

IN THE SUPREME COURT OF FLORIDA
Supreme Court Case No. 90,645

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., Respondent below, will be referred to as "Vining."

2) The complaining party, Iliana Michelson, will be referred to as "Michelson".

The Bar proceedings took place over two (2) days on February 6, 1998 and on March 20, 1998. The transcripts from those proceedings are in four (4) volumes:

-Vols. I and II, February 6, 1998, Pages 1 through 136 and pages 137 through 318, respectively. References to the proceedings on the first day, February 6, 1998, will be made by using the following: **T. 2/6/1998 p. _____**

-Vols. I and II*, March 20, 1998, Pages 1 through 160 and 161 through 260, respectively. References to the proceedings on the second day, March 20, 1998, will be made by using the following: **T. 3/20/98 p. _____**

***NOTE:** The cover page to Vol. II of the March 20, 1998 transcript (pages 161-260) contains the incorrect date of February 6, 1998.

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

STATEMENT OF THE CASE AND FACTS

Iliana Michelson was married to Mark Michelson, a local Miami attorney, and filed a petition for dissolution of marriage in 1992. Before she hired Edward C. Vining, Jr. to represent her in those divorce proceedings, she had two prior attorneys representing her. Michelson engaged the legal services of Edward C. Vining, Jr. and entered into a written agreement with him dated on July 15, 1992. (Bar Ex. 1, Appx. 44-45). That agreement contained a provision that the initial retainer to be paid by Michelson would not be the entire fee and that she would be given a bill for services at the time of the termination of her representation by Vining. Under the agreement Michelson would also be given credit for any fees and costs paid by her former husband, Mark Michelson, if any.

The Michelson's divorce case was hotly contested and tried over a period of several days in February, March and April of 1993 and culminated in the entry of a final judgment entered June 1, 1993. Among other things, that final judgment reserved jurisdiction to determine Michelson's entitlement, *if any*, to an award of attorney's fees, suit money and costs. (Appx. 29-36)

From the date Vining was hired in July of 1992 until the final judgment was entered on June 1, 1993 - a period of approximately one year -there were numerous depositions taken in the case, numerous hearings, extensive production and documentary evidence produced and other time consuming tasks associated with the litigation as demonstrated by Vining's time records marked into evidence. (Appx. 16-28)

After final judgment was entered, a petition for rehearing was filed on behalf of Michelson on June 10, 1993 which generally complained that the lower court failed to award alimony to Michelson who had been unemployed for several years, failed to equitably distribute certain marital assets,

afforded skewed visitation to the non-custodial parent, and, instead of affirmatively awarding attorney fees/costs to Michelson, merely reserved jurisdiction for the purpose of determining Michelson's entitlement, *if any*, to fees/costs [even in light of the trial court's finding that the husband earned \$9,736 per month versus Michelson's imputed \$1,864 per month income]. (Appx. 37-42) The lower court denied Michelson's petition for rehearing on June 15, 1993. (Appx. 57) With the final judgment in that form, Michelson was then faced with the possibility of being awarded *no* fees/costs if the trial court found no entitlement.

Michelson took an appeal from that final judgment in an attempt to adjust what she felt were the inequitable rulings by the trial court. However, because she either had "second thoughts" or, more likely, was influenced by some other party, Michelson decided not to pursue the appeal. On November 24, 1993 Michelson authorized Vining to file a notice of dismissal of the appeal. (Appx. 54) By order dated November 29, 1993 the appellate court dismissed the appeal. (Appx. 56)

At the bar proceedings, Michelson testified that when she asked Vining about attorneys fees and costs, Vining assured her that nothing further was owed (T. 2/6/98, p. 173). Michelson also said that she understood that she might not get any award of fees/costs from the dissolution court and that that conversation between Vining and Michelson occurred right after the entry of the final judgment, that one of the matters in the petition for rehearing was the court's failure to award fees to Michelson without any condition upon it. (T. 2/6/98, p. 183-184). Michelson said that she had two lawyers representing her in her divorce case before hiring Vining and got rid of them. (T. 2/6/98, p.195) Michelson said that she sent a check for \$182.00 and that she considered it a final payment to Vining (T. 2/6/98, p. 203) Michelson testified that her understanding was that the retainer fee was the

total fee and it had been paid (T. 2/6/98, p. 213). In answer to the question that she didn't owe Vining any more money after she got the settlement from Mark Michelson, she stated that she did not have to share it with Vining because he had already been paid and also said that Vining told her (in contravention of the provisions of the employment agreement) that Michelson did not owe Vining any more money and she said yes (T. 2/6/98, p. 213-214). Michelson stated that the date of the understanding that the fee was paid in full was "at the beginning of when [Vining] started representing me" and that the conversation about not owing any more money was during the divorce proceedings (T. 2/6/98, p. 214). Michelson testified that Vining said all along between the period July, 1992 until June of 1993 that Michelson didn't owe him any more money (T. 2/6/98, p. 214) and that both Michelson and her sister [Marianella Villa] asked (T. 2/6/98, p. 215). On May 2, 1995, Michelson wrote a letter to Vining enclosing a check for \$182.00 "which is the final payment for my legal fees" and stating "I hereby request that you let me know immediately as to what action has been taken in this matter, so it can be resolved as soon as possible" [referring to the hearing on attorney's fees]. (Appx. 10)

Thirty days later, with no further communication, on June 2, 1995 Michelson and her ex-husband, Mark Michelson, an attorney, entered into an agreement whereby Mark Michelson was to pay the sum of \$12,000.00 to Iliana Michelson as full and final payment of her attorney's fees, suit moneys and costs and that Mark Michelson would be totally and fully released from any and all claims for attorney's fees/costs by Iliana Michelson. (T. 2/6/98, p. 213; Appx. 52) That document was prepared by Mark Michelson.

