IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

EDWARD C. VINING, JR.,

Respondent.
___________________________/

Supreme Court Case
No. 90,645

The Florida Bar File
No. 96-70,433(11C)

ANSWER BRIEF OF THE FLORIDA BAR

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INTRODUCTION

The symbol "T" is used herein to designate the hearing transcripts for the February portion of the final hearing. The symbol "Tm." is used to designate the March portion.

Furthermore, I hereby certify that this brief is typed in Times New Roman, 14 Point type.

____
ARLENE KALISH SANKEL

STATEMENT OF THE CASE AND FACTS

The Bar served its Complaint against the respondent on May 27, 1997 and an Amended Complaint on July 28, 1997. The final hearing consisted of two days of testimony on February 6, 1998 and March 20, 1998.

At the conclusion of the hearing, the referee found respondent guilty of the following rule violations:

1. Rule 4-1.3, Diligence, by failing to schedule a hearing on his client's claim for attorney's fees within a reasonable time after entry of the final order of dissolution.

2. Rule 4-1.4(a) and (b) by failing to keep his client informed of her claim for attorney's fees, her responsibility for fees in excess of her $15,000 retainer, and for failing to respond to her frequent requests for information about the fees and a hearing regarding the fees.

3. Rule 4-1.5(e), by failing to provide the client with an accounting of time and charges accumulated, failing to explain the basis or rate for his fees, failing to tell his client that the fees exceeded the $15,000 retainer despite requests, and failing to advise the client of outstanding fees owed while the client, with respondent's knowledge, was negotiating with the husband regarding fees.

Iliana Michelson gave the respondent a retainer of $15,000 (T. 75). During the course of the representation, she repeatedly sought information regarding the status of

her account. She wanted to know whether the $15,000 had been used up and whether additional fees had accrued. (T. 83). At various times she was advised only that the fees did not exceed the retainer. (T. 213-217; 275). Her sister, who attended the meetings with Vining (T. 84, 97) testified similarly. (T. 275). She also called respondent's office on behalf of her sister on many occasions, to no avail. (T. 295-296).

Respondent did not advise her of the amount of the charges for his services, nor the fact that she was being billed at the rate of $350.00 per hour. (T. 100, 236, 251). He did not send her billing statements and did not produce billing records pursuant to a subpoena, nor any records until shortly before the final hearing when ordered to do so by the Referee. (Tm. 188).

On a number of occasions, respondent replied to Iliana's inquiries by stating that his billing was in his head and not in the computer. (T. 84, 85; Tm 186-187).

Nevertheless he did not disclose that she was being billed for a total of $35,000 until September, 1995. (T. 144, 145).

A final judgment of dissolution was entered on June 1, 1993. The final judgment reserved jurisdiction to determine the client's entitlement to attorney's fees and costs.

Mrs. Michelson frequently called the respondent in an effort to learn about the

hearing. (T. 100, 115, 132). Respondent's testimony, as presented in his brief, is in conflict with that of Mrs. Michelson; i.e. He claims that Iliana instructed him at various times not to bother her husband because of pending settlement discussions. He also testified that he had advised his client early in the proceedings that his hourly rate was $350.00. (Tm. 184). He denied all wrongdoing (Tm. 226) and denied that his client had asked how much she owed. (Tm. 195).

Respondent did file a motion requesting that the court schedule a hearing on attorney's fees on October 28, 1994. However, he did nothing further and Iliana sent him a letter by certified mail in May, 1995 complaining of the lack of progress. (T. 164).

During the following month, June of 1995, Iliana worked out a settlement with her husband for $12,000 (T. 194). She was not advised that $20,000 of additional billing had accrued beyond the $15,000 retainer until September, 1995. In fact, Vining had conferred with her during the settlement discussions and approved the proposed amount without disclosing the amount allegedly outstanding. (T. 170).

SUMMARY OF THE ARGUMENT

In regard to the first argument, the referee did not err by denying respondent's Motion in Limine to Exclude Testimony Regarding Fees. Respondent argues that the

Bar has no jurisdiction over fee disputes.

Respondent's authority does not address the charge brought by the Bar, namely Rule 4-1.5(e) of the Rules of Professional Conduct. That rule pertains to the failure to communicate with the client and not reasonableness of the fee. None of the cases cited by the respondent have any bearing upon the Bar's jurisdiction to pursue a violation of the aforesaid subsection.

Second, the respondent has not met his burden of proving insufficient evidence regarding diligence, failure to inform the client of the status of representation, and neglecting the duty to explain matters to the client. There is ample testimony by the former client and her sister, who accompanied her to various meetings and made phone calls in her behalf, to withstand respondent's challenge. Both said respondent neglected arranging for a requested hearing, did not inform his client of accruing bills and didn't advise her of the hourly rate of $350.00 per hour.

