., hereinafter referred to as the Respondent.

(Appx. 1-7)

That finding is not only improper but is not supported by any testimony or evidence before the Referee. The attempt to lump Edward C. Vining, Jr. and the Vining P.A. into one entity permeates the Referee's order and caused confusion and an improper view of the evidence.

Edward C. Vining, Jr. was authorized and licensed to practice law in the State of Florida as an attorney and is the named respondent in the proceedings instituted by the Florida Bar and from which Referee's report flows.

The Edward C. Vining, Jr., P.A. is a corporation whose sole and only function in these proceedings -- or any other proceedings, for that matter -- is as a lessee of rented office space in a building known as the Ingraham Building located in downtown Miami, Florida. For a ten (10) year period, the Vining P.A. leased office space from the Maurice Gusman Residuary Trust No. 1 d/b/a The

Ingraham Building and the complainant, Robert Gusman, is its agent. Edward C. Vining, Jr., the individual, did not practice law as a P.A. Vining's letterhead does not reflect "P.A." There are no pleadings or matters of record filed by Vining on behalf of the Ingraham Building in either of the two Byte cases that reflect that he practiced as a "P.A." Neither the lobby directory in the Ingraham Building nor the placard at the door of Vining's law office contain the phrase "P.A." Thus, the Referee's finding that a corporate entity and the individual, Edward C. Vining, Jr., are one and the same is misguided and are simply not supported by the evidence.

In actuality, there was a prior attempt by the Ingraham Building in its suit against the Vining P.A. to pierce the corporate veil and prove that Vining and the Vining, P.A. were one and the same and were alter egos. A judgment entered in favor of Vining against the Ingraham Building dated August 3, 1995 made abundant findings to the contrary, found that Edward C. Vining, Jr. is not the same as the Edward C. Vining, Jr., P.A. and that they were separate and distinct entities. (Appx. 23-29) The Ingraham Building has had its "day in court" with respect to its attempt to fuse Vining with the Vining P.A. Even the appeal taken by the Ingraham Building from the August 3, 1995 judgment was later dismissed when the parties globally resolved their differences. The fact that Vining and the Vining P.A. are not one and the same is the law of the case. (Appx. 23-29)

For the Referee to now make a finding contrary to that circuit court judgment and to find that Vining, the individual, is the same as the Vining P.A. is improper and not supported by the record. This Court should not be swayed by that misguided finding.

In paragraph 4 of the findings, the Referee finds that in January of 1992, the Respondent [ostensibly referring to the Vining/Vining P.A. composite] and Robert Gusman [the complaining witness] began a relationship whereby Robert Gusman asked Respondent [again ostensibly, the Vining/Vining P.A. blend] for legal assistance. There is no evidence that Vining ever practiced law as a P.A. but there is uncontroverted evidence that he never practiced as a P.A. Robert Gusman never "asked" the Vining P.A. for legal assistance as the Referee found. This Court should now understand why the concept of Edward C. Vining, Jr., the individual, should not have been merged with the Edward C. Vining, Jr., P.A., a corporate entity whose only relationship with the Ingraham Building or its agents/managers was as a lessee and *nothing else*.

This Court should ignore the finding of the Referee insofar as commingling and intertwining Edward C. Vining, Jr., the individual, with the Edward C. Vining, Jr., P.A., a Florida corporation, so as to make one, single indistinguishable entity that did not represent any client at any time.

POINT II

THERE WAS INSUFFICIENT EVIDENCE FOR THE REFEREE TO FIND THAT VINING IS GUILTY OF CONTINUED REPRESENTATION OF A CLIENT UNDER THE CIRCUMSTANCES OF THIS CASE AND THE RECOMMENDATION OF A SIX MONTH SUSPENSION IS EXCESSIVE.

The Referee's order of January 22, 1998 recommended that Vining be found guilty of violating Rule 4-1.16 by continuing to representing the Ingraham Building after the April 14, 1993 termination letter, guilty of Rule 4-1.7(b) by representing the Ingraham Building in an appeal when Vining was being sued by and counter-suing the client, and guilty of violating Rule 4-1.2(a) in that Vining failed to abide by the client's objectives. (Appx. 1-7)

On February 9, 1993 the trial court in the *Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building v. Byte International Corp.* case entered an order by which the Ingraham Building may be awarded attorney's fees and costs pursuant to Sec. 83.231, Florida Statutes. On February 17, 1993 Byte took an appeal to the Third District Court of Appeal to review that February 9, 1993 order. Byte served its initial brief on March 30, 1993 upon Vining, the individual, and not the *Vining P.A.*, who was still the attorney of record for the Ingraham Building. Upon receipt of Byte's brief, Vining began research in order to prepare an answer brief. However, on April 14, 1993 Vining received a letter

discharging him (Bar's Exhibit 1; T. 4/11/97 at Page 22). That letter demonstrates that the directions which Vining (the individual) received from Robert Gusman on behalf of the Ingraham Building referenced two case numbers, one a county court case and the other a circuit court case. The letter makes no reference to the pending appeal being pursued by Byte.

The Ingraham Building's new attorney, Moises Grayson, wrote a letter to Vining dated April 16, 1993 requesting that Vining turn over certain files. (Bar's Exhibit 3; T. 4/11/97 at Page 91)

On April 20, 1993, Moises Grayson filed suit on behalf of his client, the Ingraham Building, for breach of lease and delinquent rent against its tenant, the Edward C. Vining, Jr., P.A.

As shown by the record, the Ingraham Building's answer brief was due to be filed one day prior to the filing of the suit by the Ingraham Building against the Vining P.A. Although it was obvious that Moises Grayson was the Ingraham Building's new lawyer, he never took any steps to substitute himself/his firm in place of Edward C. Vining, Jr. as attorneys for the Ingraham Building in the Byte cases (the appellate and lower court cases) until nearly seven (7) months later on November 8, 1993. The following day, November 9, 1993, the Third District Court of Appeal issued an opinion whereby the Ingraham Building prevailed in the appeal taken by Byte. (Respondent/Vining's Exhibit 7; T. 4/11/97 at Page 73; Appx. 11-13)

At this stage of the proceedings, Vining was faced with a dilemma. The termination letter was dated April 14, 1993 does not

mention the pending appeal taken by Byte and Byte had already served its initial brief on March 30, 1993.

**Was the Ingraham Building's new attorney  
aware of the appeal taken by Byte?**

The Ingraham Building's new attorneys, Moises Grayson/the firm of Blaxberg, Grayson & Singer, P.A., have offices in the same building as Edward C. Vining, Jr. -- the Ingraham Building in downtown Miami<sup>1</sup>. Frequently, Grayson and Vining would run into each other in the Dade County Courthouse, in the lobby/elevators of the Ingraham Building and the garage where they both parked their cars. During these numerous encounters, Grayson asked Vining about the status of the Byte appeal at a time *well after* Vining had received the famous April 14, 1993 termination letter. Vining always gave Grayson a status report on the appeal. T. 4/11/97 at Page 224.

At page 16 of the transcript of the hearing held in the Bar proceedings on October 24, 1997, in the midst of testimony being given by Moises Grayson, the Referee made the following comment:

THE REFEREE: As far as one of the issues on attorney's fees, that is a matter of record at the hearing level, that both Grayson and Gusman knew of the appeal and that it was a matter of record at the hearing level and that Grayson did not move to substitute himself as a matter of probably deductive reasoning, by virtue of the fact that testimony was given in the appeal and no testimony was ever given that he substituted himself.

So this seems to be mildly repetitive.

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<sup>1</sup> In fact, Grayson's office is just down the hall from Robert Gusman's offices in the Ingraham Building's management office. T. 4/11/97 at Page 224.



Are there areas that the hearing officer is not already aware of that you want to ask questions about?

Robert Gusman candidly admitted that the April 14, 1993 termination letter directed to Vining did not mention the Byte appeal (T. 4/11/97 at Page 67) and also acknowledged that he signed a letter directed to the Florida Bar advising that he had settled the case (referring to the issues between the Ingraham Building and Vining and the Vining P.A.) and that he did not want to proceed any further. (T. 4/11/97 at Page 77; Vining's Exhibit 8; Appx. 31)

At T. 4/11/97, Page 97 Grayson testified as follows:

Q. Mr. Grayson, were you aware that Mr. Vining continued to represent the Ingraham Building after that letter of termination of April 14th, 1993?

