047

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. 85,235

EDWARD C. VINING, JR.,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.
_____/

ON PETITION FOR REVIEW

REPLY BRIEF OF PETITIONER

EDWARD C. VINING, JR.
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Miami, Florida 33131
Telephone: 305/374-7684
Petitioner

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TABLE OF AUTHORITIES

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"

5) The Respondent herein (Petitioner below), The Florida Bar, will be referred to as the "Bar."

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 Vining's initial brief will be designated as "Appx."

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.

The Bar has re-framed Point I by stating that Vining cannot avoid responsibility for ethical violations by utilizing the Vining, P.A. as a shield.

Under Point I, Vining urged this Court to examine paragraph 2 of the January 22, 1998 order wherein the referee found that for the purposes of these proceedings, the Edward C. Vining, Jr., P.A. and Edward C. Vining, Jr. were one the same.

Nothing could be further from the truth and there is absolutely no evidence before the Court either documentary evidence or testimony that would even suggest that Vining ever practiced law under a P.A. or that he ever used that P.A. as a shield.

The two cases cited by the Bar totally miss the point in that the Vining, P.A. and Vining the individual *are not* one and the same.

The Bar cites In Re the Florida Bar, 133 So.2d 554 (Fla. 1961) which stands for the proposition that the corporate entity could not be permitted to protect the unfaithful or the unethical.

There is no claim that the Edward C. Vining, Jr., P.A. ever did anything that was unethical in any fashion whatsoever or that

Vining was attempting to use the P.A. to escape some of the disciplinary rules.

Additionally, the Bar cites Corlett, Killian, Hardeman, McIntosh and Levy, P.A. v. Merritt, 478 So.2d 828 (Fla. 3rd DCA 1985) that stands for the proposition that lawyers practicing as a professional corporation are governed by the ethical standards contained in the code of professional responsibility.

Corlett involves the appeal of a lower court decision requiring the corporation to buy back the stock of members who had terminated their relationship with the corporation (that lower court decision was reversed).

In the instant case, the Edward C. Vining, Jr., P.A. did not engage in the practice of law, did not file with the Florida Bar true copies of the articles of incorporation and did not file any initial report or annual reports as called for by the rules of the Florida Bar.

The Vining, P.A. entered into a lease with the Ingraham Building as lessee and had no other relationship with the Ingraham Building other than as a mere tenant.

Additionally, that issue was litigated in the trial court in the circuit court of Dade County at a time when the Ingraham Building, through its lawsuit against the Vining, P.A., sought to pierce the corporate veil in an attempt to prove that the Vining, P.A. and Vining, the individual, were one and the same and were alter egos. On August 3, 1995 the lower court trial judgment entered a judgment in favor of Vining, *the individual*, against the

Ingraham Building on that very issue, made very specific findings to the contrary and, in fact, found that Edward C. Vining, Jr. *was not* the same as the Edward C. Vining, Jr., P.A., that they were separate and distinct entities. (Appx. 23-29).

Apparently, the Referee with no basis in fact or in the record has taken great latitude in tying Edward C. Vining, Jr., the individual, to the corporate entity of Edward C. Vining, Jr., P.A. and then treating them as one and the same entity which is contrary to the evidence, testimony and the prior determination by the trial court.

The Referee's finding is in error and that view has permeated the balance of the Referee's findings being considered by this Court.

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 Bar urges that Vining be suspended for six months for failing to abide directions from a client, complains that Vining continued to represent the Ingraham Building in a matter taken to the Third District Court of Appeal and opines that it makes no difference whether Moises Grayson [the new attorney for the complaining witness] knew -- or didn't know -- of the status of the appeal at all times and the fact that legal services were being performed by Vining.

The Bar further suggests that by continuing to work on the appeal, Vining was attempting to obtain a larger attorney fee; the fact that the complaining witness, Robert Gusman/Ingraham Building, did not wish to proceed with the Bar complaint was of no importance and that the findings, rulings and recommendations of the General Master who presided over the litigation brought by the Ingraham Building against the Vining, P.A. are not binding upon the Bar and, in fact, the Bar is privileged to ignore them.

Generally speaking, the Bar takes the position that once a perceived violation of the Bar rules occurs, the complaining witness cannot withdraw his complaint, may not settle the case with the attorney and have the Bar complaint dropped and that although

the complaining witness litigated with Vining using a new attorney, that the rulings made by the General Master in the trial court are not binding upon the Bar and, essentially, one cannot "un-ring the bell."

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.* entered an order awarding attorney's fees and costs. Eight days later on February 17, 1993, Byte took an appeal to the Third District Court to review that order. Byte served its initial brief on March 30, 1993 upon Vining who was the attorney of record for the Ingraham Building. Two weeks later on April 14, 1993, Vining received the letter discharging him. (Bar's Exhibit 1; T. 4/11/97 at Page 22). That discharge letter is defective and confusing in that it refers to two case numbers, neither of which is the appellate case filed by Byte in the Third District Court of Appeal which is the crux of the Bar Complaint. The letter makes no reference to the pending appeal being pursued by Byte. Two days after the famous April 14, 1993 discharge letter, on April 16, 1993 Moises Grayson wrote a letter to Vining requesting certain files. Point II of Vining's initial brief details the on-going contact between Grayson, as the Ingraham Building's new attorney, and Vining regarding the progress of Byte's appeal against the Ingraham Building which was being handled by Vining with the knowledge and consent of Grayson.