Third, respondent repeats his argument under argument II that if his former client believed that a "flat fee" was involved, then billing was unnecessary. His client, however, never referred to a flat fee. Ample evidence exists to establish that she knew that respondent was billing against the retainer and that the possibility of additional fees existed.

Finally, the respondent sets forth no authority which supports the conclusion

that the discipline is improper. Both the cases cited by the Bar and Florida Standards for Imposing Lawyer Sanctions demonstrate that disbarment is appropriate. Respondent's prior disciplinary history is particularly significant in regard to aggravating factors.

ARGUMENT

I

THE REFEREE DID NOT ERR BY DENYING RESPONDENT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY REGARDING FEES.

Respondent's first argument appears to be based upon the premise set forth on page twelve (12) of his brief to the effect that:

> "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".

The respondent's premise suggests that all issues and testimony regarding fees must be excluded from Bar proceedings. However, the authority relied upon by the respondent supports no such conclusion.

Count II of the Bar's complaint concludes with the allegation that:

> Based upon the foregoing, Respondent is in violation of Rule 4-1.5(e) of the Rules of Professional Conduct (duty to communicate basis or rate of fee to client).

Respondent's Motion in Limine to exclude all testimony regarding fees was wrong as a matter of law. In support of that motion, respondent quotes from The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975) to the effect that Rule 11.02(4) of the Integration Rule limits fee proceedings by the Bar to situations in which the "amount demanded is clearly excessive, extortionate or the demand is fraudulent."

(Emphasis on “clearly excessive” supplied by respondent).

Respondent’s claim ignores the fact that Moriber does not pertain to subsection (e) of current rule 4-1.5, “Fees for Legal Services” which states:

> (e) **Duty to Communicate Basis or Rate of Fee to Client.** When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Respondent also cites The Florida Bar v. Winn, 208 So.2d 809 (Fla. 1968) in support of his argument. Winn holds that the reasonableness of fees should be left to the civil courts. However, the issue presented by the Bar complaint was not the reasonableness of fees. Rather, it dealt with the specific duty set forth in Rule 4-1.5(e), quoted above.

Respondent also relies upon Wall v. Bruckner, Greene and Manas, P.A., 344 So.2d 947 (Fla. 3d DCA 1977) for the proposition 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. (At 948. Emphasis added).

That authority is totally inapplicable to a situation where a respondent is charged with a violation of a specific duty set forth in a particular portion of a Rule of Professional Conduct.

In sum, none of the authority cited by the respondent applies. His motion in

limine was properly denied.

II

THE RESPONDENT HAS NOT MET HIS BURDEN OF PROOF, THAT IS, HE HAS FAILED TO ESTABLISH THAT THE REFEREE'S FINDINGS REGARDING VIOLATIONS OF RULES 4-1.3 AND 4-1.4 ARE CLEARLY ERRONEOUS OR WITHOUT SUPPORT IN THE RECORD.

The burden of proof before this Court is upon the respondent who has petitioned for review of the Referee's Report. The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991). The report is, of course, presumed to be correct and will be upheld unless clearly erroneous or lacking competent substantial evidence. The Florida Bar v. Winderman, 614 So.2d 484 (Fla. 1993); The Florida Bar v. Smiley, 622 So.2d 465 (Fla. 1993). Respondent has failed to meet his burden of proof and has failed to overcome the presumption of correctness.

Respondent initially claims error in regard to the referee's findings concerning violation of Rule 4-1.3, "Diligence". The referee's finding of guilt is based in part, upon the respondent's failure to set a hearing on attorney's fees.

The basic fact is that respondent did not seek a hearing on attorney's fees until mid-1995 although the dissolution order was entered during mid-1993. Complainant testified that her many requests for a hearing during the two year period were ignored. (T. 243-244).

Respondent testified that he had been told to desist from seeking the hearing by

his client. (Tm. 215). His client, Iliana Michelson denied respondent's claim. (T. 132, 162). The referee resolved the conflicting evidence against the respondent. As this court has stated, the trier of fact is in the best position to evaluate the credibility of the witnesses. The Florida Bar v. Marabel, 645 So.2d 438 (Fla. 1994).

The respondent has not provided any authority which supports his claim of error. He merely reiterates his testimony at trial which was rejected by the referee.

This court, of course, is not dependent upon the reasoning process of the referee. 3 Fla. Jur. 2d, "Appellate Review," §296, and cases cited therein. However, it is very clear that, in addition to the absence of authority, respondent has not established any logical basis for rejecting the specific findings of the referee.

The referee's findings in regard to respondent's failure to seek a hearing are stated in paragraphs 16 through 18. (The references to the record in the following passages were provided by the referee). Those portions of the report state as follows:

> 16. Ms. Michelson testified that the final dissolution hearing was around June 1993. (Transcript of February 6, 1998 hearing p. 132). Subsequent to the final hearing she called the Respondent many times seeking to have a hearing on the issue of attorney's fees, but the Respondent did not have the matter set for a hearing from June of 1993 through 1995, when she took the initiative to settle the matter with her ex-husband. (Transcript of February 6, 1998 hearing p. 132.). She testified that prior to settling the matter herself, she sent the Respondent a letter in May of 1995, expressing her dismay at the Respondent's failure to set and obtain a hearing on attorney's fees and his failure to provide an account of time and fees charged. (Transcript February 6, 1998 hearing, p. 164 and Florida Bar Exhibit 3).