A. Yes. In fact, I believe he handled the appeal and ultimately a decision was rendered and he was successful in the appeal.

Vining testified that he was working on the brief in the Byte appeal at or about the time that he received the April 14, 1993 termination letter. Vining testified about the fact that the April 14, 1993 termination letter came as a surprise to him, that he assumed that some other lawyer would be assigned to handle the appeal and that when he encountered Moises Grayson in the elevator, in the lobby, in the garage or on the streets, he inquired about the status of the Byte appeal. (T. 4/11/97 at Pages 220-224)

Q. When [Grayson] asked you how the appeal was doing, what was your response?

A. [by Vining] I gave him -- I said -- I told him where we were.

We filed a brief. I told him, I said, "We filed a brief and the answer brief."

Q. Did you tell [Grayson] what you thought your chances were on the appeal?

A. When I got the brief ready, the answer brief, I thought we had an excellent chance of prevailing because we had gone to a great deal of research in going to the legislative intent of the statute.

The 3-page opinion of the Third District Court of Appeal dated November 9, 1993 affirmed the lower court and went into great detail about the legislative history of the statute. (Appx. 11-13)

By separate order the appellate court awarded attorney's fees to the Ingraham Building in connection with the appeal.

The issue of the amount of attorney's fees for the appeal and the trial court and the issue of the termination letter and its bearing thereon

At the time the Ingraham Building sued the Edward C. Vining, Jr., P.A. for delinquent rent, the Ingraham Building still owed Vining, the individual, for the services he had provided in the two Byte cases (trial level and appellate). Vining, the individual, assigned his claims for attorney's fees/costs to the Vining, P.A. by assignments dated June 22, 1993 and February 8, 1994 (Appx. 8 and 9, respectively). The issues between the Ingraham Building and the Vining, P.A. were tried before a General Master, the Hon. John R. Farrell, who issued a report and recommendation

Later, in the Bar proceedings against Vining, General Master Farrell testified that he had entered a report (dated January 4, 1994) finding that the Vining P.A. was entitled to be compensated for services rendered to the Ingraham Building from April 14, 1993 (the date of the "termination" letter) through the date of when Grayson and his firm were finally substituted in Vining's place. (Appx. 14-15). At T. 4/11/97 at Pages 199-201, General Master Farrell stated that his findings in the suit brought by the Ingraham Building against the Vining P.A. were based in part upon the fact that,

... until the existing representation by counsel was replaced by substitute counsel, that the existing counsel of record had a duty and an obligation to take all appropriate steps to protect his client.

\* \* \*

You have to be specifically relieved by a Court order or you continue to have a responsibility. In the absence of a Court order relieving him of responsibility -- and I was not aware of any then or am I now -- he had a duty to protect and maintain and continue.

The report and recommendations of General Master Farrell dated January 4, 1994 were later confirmed and ratified by the court. The Vining P.A. later took appeal from that order but, as part of the general settlement of all issues between by the Ingraham Building, the Vining, P.A. and Vining, individually, (*including the Bar proceedings*), that appeal was dismissed. The Ingraham Building gave a general release to Vining and the Vining, P.A. dated April

22, 1996 (T. 4/11/97 at Page 43; Vining's Exhibit 1; Appx. 30) absolving Vining and the Vining P.A. of any further responsibility for fees, rent or otherwise.

In addition, the Ingraham Building obtained a judgment for attorney's fees against Byte International Corp. in the sum of \$15,750.00 (T. 4/11/97 at Page 111; Vining's Exhibit 9).

It is patently obvious that both the Ingraham Building's manager, Robert Gusman, and his new attorney, Moises Grayson, had firsthand knowledge that prior to the date of the April 14, 1993 termination letter, the Byte appeal was proceeding, was being handled by Vining and no other attorney came forward to take over the case. We also know that Robert Gusman and attorney Grayson had on-going knowledge of the progress of the Byte appeal and likelihood of success.

On November 8, 1993 -- nearly seven months after the date of the termination letter -- Grayson finally got around to filing motions for substitution of counsel in the Byte cases, one in the lower court and the other in the appellate court. (T. 4/11/97 at Page 232-233; Vining's Exhibits 14 and 15, respectively) The lower court entered an order of substitution on November 23, 1993 (T. 4/11/97 at Page 233; Vining's Exhibit 16). The Third District Court of Appeal entered an order allowing substitution on January 28, 1994 (T. 4/11/97 at Page 233; Vining's Exhibit 17).

On November 9, 1993, the day after Grayson filed his motions for substitution of counsel, the Third District issued an opinion upholding the lower court's ruling that the Ingraham Building was

entitled to an award of attorney's fees and costs. (Appx. 11-13)

It was obvious that both Robert Gusman and Grayson were not only aware of Vining's continued representation of the Ingraham Building in the Byte appellate matter, but gave their tacit approval.

For the Referee to recommend that Vining be found guilty of violating the code of professional responsibility in continuing to represent a client in an appeal after his services had been terminated under these circumstances as they transpired in this case is simply not supported by the evidence. The Florida Bar v. Garland, 651 So.2d 1182 (Fla. 1995)

Generally speaking, a Referee may take into consideration evidence such as trial transcripts and judgments from civil proceedings that they may deem relevant in resolving factual questions in Bar disciplinary proceedings.

This Bar proceeding was replete with evidence of the lawsuit filed by the Ingraham Building against the Vining P.A. where the same issues complained about in the Bar proceeding were tried by a General Master (Appx. 14-15; 16-22), confirmed by the circuit court, appeal taken and later voluntarily dismissed. In addition, while not binding on the Referee, the original complainant in these Bar proceedings, Robert Gusman on behalf of the Ingraham Building, gave a release of all issues in favor of both Vining the individual and the Vining P.A., satisfied various judgments against the Vining P.A., dismissed its appeal, advised the Bar of his wishes not to pursue his Bar complaint and otherwise settled all issues between

the parties. See The Florida Bar v. Rood, 583 So.2d 314 (Fla. 1993). The Referee must make findings and recommendations based upon a finding of clear and convincing evidence which are free of substantial doubts or inconsistencies. The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994); The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). While the Referee is not bound by prior decisions, if the Referee can take into consideration transcripts and matters of record in other cases, then the Referee should be persuaded by decisions by other finders of fact and trial judges. The Florida Bar v. Bustamante, 662 So.2d 689 (Fla. 1995)

The purpose of sanctions in a disciplinary proceeding is threefold, to wit: the judgment must be fair to society, must be fair to the attorney and sufficient to deter others from similar misconduct. The purpose of sanctions is not to punish but to rehabilitate. See The Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995) and The Florida Bar v. Maynard, 672 So.2d 530 (Fla. 1996). In The Florida Bar v. Thomson, 271 So.2d 758 (Fla. 1973) the Court held that:

This Court has also required that not only a wrong, but a corrupt motive be present to authorize disbarment.

There is no finding of any such corrupt motive in the case at bar.

On April 23, 1996, Robert Gusman, the person responsible for filing a complaint with the Bar in the first place, transmitted a letter to the Bar advising that all differences between the

Ingraham Building and Edward C. Vining, Jr. and the Edward C. Vining, Jr., P.A. had been amicably resolved and that the Ingraham Building did not wish to proceed any further with its complaint to the Bar. (T. 4/11/97 at Page 77; Respondent/Vining's Exhibit 8; Appx. 31).

Even in the face of the retraction of the complaint, the Bar nevertheless elected to prosecute. Certainly there are many valid complaints brought against lawyers for violation of the professional code or other misbehavior. However, it should be painfully obvious to the Bar and virtually every judicial officer in this State that when an ex-client is involved in a dispute with his attorney, frequently concerning fees, it is not uncommon for that client to lodge a complaint with the Bar in order to gain leverage over the situation regardless of whether the Bar complaint is well founded or not. The services of the Florida Bar with respect to complaints against attorneys are free to the public. So far as is known to Vining, no complaining party has ever been subject to any form of sanctions or penalties for bringing a spurious or unfounded complaint against an attorney. The only other more widespread practice by a client seems to be the customary filing of a counterclaim against the attorney for malpractice.