On that same date, June 2, 1995, Mark Michelson prepared a letter for signature by his ex-wife directed to Vining advising Vining that Iliana Michelson and her ex-husband, "... had totally settled the reimbursement of

attorney's fees and costs which I had previously requested you to pursue. Please do nothing further in connection with my file. I forward to your attention a check in the sum of \$182.00 as full and final payment for attorney's fees and costs on May 3, 1995 that concludes any monies owed to you." (Appx. 11)

In November of 1993, after the entry of the June 1, 1993 final judgment and after Michelson dismissed her appeal, Mark Michelson's attorney, Cynthia Greene, scheduled a hearing on the issue of Michelson's entitlement to and amount of attorney's fees for hearing on December 15, 1993. Ms. Greene later cancelled that hearing. (T. 2/6/98, p. 210; Appx. 61)

At the Bar proceedings, Vining testified that Michelson instructed Vining to leave her ex-husband alone because she was negotiating with him. (T. 3/20/98, p. 211) Vining testified that those instructions were given after the final hearing, after the petition for rehearing was filed, after the petition for rehearing was denied, after the notice of appeal was filed, and after Michelson authorized the dismissal of her appeal. Michelson was saying, in essence, "don't push this issue; I'm trying to settle with my husband." (T. 3/20/98, p. 212). Vining testified that in October of 1994, a motion was filed on behalf of Michelson to set the matter for a determination of Michelson's entitlement to fees and costs as reserved in the final judgment. (Appx. 29-36) Vining also testified that Michelson knew that on May 2, 1995 (T. 3/20/98, p. 210) and that Michelson then settled the case with her ex-husband without waiting for a hearing to be set as requested in her letter and that settlement was on June 2, 1995.

At the Bar trial, Mark Michelson's attorney, Cynthia Greene, testified that she had cancelled the December 15, 1993 hearing date on entitlement to fees, that visitation was the single most important issue in the Michelson divorce case (T. 3/20/98, p. 90), that Mark Michelson negotiated with Iliana

Michelson [as to the fees/costs] at a time when she did not have an attorney (T. 3/20/98, p. 89) and that Ms. Greene told Mark Michelson that he could get hit for fees (T. 3/20/98, p. 88). Cynthia Greene testified that Mark Michelson wanted a hearing and she advised Mark that he should sit tight and argue laches later. (T. 3/20/98, p. 84) Cynthia Greene also testified that Iliana Michelson wanted to bring her sister [referring to Marianella Villa] everywhere with her.

Iliana Michelson testified that her sister [referring to Marianella Villa] accompanied her to all meetings with Vining as well as hearings and depositions because, in her opinion, Vining was able to communicate better with her sister than with her. (T. 2/6/98, p. 236)

After Michelson and her ex-husband ostensibly settled the issue of fees/costs and after the famous June 2, 1995 letter to Vining advising that he should not proceed any further, Vining sent a letter to Michelson dated September 6, 1998. ((T. 3/20/98, p. 225-226) That letter referred to the retainer already paid and that if Vining was correct in assuming that Michelson and her ex-husband had reached an accord, the balance of the fees owed to Vining exceeded \$20,000.00. That letter suggested that if Michelson would like to resolve the matter of fees between Vining and Michelson, she should mail a check to Vining in the sum of \$20,000.00 representing the estimated outstanding fees giving credit for the retainer.¹ (Appx. 14-15) Thereafter followed the famous complaint to the Bar which, although signed by

¹ That letter also returned to Michelson her 5/1/95 check in the sum of \$182.00 which contained the memo that it was for "final payment." Michelson had been receiving a cost bill for the appellate filing fee for some months that had a balance, after partial payment, of \$182.00. Michelson apparently falls into the category of those persons who are unable to make the distinction between "costs" and "fees" and felt that she could transform a cost bill into fees by the stroke of her pen.