At page 16 of the October 24, 1997 proceedings, the Referee acknowledged the fact 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 in the Byte appeal pending in the Third District.

At T. 4/11/97, Page 97, Moises 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 Grayson, whose offices are in the same building as Vining (and those of the complaining witness, as well) queried Vining on a continual and on-going basis as to the progress of the Byte appeal. These conversations took place in the Ingraham Building lobby, the elevators, the parking garage, on the street and even at the courthouse. Grayson corroborated that testimony.

After the Byte appeal was concluded by the rendering of the November 9, 1993 in favor of the Ingraham Building, Grayson finally appeared as counsel for the Ingraham Building, but only after having taken the fruits of Vining's labor in researching and submitting the appellee/Ingraham Building's brief and orally arguing the appeal to a successful and satisfactory conclusion.

It is now understandable why Robert Gusman, the complaining witness, wrote a letter to the Bar advising that he did not wish to proceed with the Bar complaint for the simple reason that Gusman/the Ingraham Building and their new attorney, Grayson, were totally familiar with the status and progress of the Byte appeal

and that Vining continued to protect the interests of the Ingraham Building in that regard.

How, we must ask ourselves, can Vining be guilty of violating a Bar rule when the complaining witness and his lawyer are familiar with the on-going handling of the Byte appeal by Vining as attorney for the Ingraham Building in the appellate court.

This Court has held that in a disciplinary matter the ultimate judgment remains with the Supreme Court. See The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968) and additionally that in a referee trial for professional misconduct, the Bar has the burden of proving its accusations by clear and convincing evidence. See The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994). This Court, on occasion, has overruled the referee and found that the suspension as recommended by the Bar referee was not necessary to accomplish discipline and found that it was sufficient to reprimand the attorney and warn him to be more circumspect with his handling of his accounts in the future.

The Court further has set forth that the discipline assessed against an attorney not only should protect the public interest but also should be fair to the attorney. See The Florida Bar v. Thompson, 271 So.2d 758 (Fla. 1972) and The Florida Bar v. Hoffer, 383 So.2d 642 (Fla. 1980).

This Court has also held that the purpose of sanctions is not to punish but to rehabilitate. See The Florida Bar v. Clements, 662 So.2d 690 (Fla. 1995) and Thompson, supra.

In Point II of Vining's initial brief, he cites to T. 10/25/97 at Page 17 whereby Moises Grayson, the new attorney for the Ingraham Building, testified that there was no damage to the Ingraham Building, that it was in litigation because of the rent owed by the Vining, P.A. and the claim for attorney's fees came up by way of a defense to the rent.

In mitigation, Vining has presented several high ranking judicial officers as well as other members of the general Bar who have attested to Vining's truth and veracity and his reputation in the community.

Each of these individuals called upon to give testimony had known Vining either socially or professional, or both, for a number of years; one witness for 50 years.

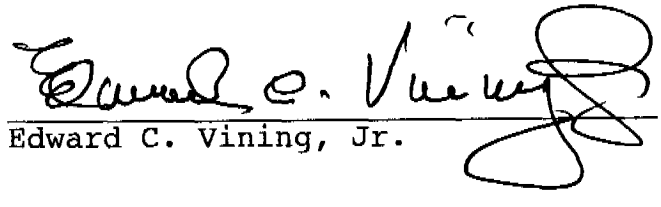
CONCLUSION

Censure, if any, should be in the form of a reprimand and not the recommended six-month suspension as recommended by the Referee which is excessive based upon the facts and circumstances of this case, especially in light of the fact that the complaining witness had his own lawyer throughout the appellate process, litigated the issue of fees in the trial court to conclusion, paid no sums, settled his/its dispute with Vining and advised the Bar that he had no further interest in pursuing the matter.

Under the circumstances, this case smacks of having the Bar over-zealously attempting to re-write the disciplinary rules so that once a complaint is instituted regardless of the facts and circumstances, the matter must proceed to determination.

The punishment recommendation is excessive and not supported by the record. Vining therefore asks this Court to refuse to accept the report of the referee and, if anything, only to find that a reprimand is appropriate.

Respectfully submitted,

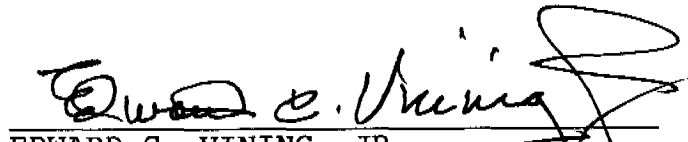


Edward C. Vining, Jr.

CERTIFICATE OF SERVICE

I CERTIFY that on August 24, 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



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