Ironically, Moises Grayson, the attorney who belatedly took over the Ingraham Building's representation, gave the following testimony before the Referee as follows:

Q. Mr. Grayson, did the [Ingraham] building suffer any harm as a result of Mr. Vining staying in the [Byte] appeal?

A. None, other than the attorney's fees, because he did win the appeal.

T. 10/25/97 at Page 17.

On cross-examination by the Bar, Mr. Grayson further testified as follows:

Q. Just to clarify, the damage to the [Ingraham] building was the liability for attorney's fees, is that correct? Is that what your testimony was?

A. I said there was no damage to the [Ingraham] building by Mr. Vining staying in the [Byte] appeal because he won the appeal, other than a bill for attorney's fees.

Q. The bill for attorney's fees --

A. That were part of the litigation.

Q. It caused Mr. Gusman or the building to hire a lawyer to dispute those fees, is that correct, that the building became liable for?

A. I'm not sure that's accurate. I would say we were already in litigation because of the rent and this came up by way of a defense to the rent.

Thus, the testimony of the Ingraham Building's own attorney should have been reason enough for the Referee to severely mitigate any finding of culpability on the part of Vining.

The Bar has not challenged the Referee's findings or recommendation that Vining be suspended for six months.

The Supreme Court has determined that in connection with the appropriate punishment to be given a lawyer, mitigation should be



considered. See Maynard, supra.

A review of the record before the Referee shows there is nothing to indicate that Vining was anything other than cooperative in these proceedings.

Also, Vining's character and reputation are excellent. The character witnesses who testified on behalf of Vining's character include two federal judges, a retired Dade County judge, two attorneys practicing in Dade County, Florida and an insurance company executive. Each of these witnesses themselves are known to be prominent, sober and reliable and have excellent reputations in their own right. The testimony presented by these witnesses supports Vining's own testimony that he acted properly. The calibre of these witnesses and their testimony should be considered sufficient mitigation.

In The Florida Bar v. Diamond, 548 So.2d 11074 (Fla. 1989), this Court stated that:

Were this conduct not extensively mitigated we would agree. But we cannot ignore the abundant character testimony from prominent, sober, and reliable witnesses. We find especially telling the fact that Judge Davis, who sat on Diamond's case, testified on Diamond's behalf.

On Vining's behalf appeared a federal appellate judge, the Hon. Peter T. Fay, a local federal district judge, the Hon. Shelby Highsmith, a retired Dade County Circuit Court judge, the Hon. Jack Turner, two prominent local attorneys, Cromwell A. Anderson and Hugh F. Culverhouse, Jr. and a local insurance executive, Lester

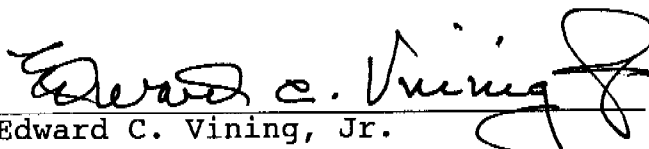
R. Johnson, Jr. Each of these individuals have known Vining either socially or professionally or both for a number of years (one for a period of 50 years) and had nothing but praise for his truth and veracity, dependability and legal talent.

The character testimony of the Hon. Jack Turner is found at T. 10/24/97 at Pages 4-13. The testimony of Lester R. Johnson, Jr. is found at T. 10/31/97 at Pages 3-13. The character testimony given by the Hon. Peter Fay, the Hon. Shelby Highsmith, Cromwell Anderson and Hugh Culverhouse, Jr. was accepted by the Referee into evidence by the filing of excerpts of testimony for consideration by the Referee at T. 10/24/97 at Page 4.

CONCLUSION

The Petitioner, Edward C. Vining, Jr., respectfully prays that this Honorable Court grant his Petition for Review and determine that the Referee's findings of fact and recommendations as embodied in the January 22, 1998 Order are unsupported by the record, are unjustified, erroneous or too severe especially in light of the rather unusual facts involved in this matter and the weighty mitigating circumstances.

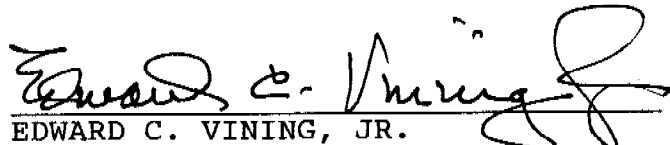
Respectfully submitted,

  
Edward C. Vining, Jr.

CERTIFICATE OF SERVICE

I CERTIFY that on June 19, 1998 a copy has been furnished by  
mail to the following:

The Florida Bar  
Suite M-100, Rivergate Plaza  
444 Brickell Avenue  
Miami, Florida 33131

  
EDWARD C. VINING, JR.  
25 S.E. Second Avenue, Suite 527  
Miami, Florida 33131  
Telephone: 305/374-7684  
Petitioner

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. 84,641

EDWARD C. VINING, JR.,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

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INDEX TO APPENDIX TO INITIAL BRIEF  
-----

| <u>Description</u>  | <u>Appx.</u> |
|---|--------------|
| ORDER (on review herein) entered by the Referee on January 22, 1998   | 1-7          |
| Letter from the Ingraham Building to Vining dated April 14, 1993 ("termination letter")   | 8            |
| Assignment dated June 22, 1993  | 9            |
| Assignment dated February 8, 1994   | 10           |
| Opinion of the Third District Court of Appeal in the appeal taken by Byte dated November 9, 1993  | 11-13        |
| Report of General Master and Notice of Filing entered January 4, 1994 by General Master John R. Farrell in the case of Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building vs. Edward C. Vining, Jr., P.A. | 14-15        |

Report of General Master and Notice of Filing entered August 19, 1994 by General Master John R. Farrell in the case of Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building vs. Edward C. Vining, Jr., P.A. 16-22

Judgment for Impleaded Party, Edward C. Vining, Jr. dated August 3, 1995 23-29

General Release dated April 22, 1996 from Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building in favor of Edward C. Vining, Jr., P.A. and Edward C. Vining, Jr. 30

Letter dated April 23, 1996 from the Ingraham Building to the Florida Bar 31

IN THE SUPREME COURT OF FLORIDA  
SUPREME COURT CASE NO. 85,235  
FLORIDA BAR CASE NO. 84-71,407 (11C)

THE FLORIDA BAR,

Complainant,

vs.

ORDER

EDWARD C. VINING, JR.,

Respondent.

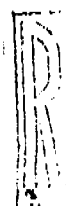
I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

- February 21, 1996
- December 13, 1996
- April 11, 1997
- July 25, 1997
- October 24, 1997
- October 31, 1997

The following attorneys appeared as counsel for the parties:

|                      |                    |
|----------------------|--------------------|
| For the Florida Bar: | Elena Evans        |
| 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:



JAN 29 1998

JAN 29 1998

1. The Respondent was at all times material to the above referenced complaint a member of the Florida Bar and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.
2. The Respondent is for the purpose of this proceeding the same as Edward C. Vining, P.A., hereinafter referred to as the Respondent.
3. Respondent, through the P.A. was a tenant of the Residuary Trust, D/B/A at the Ingraham Building, hereinafter referred to as the Building, (Transcript p.23).
4. Around January 1992, the Respondent and Mr. Gusman, as representative of the Building asked the Respondent for legal assistance in relationship to a problem with another tenant in the Building; Byte International, (hereinafter referred to as Byte) who was selling goods in contravention of the terms of their lease. (Transcript p.20 and 25).
5. Respondent was asked to write a letter to Byte to cease selling some particular goods. (Transcript p.20).
6. On or about February 7, 1992, Gusman on behalf of the Building and the Respondent entered into an agreement for representation as documented by the Florida Bar Exhibit, Number 1, in evidence, concerning the Byte matter. As Byte had not ceased selling goods, the Building wanted them evicted for breach of contract. (Transcript p.22).
7. The retainer agreement for representation in the Byte quoted the rate of \$350.00 per hour, but Gusman testified that he was assured that the Respondent would not actually charge that amount per hour and that amount was just to help pressure the tenant Byte. (Transcript p.23). Further Gusman testified that the quote of \$350.00 was a scare tactic. (Transcript p. 79).
8. In February of 1992, the Respondent was a tenant of the Building and owed rent to the Building in the approximate amount of \$13,000.00. (Transcript p.23-25).
9. Gusman testified that during the litigation against Byte, he conferred with the Respondent for an approximate total of two hours concerning the Byte matter. (Transcript p. 26). Gusman also testified that although he believed that he and the Respondent had spoken for no more than two hours on the case he received a bill which listed twenty-two hours of consultation with the client, Gusman as trustee for the building. Gusman testified that one date in particular was listed as a conversation with the client, which he knew would have been impossible because that date, October 6, was his birthday and he never comes to work on his birthday. (Transcript p.87).
10. Gusman testified that he eventually requested a bill from the Respondent in the



Byte matter and received that bill around April 1993, in the amount of \$26,025.58. (Transcript p.26-28).