Iliana Michelson, was really the product of Mark Michelson. (T. 2/6/98, p. 151)

Mark Michelson wrote the letter dated June 2, 1995 advising that he and Iliana Michelson had settled the issue of attorney's fees. Iliana Michelson said she changed her mind after the May 2, 1995 letter wherein she inquired of Vining about what action was being taken and that she knew the fee issue was not settled at that time and that was based upon her understanding that the retainer was to be total fee and it was paid. (T. 2/6/98, p. 212) Michelson further testified that the September 6, 1995 letter from Vining triggered the Bar complaint. The complaint to the Bar was written and typed by Mark Michelson for Iliana Michelson's signature. Iliana Michelson also testified that she did not know Vining's hourly rate (T. 2/6/98, p. 233). Michelson candidly admitted that her prior lawyer, Mr. Rosenthal, did not tell her what his hourly rate was. Michelson says that her sister [referring to Marianella Villa] was present during all conferences with Vining including conferences relating to the fee agreement (T. 2/6/98, p. 236). Michelson also said that she had to pay back her parents [from whom she borrowed the initial retainer], that she had paid back the retainer (T. 2/6/98, p. 237-238)² and that she had nothing in writing to change the retainer agreement (T. 2/6/98, p. 243). In answer to the question by Vining "Do you think the final judgment was a conclusion [of Vining's representation]?" Michelson answered, "I pretty much think that was at least a conclusion of my divorce case, so --" and that she did not think that Vining was representing her in any way on May 2, 1995 (T. 2/6/98, p. 243).

² At T. 2/6/98, p. 305, Michelson's own mother, Nelly Villa testified that her daughter **had not** repaid the loan of \$15,000 for the retainer fee contrary to Michelson's testimony.

SUMMARY OF THE ARGUMENT

As to Point I, Vining argues that the referee should have granted his motion in limine to exclude testimony regarding the attorney's fees dispute that exists between Michelson and Vining.

As to Point II, that the referee erred in finding that Vining failed to schedule a hearing on his client's claim for attorney's fees within a reasonable period of time and in failing to keep contemporaneous records of time spent on the case.

As to Point III, Vining argues that the referee erred in finding that Vining failed to render an accounting of time and charges accumulated in Michelson's case, failed to explain the basis or rate of Vining's fees and failed to advise when retainer sum has been used up.

As to Point IV, Vining argues that the referee's recommendation of disbarment is excessive and not called for under the circumstances of this case.

POINT I

THE REFEREE COMMITTED ERROR IN FAILING TO GRANT VINING'S MOTION IN LIMINE PRIOR TO TAKING ANY TESTIMONY WHEN VINING SOUGHT TO EXCLUDE ALL TESTIMONY REGARDING THE ATTORNEY'S FEE DISPUTE THAT EXISTED BETWEEN THE COMPLAINANT, ILIANA MICHELSON, AND HIM.

From an examination of the matters before this Court, it is obvious that the entire thrust of Iliana Michelson's complaint to the Bar [amended complaint dated August 8, 1997] involves a dispute between Michelson and her attorney, Vining, over the issue of whether or not Michelson may be indebted to Vining for attorney's fees and unpaid/unreimbursed costs over and above the original retainer paid. (Appx. 58-60)

On February 6, 1998, Vining filed a timely motion in limine. (Appx. 63-65) In that motion, Vining recited Michelson's position that the retainer fee called for under the July 15, 1992 agreement (Bar Ex. 1; Appx. 44-45) had been paid in full and that she had an "understanding" with Vining that she did not owe any further fees to him. Based on that "understanding", and with no independent, outside counsel or help to settle the remaining issues reserved in the final judgment as to attorney's fees/costs, Michelson took it upon herself with to negotiate directly with her ex-husband, Mark Michelson (a local attorney who, by his own testimony, practices in the area of domestic relations). Michelson received the \$12,000 for that endeavor. Michelson took the further position that she is not indebted to Vining for any additional sums. Michelson also wrote to Vining on June 2, 1995 [a letter also manufactured by Mark Michelson]. (Appx. 11)

Without agreement of the parties, the Florida Bar is precluded from determining the issue of attorney's fees between members of the Bar and their clients. During argument on the motion in limine, the Referee asked of Bar counsel as to the propriety of the analogy in a DUI case where a flat fee of

\$5,000 was quoted and paid and inquired as to the difference regarding the non-refundable retainer fee in a DUI analogy. (T. 2/6/98, p. 16)

Vining argued that Michelson's non-refundable retainer coupled with Michelson's own testimony that she "modified" the agreement to the end that the \$15,000 retainer was to be the entire fee effectively placed the Bar in the position that any testimony regarding time records, hourly rates, settlement letters in the form of a request for additional fees, etc., became moot.

Michelson came to Vining July 15, 1992 and signed a retainer agreement (Bar Ex. 1; Appx. 44-45). Unlike the complicated retainer agreements which are standard by most law firms, the retainer agreement between Vining and Michelson is simple, plain, straightforward and unambiguous. Under that agreement, Michelson agreed to pay Vining a non-refundable retainer fee of \$15,000.00. The agreement also contains the clear language that the retainer is not to be considered the entire fee and that either periodically, or at the conclusion of the proceedings or at the time Vining's representation is terminated, Michelson would be given a bill for services rendered. The agreement further set forth that a request for fees/costs would be made on her behalf to the court for an award to be paid by her husband. The agreement cautioned that such an award is discretionary on the part of the court and that any sums awarded by the court, if any, and actually paid by her husband, would be credited to Michelson's bill. Michelson accepted that contract. (Appx. 44-45)

Paragraph 5 of the report of referee (Appx. 1-9) sets forth that there was no hourly rate recited in the retainer agreement. Michelson testified that it was her understanding from the onset that the \$15,000 retainer was to be the full fee and that there would be no further monies paid to Vining as a result of that arrangement. (T. 2/6/98, p. 173)

On the other hand, Vining takes the position that the written fee agreement contained the understanding between the parties and that if there is no further writing or consideration for any change, the fee agreement stands in its present form as executed.