11. In April of 1993, Gusman wrote to the Respondent and terminated Respondent's representation on behalf of the Building v. Byte. (Transcript p.30).

12. In the termination of representation letter of April 14, 1993, from Gusman to Respondent, Gusman requested delivery of all file documents relating to the Byte matter. (Transcript p.31 and Fla. Bar Composite Exhibit 1, Subsection B).

13. Shortly thereafter, Gusman retained the firm of Blaxberg, Grayson and Singer, specifically counsel Moises Grayson to take over the Byte matter from the Respondent. (Transcript p.31)

14. Grayson on behalf of the building in the matter of Byte wrote to Respondent on April 16, 1993, in an attempt to obtain the file the Respondent had on the Byte matter and asked for the opportunity to have the file photocopied. (Transcript p.93 and 94).

15. Grayson wrote again to the Respondent on July 13, 1993 to make a second request to copy the file. (Transcript p.95).

16. Unsuccessful in those efforts to secure a copy of the Byte file, Grayson filed a motion before Dade County Circuit Judge Goldman in the Ingraham Building v. Edward Vining, P.A. case, for a copy of the file, which motion was denied. (Transcript p.95).

17. Shortly after the denial of that motion, Respondent made a copy of the file and it was delivered to Grayson. (Transcript p.91).

18. Around April 1993, the Building filed a complaint against the Respondent suing for back rent owed in the approximate amount of \$32,154.00. (Transcript p.32-33). The Respondent countersued for legal fees in the Byte matter, including legal fees for work which occurred after the April 1993, termination of representation letter.

19. Respondent continued to represent the Building after April 1993, subsequent to the termination of representation letter sent by Gusman to the Respondent by pursuing an appeal before the Thrd District Court of Appeals on the issue of attorneys fees in the Byte matter. (Transcript p.72).

### **III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty:**

I recommend that the Respondent be found guilty of the violation of Rule 4-1.16, by

continuing to represent the Building after the April 1993, termination of representation letter. The Respondent had an obligation to notify the appellate court of his termination and should not have continued the appeal having been clearly notified by the client of his termination.

It is the further recommendation that the Respondent be found in violation of Rule 4-1.7(b) by representing the client in an appeal while he himself was being sued by and countersuing the client.

It is the further recommendation that the Respondent be found not guilty of being in violation of Rule 4-1.5, that the client was charged a clearly excessive fee.

It is the further recommendation that the Respondent be found guilty of failing to abide by the objectives of the client or consult with the client in the representation in this matter by continuing to pursue the appeal when he had been instructed by the client to terminate his representation, a violation of Rule 4-1.2(a).

**IV. Recommendation as to Disciplinary Measures to Be Applied, Mitigation and Aggravating Factors and Past Disciplinary Record:**

The referee is not aware of any diminished mental capacity or mental illness which impinged upon the Respondent's mental ability to know that he was discharged or know that he was being sued by the building owned by his client. The referee considered that the Respondent intentionally continued to represent the client after he had been discharged.

The referee considered the factor that the client suffered injury in that the respondent continued to represent the client after he had been discharged and used the hours he worked in pursuing the appeal to offset monies sued for back rent by the respondent's firm to the client's building. The fact that the Respondent prevailed at the appeal and was able to have fees awarded from the opposing party on behalf of the client, does not diminish the ethical violation. Fundamentally, the Respondent should not have continued in the proceedings because he had been discharged and was in an actual litigation with the client, himself.

In aggravation, the referee considered:

1. The Respondent has one prior disciplinary action against him, which was heard by this referee within the last year.
2. The Respondent had a self-serving motive by continuing the representation in the appeal; the billing of more hours to used as an offset in the suit by

the client for back rents owed by the Respondent's firm, to the client.

3. The Respondent refused to acknowledge that he was wrong in continuing the representation of the client.

4. The Respondent has substantial experience in the practice as an attorney.

*In mitigation, the referee considered:*

1. A number of respected members of the legal community, the business community and the judiciary have come forth and testified as to the good character of the Respondent, his abilities as an attorney and his reputation for truth and veracity.

I recommend that the Respondent be suspended from the practice of law for a period of six months and thereafter until Respondent shall prove rehabilitation as provided in Rule 3-5.1(e) Rules of Discipline.

**V. Statement of Costs and Manner in Which Cost Should be Taxed:**

|  |          |
|--|----------|
| Administrative fee.....  | \$750.00 |
| Court Reporter's attendance<br>and transcription of hearing<br>before Referee on 12/13/96.....                       | \$101.72 |
| Court Reporter's attendance<br>and transcription of deposition<br>of Grayson on 2/6/97.....                          | \$123.70 |
| Court Reporter's attendance<br>and transcription of depositions<br>of Lafontisee, Heller & Walker<br>on 2/11/96..... | \$120.60 |
| Court Reporter's attendance<br>and transcription of deposition of<br>General Master Farrell on 2/7/97.....           | \$103.60 |
| Court Reporter's attendance  |          |

and transcription of deposition of  
Jonathan Segal on 2/12/97.....\$ 86.85

Court Reporter's attendance  
and transcription of depositions of  
Nevins, Schausel, Kinght, Turner  
& McGuinness on 2/13/97.....\$292.50

Court Reporter's attendance  
and transcription of deposition  
of Armstrong on 2/14/97.....\$ 80.15

Court Reporter's attendance  
and transcription of hearing  
before Referee on 2/21/97.....\$183.65

Court Reporter's attendance  
and transcription of telephone  
conference before Referee on 2/25/97.....\$103.60

Court Reporter's attendance  
of hearing before Referee on 2/27/97.....\$ 50.00

Court Reporter's attendance  
and transcription of deposition  
Josefsberg on 3/31/97.....\$ 78.60

Court Reporter's attendance  
of hearing before Referee on 4/10/97.....\$ 50.00

Court Reporter's attendance  
and transcription of hearing  
before Referee on 4/11/97.....\$984.15

Excerpt transcript of deposition of  
Haber in Maurice Gusman Residuary  
Trust v. Vining on 4/19/94 invoice  
dated 2/14/97.....\$140.00

Court Reporter's attendance  
and transcription of hearing  
before Referee on 7/25/97.....\$123.70

Court Reporter's attendance

and transcription of hearing  
before Referee on 10/24/97.....\$127.05

Court Reporter's attendance  
and transcription of deposition  
of Lester Johnson on 10/28/97.....\$248.99

Court Reporter's attendance  
and transcription of hearing  
before Referee on 10/31/97.....\$127.10

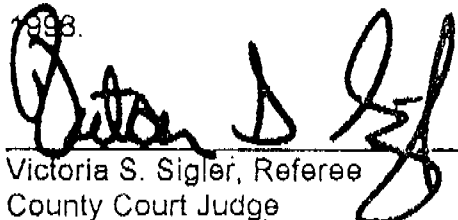
Staff Investigator's Costs.....\$1,191.36

\_\_\_\_\_

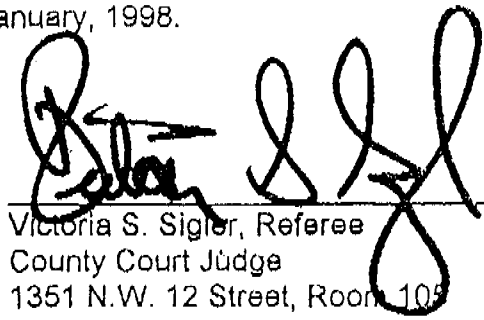
TOTAL.....\$5,067.32

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

Dated this 22 day of January, 1998.

  
\_\_\_\_\_  
Victoria S. Sigler, Referee  
County Court Judge

I HEREBY CERTIFY that a copy of the above report of referee has been served on Elena Evans, Bar Counsel for the Florida Bar, 444 Brickell Avenue, Suite M-100, Rivergate Plaza, Miami, Florida 33131, Louis Jepeway, Jr., Attorney for Respondent, at 19 West Flagler Street, Suite 407, Miami, Florida 33130 and Office of the Clerk, Supreme Court of Florida, Supreme Court Bldg., 500 South Duval Street, Tallahassee, Florida 32399-1927 this \_\_\_\_\_ day of January, 1998.

  
\_\_\_\_\_  
Victoria S. Sigler, Referee  
County Court Judge  
1351 N.W. 12 Street, Room 105  
Miami, Florida 33125



## INGRAHAM BUILDING

Modern downtown offices in a setting of old world charm.

25 S.E. Second Ave., Miami, Fla. 33131 • (305) 377-1669

April 14, 1993

HAND DELIVERED

Edward C. Vining, Jr., Esq.  
527 Ingraham Building  
25 S.E. 2nd Avenue  
Miami, Florida 33131

Re: Ingraham Building v. Byte International Corporation  
Case No. 92-00957  
Case No. 93-007021 (08)

Dear Mr. Vining:

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.

Very truly yours,

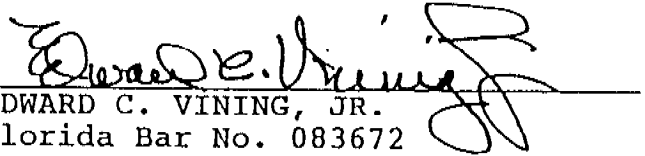
Robert M. Gusman

8

ASSIGNMENT

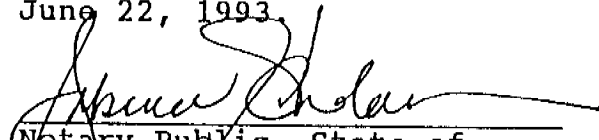
FOR VALUE RECEIVED, Edward C. Vining, Jr. assigns and transfers to Edward C. Vining, Jr., P.A., a Florida corporation, all of his right, title and interest in the account receivable from Maurice Gusman Residuary Trust Number 1 in connection with the attorney's fees and costs due and owing regarding Byte International Corporation. This assignment is effective as of June 22, 1993.

DATED at Miami, Dade County, Florida on this June 22, 1993.



EDWARD C. VINING, JR.  
Florida Bar No. 083672  
25 S.E. Second Avenue, Suite 527  
Miami, Florida 33131  
Telephone: 305/374-7684

SUBSCRIBED before me on this  
June 22, 1993.

  
Notary Public, State of  
Florida at Large

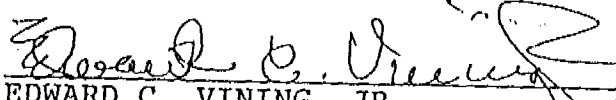
My commission expires:

OFFICIAL NOTARY SEAL  
SABINA R PHELAN  
NOTARY PUBLIC STATE OF FLORIDA  
COMMISSION NO. CC234415  
MY COMMISSION EXP. OCT. 13, 1996

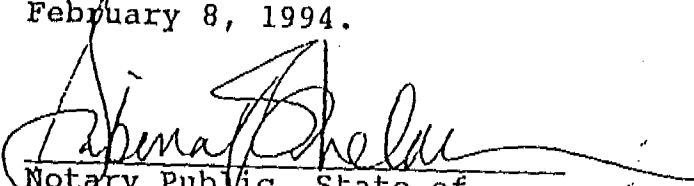
ASSIGNMENT

FOR VALUE RECEIVED, Edward C. Vining, Jr. assigns and transfers to Edward C. Vining, Jr., P.A., a Florida corporation, all of his right, title and interest in the account receivable from Maurice Gusman Residuary Trust Number 1 in connection with the attorney's fees and costs due and owing as a result of services rendered to Maurice Gusman Residuary Trust Number 1 in Third District Court of Appeal Case No. 93-00348 (Byte International Corporation as appellant). This assignment is effective as of December 29, 1993.

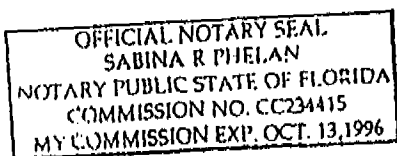
DATED at Miami, Dade County, Florida on this February 8, 1994.

  
EDWARD C. VINING, JR.  
Florida Bar No. 083672  
25 S.E. Second Avenue, Suite 527  
Miami, Florida 33131  
Telephone: 305/374-7684

SUBSCRIBED before me on  
February 8, 1994.

  
Notary Public, State of  
Florida at Large

My commission expires:



10



NOT FINAL UNTIL TIME EXPIRES  
TO FILE REHEARING MOTION  
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, A.D. 1993

|                                 |    |                 |
|---------------------------------|----|-----------------|
| BYTE INTERNATIONAL CORPORATION, | ** |                 |
| Appellant,                      | ** |                 |
| vs.                             | ** | CASE NO. 93-348 |
| MAURICE GUSMAN RESIDUARY TRUST  | ** |                 |
| NUMBER 1, etc.,                 | ** |                 |
| Appellee.                       | ** |                 |

Opinion filed November 9, 1993.

An appeal from a non-final order of the Circuit Court for  
Dade County, Melvia B. Green, Judge.

Brian S. Heller, for appellant.

Edward C. Vining, Jr., for appellee.

Before NESBITT, JORGENSON, and GERSTEN, JJ.

PER CURIAM.

Byte International Corporation (Byte) appeals an award of  
attorney's fees and costs to the Maurice Gusman Residuary Trust in  
an action by the Gusman Trust, acting as landlord, to recover  
possession against the tenant Byte pursuant to section 83.231,

//

Florida Statutes (1991). Money damages were neither sought nor awarded. Byte challenges the award of attorney's fees and costs on the ground that the statute, in derogation of the common law, does not authorize attorney's fees unless both possession and money damages are awarded. We agree with the trial judge's ruling, and affirm the award of attorney's fees and costs.

Section 83.231 provides in part:

If the issues are found for plaintiff, judgment shall be entered that he recover possession of the premises. In addition to awarding possession of the premises to the plaintiff, the court shall also direct, in an amount which is within its jurisdictional limitations, the entry of a money judgment in favor of the plaintiff and against the defendant for the amount of money found due, owing, and unpaid by the defendant, with costs . . . . [T]he plaintiff in the judgment for possession and money damages may also be awarded attorney's fees and costs. (emphasis added).

Courts may construe "and" as "or" in statutes where a construction based on the strict reading of the statute would lead to an unintended or unreasonable result and would defeat the legislative intent of the statute. Winemiller v. Feddish, 568 So. 2d 483, 485 (Fla. 4th DCA 1990). Following the reasoning of Winemiller, we see no reason why the word "and" used in the statute should not be given the meaning "or" in the circumstances of only recovering possession of real property and not also recovering money damages. Such a construction is entirely in accord with the legislative history of the enactment of this particular statute. The debate before the Florida House of Representatives on the final passage of section 83.231, Florida Statutes (1991) reflects this construction:

Representative Renke: Under Section 1 on page 2 of the bill, the Florida Statute 83.231 provides that "the plaintiff in the judgment for possession and money damages may also be awarded attorney's fees and costs." Is the intent of that to allow the plaintiff to recover attorney fees in the case where he only goes for a judgment of possession, even if he is not seeking money costs?

Representative Drage: I believe that the intent of this bill -- and I'll stand corrected if Mr. Cosgrove disagrees -- is to make sure that attorney's fees will be awarded either in the case eviction without money damages is involved or in the case where there is an eviction with money damages involved.

The legislative history of the adoption of a statute may be judicially noticed by the court to clarify ambiguity and illuminate the judiciary as to legislative intent. Amos v. Moseley, 74 Fla. 555, 77 So. 619 (1917). Here, legislative intent clearly includes permitting a landlord to recover attorney's fees from a tenant pursuant to a judgment for possession only or pursuant to a judgment for possession and money damages.