There is obviously a dispute between Michelson and Vining regarding the terms of the fee agreement and the more compelling question as to what, if any, amounts are still owed to Vining for his representation of Michelson during the period July, 1992 to June 1, 1993 when the final judgment was entered.

This is as pure a fee dispute as can be envisioned and the Florida Bar does not have the jurisdiction or authority to resolve the issue of a fee dispute between an attorney and client.

Additionally, and of more prejudicial import to Vining, the referee allowed testimony to come in regarding billings for fees, the hourly rate which was not contained in the written fee agreement and, if the non-refundable retainer is a set amount and if Michelson is correct and the original agreement for attorney's fees has been modified, then under Michelson's theory, the retainer amount now becomes a fixed fee amount, and then there would be no requirement to keep time records or to communicate an hourly rate for the simple reason that if Michelson is correct, then there will be no further fees regardless of whether there is an hourly rate or time records kept.

The referee's failure to grant the motion in limine and exclude the fee dispute testimony was error and has prejudiced Vining's presentation of his defense that he violated no Bar rules. (motion denied at T. 2/6/98, p. 16)

Under paragraph 18 of the finding, the referee comments upon the fact that regular cost billing information (Appx. 45-51) was sent to the client and that "this seems quite irregular to have such detailed cost billing with

no hourly billing ..." Apparently, the Referee has not reconciled the *difference* between fees and costs. Under the retainer agreement, a clear distinction was made between fees and costs and further that the \$15,000.00 retainer expressly **did not** include costs. Fees and costs are "different animals." Now the referee takes the position that the cost bills are irregular because they do not contain hourly billings! Cost bills are not supposed to contain hourly billings. The cost billing record inquiry which should have been precluded and was the subject matter of Vining's motion in limine (Appx. 63-65) has further prejudiced Vining's case because the agreement does not call for billing records but only payment of costs on an on-going basis and that is the agreement of the parties.

The referee further comments upon Vining's failure to produce "billing records" until six weeks before trial and draws the conclusion that they were manufactured sometime before the trial.

The referee has obviously overlooked the fact that the Bar never requested time records from Vining. Rather, on July 3, 1997 the Bar directed a request for production to Vining and took its typical "shot gun" approach demanding "each and every document which [Vining] intends to use as an exhibit at any hearing to be held in these proceedings." (Appx. 68-69)

On July 18, 1997 Vining filed an objection to that request for production arguing, among other things, that such a broad and open-ended request was premature, speculative and. (Appx. 66-67) The referee heard Vining's objections on October 24, 1997 and granted them with the proviso that Vining should determine the exhibits which he intends to use at trial and thereafter he shall list them and produce them in a timely fashion prior to hearing.

About one month after the referee ruled upon Vining's objection, the referee entered a pretrial order dated November 20, 1997 which directed the

parties to file witness lists, exhibits lists, etc., by a date certain. On December 15, 1997 Vining complied with that pretrial order by filing his compliance with order setting cause for non-jury trial. In that pretrial compliance, Vining listed the various exhibits which he intended to use at trial which included time records (item #33). For the referee to deny the motion in limine and then to consider Michelson's testimony that the \$15,000 retainer fee was in fact the full fee and then to recommend a violation of 4-1.3 that set forth that Vining failed to keep detailed and contemporaneous written records of work done and time spent is inappropriate and improper.³

Michelson settled the attorney's fee issue with her ex-husband on June 2, 1995 for the sum of \$12,000 and was apparently satisfied with the result because the court had reserved ruling on the issue of determining the wife's entitlement, if any, to an award of attorney's fees, suit moneys and costs thereby placing Michelson in a position where she could have received a finding of the court that because of her employment she was not entitled to anything for attorney's fees and costs.

Michelson expended the \$15,000 retainer fee and approximately \$4,000 in costs and was well aware of the amount that she had paid, was able to negotiate a \$12,000 voluntary contribution by her ex-husband contrary to the Referee's comments that Michelson needed to have the results from a hearing on the issue of attorney's fees in order to be in a position to reach a settlement determination with her former husband.

Apparently, Mark Michelson was also concerned because he testified that he wanted the matter to come to a conclusion ((T. 3/20/98, p. 19), and that

³ There is nothing in the record before this Court that would support the referee's contention that contemporaneous time records were not kept. A member of Vining's staff testified to the contrary at T. 3/20/98, p. 98-179.

he approached his ex-wife and negotiated the fee payment at a time when Vining was representing Iliana Michelson.

Thus, we have the ex-husband as an attorney negotiating the fees directly with his ex-wife and paying the sum of \$12,000 which apparently he considered to be appropriate as to entitlement and amount.