Accordingly, the order of the trial court awarding attorney's fees and costs is affirmed.

MAURICE GUSMAN RESIDUARY  
TRUST NUMBER 1 D/B/A  
THE INGRAHAM BUILDING

PLAINTIFF

EDWARD C. VINING, JR., P.A.  
A FLORIDA CORPORATION

DEFENDANT

IN THE CIRCUIT COURT OF THE 11TH  
JUDICIAL CIRCUIT IN AND FOR DADE  
COUNTY, FLORIDA

CASE NO. 93-07285 (30)

REPORT OF GENERAL MASTER  
AND NOTICE OF FILING

THIS MATTER came before the undersigned, pursuant to an Order of Referral previously entered and upon review of memoranda submitted by the parties and authorities cited, the following findings and recommendations are made with respect to Plaintiff/Counter-Defendant's Motion to Determine that Defendant Vining is Not Entitled to Attorney Fees After Discharge, including fees related to appeal in the Byte case:

1. Defendant/Counter-plaintiff is found and determined to be entitled to attorney fees for the performance of legal services on behalf of Maurice Gusman Residuary Trust No. 1, D/B/A The Ingraham Building, from and after April 14, 1993 until the date on which substitution of counsel occurred, viz., November 23, 1993.

2. In the absence of express agreement defining or quantifying the attorney fees mentioned above in paragraph 1, said attorney fees shall be determined upon the standards of quantum meruit, subject to appropriate presentation of satisfactory evidence and proofs defining the scope of undertakings, reasonableness thereof, quality of results/ outcome and all other properly considered matters related thereto.

WHEREFORE the undersigned files this Report with the Office of

14

the Clerk of the Court..

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this date to Edward C. Vining, Jr., Blaxberg Grayson & Singer, P.A.

DATED at Miami, Dade County, Florida, this 4 day of January, 1994.

\_\_\_\_\_  
JOHN R. FARRELL

GENERAL MASTER

MAURICE GUSMAN RESIDUARY  
TRUST NUMBER 1 D/B/A  
THE INGRAHAM BUILDING

IN THE CIRCUIT COURT OF THE 11TH  
JUDICIAL CIRCUIT IN AND FOR DADE  
COUNTY, FLORIDA

PLAINTIFF(S) GENERAL JURISDICTION DIVISION

VS

CASE NO. 93-7285 (30)

EDWARD C. VINING, JR., P.A.  
A FLORIDA CORPORATION

REPORT OF GENERAL MASTER  
AND NOTICE OF FILING

DEFENDANT(S)

---

THIS MATTER came before the undersigned pursuant to an Order of Court dated September 7, 1993 and a further Order dated April 25, 1994. An evidentiary hearing/trial was held on May 3, 1994, July 19, 1994 and July 20, 1994. After hearing testimony of witnesses, receiving and reviewing evidence, and hearing argument of counsel, it is

FOUND AND RECOMMENDED as follows:

This matter was originally referred for a determination pursuant to the Court's Order of September 7, 1993 for the following limited matters:

" a. What is the correct amount of the set-off (if any) that is due as a result of the attorneys fees being claimed by Edward C. Vining, Jr. (which have been assigned to the Defendant corporation).

b. What are the reasonable attorneys fees that are due to Plaintiff's attorneys in connection with this action.

c. Is the Defendant corporation entitled to set-off of attorneys fees for attorneys fees incurred by Edward C. Vining, Jr after he was discharged by Plaintiff."

A subsequent Order dated April 25, 1994 was entered referring the issue of Attorney's Fees/Costs Due to Defendant's Attorney in connection with this action, together with the issue of Defendant/Counter-claimant's entitlement to attorney's fees and for the defense of the complaint and the prosecution of its counterclaim in this action.

GUSMAN V VINING (93-7285 CA 30)

The initial matter submitted for determination was the Plaintiff's action for breach of the original lease dated December 1, 1986 which was extended by means of "Extension of Lease Between Ingraham Building and Edward C. Vining, Jr., P.A., a Florida Corporation". (Px-1). While there is no dispute between the parties that the rents are owed, there is a dispute as to the amounts due and owing the plaintiff. The evidence and testimony received supports a finding that the defendant has failed to pay rent for the leased premises in the following amounts:

|                           |                    |          |                     |
|---------------------------|--------------------|----------|---------------------|
| July 1992:                | \$791.16 paid      | Bal. Due | \$ 1,370.54         |
| August 1992-November 1992 | (4 mo. @\$2161.70) |          | \$ 8,646.80         |
| December 1992-August 1993 | (9 mo. @\$2236.25) |          | <u>\$ 20,126.25</u> |
| TOTAL UNCOLLECTED RENTS:  |                    |          | \$ 30,143.59        |

Paragraph 3 of the lease in question (Px-1) also provides that the plaintiff is entitled to "...interest at the rate of 1 1/2% per month from the time any rental payment is due and not paid until the time it is paid." The plaintiff is, accordingly, also entitled

calculated

to interest on the outstanding sums/pursuant to that provision.

There is no claim made by the plaintiff in its complaint, and no provision in the lease that the plaintiff is entitled to sales tax due on rents owed. It would appear that a sales tax is imposed upon and in addition to the amount of the rentals charged by the lessor pursuant to Fla. Stat. §212.031. That such statute imposes the tax upon a lessee (rather than lessor) is no longer an open question. Schnurmacher Holding, Inc. v Noriega, 542 So. 2d 1327 (Fla. 1989). Nor is there any question that the lessor is the State's collecting agent with a concomitant duty to remit the proceeds to the State. Fla. Stat. §212.031(3).

Notwithstanding the foregoing, there nonetheless exists a minimal requirement that such an involuntary extraction through the process of litigation be stated and claimed if the tax is sought to be recovered in such litigation. Entirely absent from the complaint herein, and wholly unmentioned in the subject lease sued upon, due process would be denied a defendant without reasonable notice and an opportunity to be heard and defend against the same on such grounds as may be available to it.

Absent any claim made for the unmentioned sales tax, discussion is unnecessary as to whether such a claim need be formally structured for the use and benefit of the State; nor, indeed, whether such a collection claim need be through the foreclosure of lien pursuant to Fla. Stat. §212.031(4).

BLAXBERG, GRAYSON & SINGER, P.A.

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### ENTITLEMENT TO FEES ON ORIGINAL CLAIM

As a result of the successful prosecution of its claim of entitlement to back rents, the plaintiff is entitled, pursuant to the lease, to attorneys fees and costs.

Evidence and testimony was received to support such a claim of entitlement and the amount of same. (Px-3). Based on the testimony and evidence, the plaintiff is entitled to its reasonable attorneys' fees (inclusive of paralegal's) in the amount of \$17,505.00, which includes 17.5 hours of trial time at the rate of \$175.00 per hour for Moises T. Grayson.

It is further determined that the plaintiff is entitled to recover its costs incurred in this matter, the specific amount of which may be assessed at a separate, subsequent hearing.

### COUNTERCLAIM

Upon conclusion of the plaintiff's main case, the defendant presented its counterclaim. The following findings are made with respect to same.

The defendant/counter-plaintiff filed a counterclaim for attorneys fees alleged to be due and owing as a result of legal services performed for the plaintiff in an unrelated matter. The counterclaim was ruled to be in the nature of a permissive counterclaim. Submitted into evidence as DX-B and C were Assignments from Edward C. Vining, Jr., to Edward C. Vining, Jr., P.A. Said assignments give over Vining's "... right, title and interest in the account receivable from Maurice Gusman Residuary

Trust Number 1 in connection with the attorney's fees and costs due and owing as a result of services rendered to Maurice Gusman Residuary Trust Number 1 in Third District Court of Appeal Case #93-00348 (Byte International Corporation as appellant)." (Dx-B) to the Vining, P.A; as well as "all of his right, title and interest in the account receivable from Maurice Gusman Residuary Trust Number 1 in connection with the attorney's fees and costs due and owing regarding Byte International Corporation." (Dx-C). It is by reason of said Assignments that the Defendant/counter-plaintiff Vining, P.A., is entitled to assert a counterclaim herein.

#### TRIAL COURT

Entitlement to fees as to the Gusman v Byte matter, 11th Judicial Circuit, Dade County, Florida, Case No. 92-7021 (08) was presented by the counterclaimant on a theory of quantum meruit. Based upon the evidence received in this regard, it is the finding of the undersigned that Edward C. Vining, Jr., P.A. is entitled to fees at the rate of \$225 per hour for a total of forty (40) hours for a total of \$9,000.00. See: Quayside v Triefler, 506 So. 2d 6 (Fla. 3rd DCA 1987).

#### APPEAL

By prior Order of Court adopting the Report of General Master dated January 4, 1994, it was earlier determined that:

- "1. Defendant/Counterplaintiff is found and determined to be entitled to attorney fees for the performance of legal services on behalf of Maurice Gusman Residuary Trust No. 1, D/B/A The Ingraham Building,

from and after April 14, 1993 until the date on which substitution of counsel occurred, viz., November 23, 1993.

2. In the absence of express agreement defining or quantifying the attorney fees mentioned above in paragraph 1, said attorney fees shall be determined upon the standards of quantum meruit, subject to appropriate presentation of satisfactory evidence and proofs defining the scope of undertakings, reasonableness thereof, quality of results/outcome and all other properly considered matters related thereto."

Accordingly, it is further found that Edward C. Vining, P.A. is entitled to fees in the appellate proceedings Byte International Corp. v Maurice Gusman, Third District Court of Appeals, Case No. 93-348. (Px/CtrD EX 7 and 8). Counterplaintiff Vining P.A.'s evidence reported expenditure of 54 hours at a rate of \$350 per hour (\$18,900). Nevertheless, the total fee originally requested for appellate representation had been tendered as \$7500. See: Department of Natural Resources v Gables By The Sea, 374 So. 2d 582, 585 (Fla.3rd DCA 1979) (Fees should not exceed the valuation placed upon services by the attorneys who performed the Services.)

It is therefore found that the appellate fees should be assessed at \$6750 which is amply supported by a reasonable amount of time (30 hours) at a rate of \$225.00 per hour.

The Defendant/ Counter-claimant has moved for an award of fees based upon successful prosecution of the counterclaim. In the absence of contractual or statutory bases to support such claim, this claim was earlier denied by Report of General Master dated July 7, 1994 which said report is hereby ratified, readopted and

incorporated by reference.

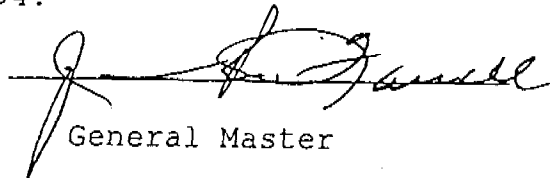
Jurisdiction is reserved for assessment of costs upon proper notice.

Exhibits may be retrieved by the offering party from the office of the undersigned for retention pending further Order of the Court.

WHEREFORE, the undersigned files this Report with the Office of the Clerk of the Court.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this date to: Moises T. Grayson, 25 SE 2nd Avenue, Miami, FL 33131; Edward C. Vining, Jr., P.A., 25 SE 2nd Avenue, Miami, Fl 33131.

DATED at Miami, Dade County, Florida, this 19<sup>th</sup> day of August, 1994.

  
General Master

IN THE CIRCUIT COURT OF THE IITH  
JUDICIAL CIRCUIT IN AND FOR DADE  
COUNTY, FLORIDA

MAURICE GUSMAN RESIDUARY  
TRUST NUMBER 1 d/b/a  
THE INGRAHAM BUILDING,

Plaintiff,

vs.

EDWARD C VINING, JR., P.A.,  
a Florida corporation,

Defendant.

General Jurisdiction Division

Case No. 93-07285 CA 30  
(Judge Goldman)

JUDGMENT FOR IMPLEADED PARTY, EDWARD C. VINING, JR.

THIS CAUSE came before the Court on July 19, 1995 pursuant to the Order Granting Plaintiff's Motion for Supplementary Proceedings Motion for Impleader of Third Party dated April 11, 1995. After hearing argument of counsel, testimony of Plaintiff's witnesses and the impleaded Defendant, and reviewing memoranda of law and evidence submitted, the Court finds as follows:

a) The Court heard testimony that Edward C. Vining, Jr., individually, had been a tenant of the Plaintiff, Maurice Gusman Residuary Trust Number 1 d/b/a The Ingraham Building (hereinafter referred to as "The Ingraham Building") for a number of years prior to the execution of the 1986 lease between Plaintiff and Edward C. Vining, Jr., P.A., a professional association formed on December 1, 1986. That professional association entered into a five-year lease with "The Ingraham Building" which is owned by Plaintiff. That five-year lease was signed on behalf of the Plaintiff by its then-manager, Bruce Gusman. During the term of that lease, the individual, Edward C. Vining, Jr., conducted his law practice from the subject premises with the full knowledge of the Plaintiff and its manager/agent.

From: Blazberg, Grayson & Slager P.A.  
Copy To: MTB, B. Gusman, K. [unclear]

Sent On: \_\_\_\_\_ . 19 \_\_\_\_  
By: \_\_\_\_\_

b) The rent due under that 1986 lease was paid during the entire five-year term by using checks drawn on the account of Edward C. Vining, Jr.

c) Testimony further revealed that in 1988, and during the term of the five-year lease, the Ingraham Building filed a prior suit against Edward C. Vining, Jr., P.A. for rent arrears. That suit was eventually resolved and dismissed.

d) With the aforesaid information known to the Plaintiff's manager/agent and a time when all rents were paid under the original 1986 lease and some three months after the expiration of that 1986 lease, the Plaintiff entered into an extension of that lease with Edward C. Vining, Jr., P.A. in March of 1992. The lease extension was signed on behalf of the Ingraham Building by Robert Gusman as agent and on behalf of Edward C. Vining, Jr., P.A. by Edward C. Vining, Jr., as president.

e) In 1993 Plaintiff again filed suit against Edward C. Vining, Jr., P.A. for arrears in rent. After credit was given to the Defendant P.A. for certain off-sets, a judgment was entered against Edward C. Vining, Jr., P.A. on November 1, 1994 in the sum of \$36,194.73 which Plaintiff now seeks to collect. It appears that Plaintiff is dissatisfied with the course of litigation it elected to follow and these instant proceedings are brought in an attempt to implead an individual party to rectify Plaintiff's prior decision.

f) The Plaintiff has alleged that the impleaded individual, Edward C. Vining, Jr., is one and the same as Edward C. Vining,

Jr., P.A., and is in fact the alter ego of that professional association. In support of that position, Bruce Gusman and Robert Gusman, (the former manager and present manager of The Ingraham Building, respectively) testified that they were unaware of any difference or distinction between the professional association known as Edward C. Vining, Jr., P.A., and the individual, Edward C. Vining, Jr., even though the relationship between the Ingraham Building and the individual, Edward C. Vining, Jr., spans a fifteen-year period.

g) However, further testimony from these witnesses indicates otherwise. Sometime during the term of the 1986 five-year lease between the P.A. and the Plaintiff, Plaintiff's then-manager, Bruce Gusman, used the professional services of Edward C. Vining, Jr., individually, as an attorney in connection with some of Bruce Gusman's personal legal matters. During the second five-year period of the lease commencing in March of 1992, the new building manager, Robert Gusman, employed the services of the individual, Edward C. Vining, Jr., to perform certain legal services on behalf of the Plaintiff in evicting a tenant (Byte International Corporation). Robert Gusman signed a retainer agreement for those legal services with Edward C. Vining, Jr., the individual, and all the while the Ingraham Building continued to accept rent checks that were not drawn on a P.A. account. These checks were credited to the rental account of Edward C. Vining, Jr., P.A. When Robert Gusman eventually terminated the services of Vining as the attorney for the Ingraham Building in the Byte International Corporation

matter, Mr. Gusman directed the letter of discharge to Edward C. Vining, Jr., individually.

h) The evidence shows that the manager, Robert Gusman, served three-day notices directed to Edward C. Vining, Jr., P.A. on at least 8 occasions.