Mark Michelson then typed the letter of June 2, 1995 signed by Iliana Michelson and directed to Vining advising that Michelson and her ex-husband had settled the reimbursement of attorney's fees and costs and that Vining was directed to do nothing further in connection with the file. (T. 3/20/98, p. 45)

Mark Michelson then on September 25, 1995 contributed to the form and substance of the complaint signed by Iliana Michelson to the Bar. Mark Michelson having typed same for Iliana Michelson's signature. (T. 3/20/98, p. 46)

None of the issues concerning the fee dispute should have been properly before the referee because the Bar may not settle fee disputes.

In The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975), the Supreme Court held that:

The respondent contends that excessiveness cannot be charged absent a showing of fraud or dishonesty. This argument is answered by Rule 11.02(4) of the Integration Rule of The Florida Bar, which provides:

". . . . Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is *clearly excessive*, extortionate or the demand is fraudulent." [Emphasis supplied]

* * *

. . . In any event, even if we presume that the client were an educated and experienced party dealing at arm's length with the respondent, it is our view that an attorney may still be disciplined for overreaching where the fees charged are grossly disproportionate to the services rendered. The arguments presented by the respondent are without merit.

In the instant case, the Bar has not accused Vining of charging an excessive fee. Moriber is on point and effectively holds that unless there is a charge that the fee is clearly excessive, extortionate or the demand is fraudulent, then there is no basis for disciplinary proceedings.

Additionally, in The Florida Bar v. Winn, 208 So.2d 809 (Fla. 1968), the Court held that:

Controversies, however, concerning the reasonableness of fees charged to and paid by clients are matters which by the very nature of the controversy should be left to the civil courts in proper proceedings for determination.

In Wall v. Bruckner, Greene & Manas, P.A., 344 So.2d 947 (Fla 3DCA 1977), the Court held:

. . . that disciplinary proceedings do not afford redress for a private grievance and are separate and distinct from the legal right of an attorney to proceed in the civil courts for the collection of a debt owing to him. See *The Florida Bar v. Winn*, 208 So.2d 809 (Fla. 1968)

Vining's motion in limine called to the referee's attention the fact that the perceived issue between the Bar and Vining should in fact be a matter for the civil courts to resolve between Vining and Michelson and should not be the subject matter of a Bar complaint. Despite this, the motion was denied and extensive testimony was had which prejudiced the referee and caused the skewed and unsupported findings contained in the report of referee and recommendation of disbarment. (Appx. 1-9)

The inclusion of the fee dispute was error.

POINT II

THE REFEREE ERRED IN RECOMMENDING A FINDING OF GUILT AGAINST VINING FOR THE VIOLATION OF RULE 4-1.3 AND RULE 4-1.4(a) and (b) WHEN SUCH RECOMMENDATION IS NOT SUPPORTED BY THE TESTIMONY AND EVIDENCE.

Rule 4-1.3 is entitled "diligence" and sets forth "a lawyer shall act with reasonable diligence and promptness and in representing a client."

The referee recommended this violation and sets forth the following as the reason therefor: "By failing to schedule a hearing on his client's claim for attorney's fees within a reasonable period of time following the final dissolution order, failing to obtain a hearing, failing to keep detailed and contemporaneous written records of work done and time spent, to support his client's claim for attorney's fees."

The matter referenced in the referee's recommendation is at a time subsequent to the entry of the final judgment of dissolution of marriage which was entered on June 1, 1993.

That judgment contained a provision under paragraph 11 as follows, "the court reserves jurisdiction for the following purposes: a) to determine the wife's entitlement, if any, to an award of attorney's fees, suit money and costs." (Appx. 29-36). After the entry of the judgment, a petition for rehearing was filed on June 10, 1993 (Appx. 37-42) which was denied without hearing on June 15, 1993. (Appx. 57) Thereafter, a notice of appeal was filed on July 15, 1993, however, on November 24, 1993, Iliana Michelson later instructed Vining to dismiss the appeal (Appx. 54); the appellate court dismissed the appeal on November 30, 1993. (Appx. 56)

In these Bar proceedings, Vining testified that Michelson advised Vining to, in essence, leave her ex-husband alone because she was negotiating with

him. Vining also testified that Michelson said "don't push this thing, I'm trying to settle it with my husband." (T. 3/20/98, p. 212) The dilemma that was facing Michelson and Vining subsequent to the final judgment was that the provision that reserved jurisdiction to determine Michelson's entitlement, if any, to an award of attorney's fees, suit money and costs was framed so that if the court found no entitlement, then of course, Michelson would get nothing.

On the other hand, if the court did find entitlement, then a reasonable fee could be awarded.

As long as Michelson was advising Vining that she was negotiating with her husband it was, of course, the hope that the ex-husband would give certain monies and therefore the issue of entitlement would be moot because if the ex-husband paid monies then, of course, there was no necessity to have a hearing on entitlement and risk having the court decline to find entitlement in favor of Michelson.

Vining also testified that Michelson said, "don't bother my husband. I don't want this issue determined by the court because I might lose. I'm settling it with my husband." (T. 3/20/98, p. 220)

The referee further attempted to support the recommendation of guilt under 4-1.3 by concluding that Vining failed to keep detailed and contemporaneous written records of work done and time spent.

In connection with the compliance with the pretrial order, time records were furnished, were detailed as to date, amount of time spent and the identity of the subject matter on which the time was spent.

Michelson in her wisdom on May 2, 1995 wrote to Vining requesting that he let her know immediately as to what actions had been taken in this matter so that it can be resolved as soon as possible referring to the hearing on attorney's fees.

Approximately thirty days later, Vining received a letter which was typed by Mark Michelson and signed by Iliana Michelson advising that she and her ex-husband had totally settled the reimbursement of fees and costs issue and announces that "that concludes any monies owed to you." (Appx. 10)

Michelson had previously testified that even though she had a written fee retainer agreement with Vining dated July 15, 1992, that she and Vining had agreed that the non-refundable retainer of \$15,000.00 would be the total fee and therefore apparently she included in her letter of June 2, 1995 a provision that "that concludes any monies owed to you."

The referee further recommended that Vining be found guilty of violating Rule 4-1.4(a) and (b) by failing to keep his client informed of the status of her claim for attorney's fees, her responsibility for his attorney's fees in excess of the \$15,000.00 retainer and failing to respond to her repeated requests for information about the fees and a hearing on the fees.

The testimony at the Bar proceedings shows that the only issue remaining to be resolved subsequent to the final judgment being entered by the court on June 1, 1993 was the reservation for the purpose of determination of wife's entitlement, if any, to an award of attorney's fees, suit monies, and costs.

Thus, the status was well known to Michelson, that the only remaining issue was either settlement or court determination of Michelson's entitlement to fees and the amount.

The status of Michelson's claim for attorney's fees was well known to her because there was only one issue outstanding, she settled with her husband on June 2, 1995 for the sum of \$12,000.00.

The referee also recommended that Vining be found guilty of violation of Rule 4-1.4(a) and (b) by failing to inform Michelson of her responsibility for his attorney's fees in excess of the \$15,000.00 retainer.

Apparently, the referee has either overlooked or failed to comprehend Michelson's testimony when she testified that Vining had told Michelson that she did not owe any other fees other than the non-refundable retainer which had already been paid.

The referee further recommended a violation of 4-1.4(a) and (b) and set forth that Vining failed to respond to her repeated requests for information about the fees and a hearing on the fees.

Again, apparently, the referee has either overlooked or misapprehended Michelson's testimony that she and Vining had agreed that the retainer would be the full fee and she well knew that there had not been a hearing on fees at the time she wrote the May 2, 1995 letter to Vining where she instructed him to take immediate action so that the matter could be resolved as soon as possible.

Within thirty days, Michelson and her ex-husband, Mark Michelson, had settled the fee issue so that the necessity for the fee hearing became moot.

Michelson signed the letter dated June 2, 1995 (thoughtfully prepared by her ex-husband) directing Vining to do nothing further in connection with her file and announcing, "that concludes any monies owed to you." ((T. 3/20/98, p. 45; Appx. 11)

Thus, Michelson was familiar with the status of the case, there being only one issue left to be determined, and then negotiated a settlement with her husband and obtained the sum of \$12,000.00, which obviated the necessity for a ruling by the court as to her entitlement to fees/costs, if any, because of the voluntary settlement and contribution by the husband in the sum of \$12,000.00.

It is respectfully submitted that the referee is apparently not paying attention to the testimony wherein Michelson said no fees were due and owing from Michelson to Vining and Michelson was in the process of settling her own

fee claim with the ex-husband which she in fact did accomplish and then Michelson announced to Vining in her letter of June 2, 1995 "that concludes any monies owed to you."

If Michelson believed that she owed Vining no more than the initial retainer, that the only issue left was the determination of the fees to be paid by her ex-husband and she was having on-going settlement negotiations with him which culminated in Michelson receiving \$12,000 from him, the referee then has misconceived the import of the testimony and documentary evidence.

POINT III

THE REFEREE ERRED IN RECOMMENDING A FINDING OF GUILT AGAINST VINING FOR THE VIOLATION OF RULE 4-1.5(E) WHEN SUCH RECOMMENDATION IS NOT SUPPORTED BY THE TESTIMONY OR THE EVIDENCE.

Contained in the report of referee is a recommendation that Vining be found guilty of violating Rule 4-1.5(e) by failing to provide the Respondent with an accounting of time and charges accumulated, explaining the basis or rate for his fees, failing to tell his client that his fee had exceeded the \$15,000 retainer when she had expressly asked him to do so and failing to advise the client of the outstanding fees owed to him at a time when he knew the client to be negotiating a settlement with her ex-husband for those monies which he had failed to obtain on her behalf.

Apparently, the referee did not comprehend, did not recall, or simply chose to ignore Michelson's own testimony at trial.

When the referee recommends guilt and cites as a basis therefor that "by failing to provide the Respondent (sic) with an accounting of time and charges accumulated", the referee has overlooked the testimony of Michelson where she testified that she had been told by Vining early in the dissolution case that she owed no other fees other than the initial non-refundable retainer and that Vining in fact furnished Michelson with an itemized list of costs and expenses which Michelson paid in the approximate sum of \$4,000.00.

The referee further cites as a basis for a recommendation of guilt under this rule that Vining failed to explain the basis or rate of his fees.