i) The name of the occupant of the subject leased premises, Suite 527, Ingraham Building, is listed on the Ingraham Building's lobby directory as Edward C. Vining, Jr. The sign on the door identifies the occupant of Suite 527 in the Ingraham Building as Law Offices of Edward C. Vining, Jr. The fabrication of these signs is done by The Ingraham Building for its tenants.

j) The actions of the Plaintiff, through its agents/managers, belie the testimony of Bruce Gusman and Robert Gusman that they did not perceive a difference between Edward C. Vining, Jr., P.A. and Edward C. Vining, Jr., the individual. Therefore, the testimony of the building managers, Bruce Gusman and Robert Gusman, is found to be not credible and the Court gives no weight to their testimony. The Plaintiff, through its agents/managers, had full knowledge of the activities of both the Edward C. Vining, Jr., P.A. and of the individual, Edward C. Vining, Jr., who maintained a law office in the subject premises.

k) Plaintiff elected to sue Edward C. Vining, Jr., P.A. and received a money judgment; Plaintiff should not now be heard to complain that an individual should be impleaded because Plaintiff has found that the corporation does not have sufficient corporate assets to pay that judgment.



l) The Plaintiff could have required that the impleaded Defendant guarantee the rent called for under the lease extension that was executed on or about March of 1992 but Plaintiff elected to forego and forebear that option based upon the Defendant corporation's favorable performance in the payment of its rent over the five-year term of the original 1986 lease.

m) Testimony of the managers/agents, Bruce and Robert Gusman, revealed that the Ingraham Building has numerous leases with corporate entities but as a general rule they do not perform an investigation or inquiry into a corporate tenant's finances, assets or background.

n) The greater weight of the evidence leads to the conclusion that Plaintiff, through its managers/agents, was well aware of the difference between its tenant, Edward C. Vining, Jr., P.A., and Edward C. Vining, Jr., the individual.

o) Edward C. Vining, Jr., P.A. operated in a bona fide manner and caused rent to be paid for a period of five years under the original December, 1986 lease and for two years under the lease extension dated in March of 1992. At the time of the trial of this cause, except for a period of about one year period when the rent was not paid and the Plaintiff opted to sue the Defendant corporation to obtain a judgment, the rent was paid and remained current up to the date of this trial in July of 1995.

p) The corporate entity known as Edward C. Vining, Jr., P.A. was not organized or used to mislead creditors or to perpetrate a fraud upon any creditor or for any other illegal purpose nor was

it used as a means to evade liability; therefore, the corporate veil will not be pierced.

q) Plaintiff further failed to present evidence or testimony that the impleaded individual, Edward C. Vining, Jr., should act as a guarantor for the payment of the judgment which Plaintiff holds against Edward C. Vining, Jr., P.A.

r) Plaintiff cited the case of USP Real Estate Investment Trust v. Discount Auto Parts, 570 So.2d 386 (Fla. 1st DCA 1990) wherein the plaintiff/landlord was kept in the dark concerning the relationship of the lessee and subsequent assignments until the premises were abandoned. The facts of this instant case, however, demonstrate that Plaintiff, through the testimony of its agents/managers Bruce Gusman and Robert Gusman, was fully aware of the distinction between Edward C. Vining, Jr., P.A. and Edward C. Vining, Jr., the individual. Edward C. Vining, Jr., P.A. fulfilled its obligations under the first five-year lease. When the time arose for a renewal or renegotiation of that lease, Plaintiff had every opportunity to require either a personal guarantee for the lease payments or to exercise its right to evict the tenant if the rent was not paid. In this case there was nothing hidden from the Plaintiff, no attempt was made by the Defendant to deceive or evade a creditor and therefore Plaintiff is not entitled to pierce the corporate veil of Edward C. Vining, Jr., P.A.

s) The formation of Edward C. Vining, Jr., P.A. was a proper utilization of the laws of the State of Florida and the corporate veil will not be pierced because Plaintiff has failed to prove any

illegal, fraudulent or other unjust purpose on the part of the corporation.

t) That Edward C. Vining, Jr. is not the alter ego of Edward C. Vining, Jr., P.A.

It is therefore ORDERED and ADJUDGED as follows:

1. Plaintiff's Motion for Impleader of Third Party is denied.

2. Plaintiff's Motion for Proceeding Supplementary to Execution and Appointment of a Receiver is denied.

3. That the cause of action against Edward C. Vining, Jr., individually, is dismissed with prejudice, a judgment is entered in favor of Edward C. Vining, Jr. against Plaintiff Maurice Gusman Residuary Trust Number 1 d/b/a The Ingraham Building on its motion for impleader.

4. The Court reserves ruling for the purpose of awarding attorney's fees and costs to improperly impleaded Defendant, Edward C. Vining, Jr., individually, under the prevailing party rule.

DONE and ORDERED at Miami, Dade County, Florida on this  
3 day of August, 1995.

MURRAY GOLDMAN

CIRCUIT COURT JUDGE  
Hon. Murray Goldman

Copies furnished:  
Edward C. Vining, Jr., Esq.  
Blaxberg, Grayson & Singer, P.A.

GENERAL RELEASE

KNOW ALL MEN BY THESE PRESENTS that Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building, party of the first part, for an in consideration of the sum of \$10.00, or other valuable considerations, received from or on behalf of Edward C. Vining, Jr., P.A. and Edward C. Vining, Jr., parties of the second part, the receipt whereof is hereby acknowledged, has remised, released, acquitted, satisfied and forever discharged the said Edward C. Vining, Jr., P.A. and Edward C. Vining, Jr., of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which said party of the first part ever had, now has, or which any personal representative, successor, heir or assign of said first party, hereafter can, shall or may have, against said parties of the second part, for, upon or by reasons of any matter, cause or thing whatsoever, from the beginning of the world to the date of the present, except for the obligations which arise after the date hereof and are created by and set forth in the Lease Agreement dated December 1, 1986 and Extension of Lease Agreement dated December 1, 1991 by and between Edward C. Vining, Jr., P.A. and the Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

Signed, Sealed and Delivered in the Presence of:

Maurice Gusman Residuary Trust  
No. 1 d/b/a The Ingraham  
Building

By: [Signature]  
Robert Gusman, Manager/Agent

[Signature]

Printed Name of Witness

[Signature]

Printed Name of Witness

STATE OF FLORIDA

COUNTY OF DADE

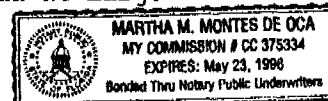
I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the state and county aforesaid to take acknowledgements, appeared Robert Gusman as Manager/Agent of the Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building, and s/he executed the foregoing instrument and acknowledged before me that s/he executed same.

WITNESS my hand and official seal in the County and State aforesaid on this about April, 1996.

[Signature]  
Notary Public,  
State of Florida at Large

Personally known, or

Produced ID: \_\_\_\_\_



This instrument prepared by:  
Edward C. Vining, Jr.  
25 S.E. Second Avenue, #527  
Miami, Florida 33131

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## INGRAHAM BUILDING

Modern downtown offices in a setting of old world charm.

25 S.E. Second Ave., Miami, Fla. 33131 • (305) 377-1669

April 23, 1996

THE FLORIDA BAR  
Attn: Elena Evans, Esquire  
Assistant Staff Counsel  
Suite M-100, Rivergate Plaza  
444 Brickell Avenue  
Miami, Florida 33131

Re: *Complaint by Ingraham Building/Robert M. Gusman  
against Edward C. Vining, Jr.*  
Florida Bar File Number: 94-71,407(11C)

Dear Ms. Evans:

As you know, I filed the above referenced Bar Complaint against Edward C. Vining, Jr.

All disputes between Edward C. Vining, Jr., the Edward C. Vining, Jr. P.A. and the Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building and myself have been resolved and settlement documents and general releases have been executed. One of these disputes involves the above referenced Bar Complaint.

Mr. Vining is a tenant in the Ingraham Building and in view of the fact that all disputes between us have been amicably concluded, I am informing you that neither I nor the Maurice Gusman Residuary Trust No. 1 d/b/a The Ingraham Building wish to proceed any further with the Bar Complaint.

Please advise if you need any further information, otherwise, please consider this matter closed.

Sincerely,

Robert Gusman,  
Manager

cc: Edward C. Vining, Jr., Esquire

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