Throughout the Bar proceedings, Michelson unequivocally testified that Vining told her that she owed no further fees to him other than the initial \$15,000 retainer. (T. 2/6/98, p. 173) If that testimony is taken to be true, then there is no reason for Vining to have to explain a basis or rate

for his fees. If the \$15,000 retainer was a "flat fee" as Michelson insists (even though the contract clearly states otherwise), then why did the referee lay blame on Vining for failing to state a basis for his fees? What would it matter if Vining's hourly rate was \$10 or \$500 or if Vining spent 10 hours on the case or 1,000 hours? If the retainer fee was to be the full fee as Michelson maintains, then all else falls by the wayside.

In the recommendations, the referee further faults Vining for failing to tell Michelson that his fee exceeded the initial \$15,000.00 retainer when Michelson had expressly asked him to do so and in failing to advise Michelson of outstanding fees owed to Vining at a time when he knew Michelson was negotiating a settlement with her ex-husband for those monies which Vining failed to obtain on her behalf.

Michelson well knew that the reservation of jurisdiction contained in the final judgment entered June 1, 1993 was subject to the trial judge awarding no fees to Michelson or, alternatively, finding entitlement and making a fee award within the discretion of the court.

Michelson knew that she had paid Vining a \$15,000 non-refundable and, as mentioned above, she testified at the Bar proceedings that Vining told her (and supposedly told her family, as well) that there would be no further fees.

Armed with this knowledge and in the light of Michelson's own testimony, it is incomprehensible that the referee would find that Vining failed to advise his client of outstanding fees.

According to Michelson, there were no outstanding fees and the costs had been paid. Michelson's claim that she (and her *family*) requested information about fees is pure fabrication. No request was ever made to Vining by Michelson or her family and Vining so testified. ((T. 3/20/98, p. 185)

Thus we have no basis for the referee to come to the conclusion and make a recommendation such as same is set forth in the report of referee as to count II.

The recommendation as to count II is totally unsupported by the testimony and the record.

POINT IV

THERE WAS INSUFFICIENT EVIDENCE FOR THE REFEREE TO FIND THAT VINING FAILED TO SET A MATTER DOWN UNDER A RESERVED JURISDICTION PROVISION WHICH RELATED ONLY TO ATTORNEY'S FEES AND COSTS ESPECIALLY UNDER THE CIRCUMSTANCES OF THIS CASE AND IN RECOMMENDING A DISBARMENT FROM THE PRACTICE OF LAW IN FLORIDA.

The report of referee dated June 22, 1998 recommended that Vining be disbarred from the practice of law in Florida.

An examination of the alleged violations, Counts I and II, demonstrate that the client settled her fee issue matter herself for an amount of money which apparently she thought was appropriate.

Michelson's sister, Marianella Villa, was with Michelson at virtually all times during the lawsuit that lasted approximately one year.

The issue that was addressed under the reservation of jurisdiction concerned itself with the reservation to entertain the wife's claim for attorney's fees and for the court to rule upon the entitlement, if any, to be paid by the husband.

Vining testified that Michelson told him to leave her ex-husband alone because she was trying to settle and if she went to court, she might not get anything. Husband's lawyer told the husband do not set the matter for hearing because at the present time the husband is not paying anything and may get hit on entitlement and fees and be ordered to pay. (T. 3/20/98, p. 84)

Michelson never complained about any shortcoming in Vining's representation of her during the one year of active litigation, paid only the retainer amount and nothing else and now the referee has recommended that Vining be disbarred from the practice of law in the State of Florida.

In closing argument, Vining argued that the Bar complaint was orchestrated by the former husband, Mark Michelson, who had made a settlement

agreement for the payment of fees and costs to the wife at a time when Vining was still her attorney, without any participation by Vining. (T. 3/20/98, p. 254-259)

The former husband was an attorney and under the circumstances, the settlement agreement could be suspect for the simple reason that the husband had superior knowledge as an attorney, may have taken advantage of the former wife at a time when she was represented by counsel.

The character witnesses' testimony which was allowed into evidence in written form is unchallenged, the Bar having not put on any witnesses in that regard.

Vining argued at closing argument before the referee that Michelson's testimony (in concert with her sister) was fabricated in large measure after Vining wrote to Michelson on September 6, 1995 and suggested that the case was over and that there were some additional monies owed on fees.

There then comes a Bar complaint manufactured by Mark Michelson and signed by Iliana Michelson which, in Vining's argument before the referee, was the sole reason why the Bar complaint was filed, that is, the attempt by Mark Michelson to use the vehicle of a Bar complaint as a scare tactic so that Vining would not pursue the additional fees owed under the contract provisions between Vining and Michelson.

Michelson at all times knew of the status of her case, with the only remaining issue being the reservation of entitlement, if any, to attorney's fees.

Michelson knew as she testified that there would be no additional fees charged and she knew that she had paid the retainer and the cost billing.

Armed with that knowledge, Michelson settled her claim for fees apparently satisfactory to herself.

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. Also see The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994); The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).

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.

Vining capably represented the complaining witness, Michelson, throughout a one year of vigorous litigation at which time her sister accompanied her as to all proceedings and thereafter filed a petition for rehearing and an appeal which Vining was directed to dismiss for Michelson and thereafter abided Michelson's wishes that Vining defer from any actions on a hearing calculated to determine entitlement by Michelson to any fees and costs, if any, to be paid by the husband.

If Vining had proceeded as Michelson has urged, the result could have been that the court would find no entitlement.

Under the circumstances of this case and the facts of this case, wife settled the fee issue with the husband without the necessity of addressing the entitlement issue before the court and received \$12,000.00.

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

In The Florida Bar v. Diamond, 548 So.2d 1107 (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 as a matter of record a federal appellate judge, the Hon. Peter T. Fay, a local federal judge, the Hon. Shelby Highsmith, and Hugh F. Culverhouse, Jr., a prominent local attorney. Each of these individuals have known Vining either socially or professionally or both for a number of years and had nothing but praise for his truth and veracity, dependability and legal talent. The character testimony given by the Hon. Peter Fay, the Hon. Shelby Highsmith and Hugh Culverhouse, Jr. was accepted into evidence by the filing of excerpts of testimony for consideration by the Referee at T. 2/6/98, p. 6.

Disbarment is a distasteful and extensive penalty against an attorney. For this court to find that the referee was correct in recommending disbarment belies the matters of record in this case.

The recommendation for disbarment is excessive and, in fact, the errors of the referee warrant reversal and no disciplinary action whatsoever.

CONCLUSION

Vining has consistently taken the position that this bar complaint is nothing more than a fee dispute between Vining and Michelson which is not cognizable as a Bar complaint.

During the one year period that Vining represented Michelson in her divorce proceedings, Marianella Villa continually "shadowed" her sister, Iliana Michelson, and was present during practically all conferences, hearings, depositions, etc. and participated with Michelson on an on-going basis. During the one year period when Vining actively represented Michelson, there was not a single complaint voiced by Michelson, her sister, or any other members of the "family."

The petition for rehearing was filed from the operation and effect of the final judgment, however, the court denied same without a hearing.

The appeal was filed with the Third District Court of Appeal. Michelson in late November of 1993 elected to dismiss same. Thereafter, the counsel for the former husband, Mark Michelson, filed a notice of hearing on the remaining issue in the case which was the entitlement, if any, and the amount of attorney's fees and costs to be awarded to Iliana Michelson.

That hearing was cancelled. Vining testified that Iliana Michelson advised him not to re-set the hearing or to pursue the fee issue because of the reason that Michelson was in touch with her former husband and was trying to settle the matter.

Counsel for Mark Michelson testified at the Bar proceedings that she cancelled the hearing because the court might find entitlement and that would require Mark Michelson to pay out monies in an amount to be set by the Court.

Vining testified that he was concerned about setting the hearing because the outcome of the hearing might eliminate the obligation of Mark Michelson to pay fees by finding no entitlement.

In October of 1994, Vining filed a motion for the court to set a hearing on the attorney's fee issue, however, on June 2, 1995, Michelson individually settled the matter with Mark Michelson, the ex-husband paying \$12,000 to Iliana Michelson as his contribution to her fees and costs which settlement eliminated the necessity for a judicial determination and Michelson signed a settlement agreement recognizing that the former husband was relieved of any further obligation for fees or costs.

That same date, June 2, 1995, Mark Michelson prepared a letter for Iliana Michelson's signature, mailed it to Vining, advised Vining that his services were no longer needed and that the matter had been settled.

On September 6, 1995, Vining directed a letter to Michelson calling to her attention the provisions of the retainer fee agreement which called for a final billing after the termination of the proceedings, and suggested the payment of a sum of money necessary to conclude her obligation to Vining for attorney's fees.

Thereafter, and with a great amount of assistance by Mark Michelson, Mark Michelson typed up a bar complaint for Iliana Michelson to sign directed to the Bar and subsequently typed up a letter from her sister to the Bar.

It appears obvious that Mark Michelson was trying to protect what he apparently believed was a favorable settlement when he paid \$12,000 to Iliana Michelson at a time when she was represented by Vining which Mark Michelson negotiated with her alone and was concerned that the settlement agreement could be challenged based upon the fact that Vining, as Michelson's lawyer at that time, did not participate in the settlement negotiations.

Up until the letter from Vining to Michelson in September of 1995, there had been no complaints from Michelson of any kind or nature.

Thus, we come to the conclusion that Mark Michelson in concert with Iliana Michelson is attempting to utilize the auspices of the Bar in filing a Bar complaint against Vining in order to shield and protect what Mark Michelson apparently feels in a favorable settlement of the issue of attorney's fees, a low figure and which was improperly negotiated by Mark Michelson who is a lawyer with Iliana Michelson individually with no participation from Vining.

Thus, we come to the conclusion that this Bar complaint really is a fee dispute and the fabrications and testimony about unsatisfactory conduct on behalf of Vining are in fact just that: fabrications.

Vining urged in closing argument to the referee that this Bar complaint was orchestrated by Mark Michelson and had no basis in fact and should not have been filed and that any dispute between Vining and Michelson should be resolved in another forum.

Respectfully submitted,

Edward C. Vining, Jr.

CERTIFICATE OF SERVICE

I CERTIFY that on October 29, 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. **90,645**

EDWARD C. VINING, JR.,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

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