17. Ms. Michelson wrote the letter shortly after calling the chambers of Judge Hubbart, the judge in the dissolution matter and finding that the Respondent had never set the matter for a hearing, despite her repeated requests. (Transcript February 6, 1998 hearing p. 164).

18. The Respondent testified that he didn't file any motion because the client instructed him not to do so. (Transcript hearing March 20, 1998, p. 215).

In deciding this matter the referee must determine whether the Respondent or Ms. Michelson and Ms. Villar were truthful in their recitation of the events. The Respondent argues that, this is all fabricated because he billed Ms. Michelson and she concocted these events in order to avoid paying his fee. In resolving this conflict, the referee relies in part upon, the letter which Ms. Michelson wrote to the respondent in May of 1995, expressing her dismay and disappointment in the Respondent's failure to set the matter for a hearing. This happened some three months before the Respondent sent his bill for fees and services to Ms. Michelson in September of 1995. It is apparent to the referee that her dismay existed in writing long before the supposed "motive" for the complaint in this matter.

Iliana's former husband, Mark Michelson, an attorney, also testified regarding respondent's failure to obtain a hearing. As an attorney with expertise in family law matters, he testified that the fee issue was usually settled immediately after entry of judgment on the merits. (Tm. 18). In his divorce case, the attorney's fee issue had not been resolved. (Tm. 19).

Mark's attorney in the divorce case also testified. Cynthia Greene had discussed the fact with Mark that there was an entitlement to fees and the wife was not proceeding to go into court to establish the amount and obtain the award. (Tm. 81). The fact that Vining had not proceeded to resolve the matter of fees surprised

her. (Tm. 58). In her family law practice, nothing similar had occurred. (Tm. 58).

Vining also mentions additional findings of the referee related to lack of diligence and Rule 4-1.3. The referee's findings regarding respondent's failure to maintain records are found in paragraphs 13-15 of the referee report.

In brief, those paragraphs, including references to the record, point out that:

> A. Respondent's time records were not provided to the Bar until ordered by the Referee, approximately six (6) weeks prior to the final hearing. (ROR, para. 13).
>
> B. A February 21, 1996, letter from the Bar requesting production of time and billing records produced no records. (ROR, para. 14).
>
> C. Records requested pursuant to a subpoena which were provided on February 5, 1998 did not reveal the existence of any time records. (ROR, para. 15; Tm. 244).

In addition, Mrs. Michelson testified that she had never seen the billing documents shown to her at the final hearing (T. 115). The documents provided at the hearing had two different kinds of type. (Tm. 200).

All of the foregoing constituted evidence in support of the referee's conclusion that time records had not been prepared contemporaneously. Respondent's entire argument is that the records were provided ultimately, pursuant to the referee's order. That statement does not establish that the referee's findings constitute error. It merely establishes that the conflicting evidence and questions of credibility were resolved against the respondent.

Additional discussion is advanced by the respondent in relation to Rule 4-1.4(a) and (b) violations. Those violations are (a) the failure to inform the client of the status of representation and (b) neglecting the duty to explain matters to the client. There is ample testimony in the record to support the guilty findings in regard to that rule.

Respondent's response is the bland assertion the client was aware of the status. No references to the record have been presented by the respondent. No authority was advanced by the respondent. His discussion of this point does not present a coherent argument and certainly does not prove the existence of error. In fact, the record directly contradicts respondent's assertions. Iliana Michelson testified as follows:

> A. All sorts of questions. I mean from things that he was going to -- like, for example, a hearing that he was going to request attorney fees and costs and he gave that runaround for about two years.
>
> He told me all along since the last day of the divorce -- I remember clearly outside the courtroom in the hallway and he said he would get to it immediately.
>
> Many times, I would call him. He would tell me, "I'm working on it. I'm working on it."
>
> So apparently, he not only did not do what he had to do, but he lied to me because he told me he was working on it and I realized later that -- like a year and a half later he filed, a year later after the divorce, he finally requested a hearing. So he had lied to me all along. (T. 98-99).

Much of the remaining argument set forth by respondent is based upon false

premises and misrepresentation of the actual testimony on the record. In that regard, respondent argues that if Mrs. Michelson's view was that she only had to pay the $15,000 retainer, then the contemporaneous aspect of his hourly billing was of no consequence.

Mrs. Michelson's testimony was not, however, to the effect that the $15,000 was a flat fee as respondent suggests. (See particularly respondent's brief, page 26, where he uses the words "flat fee".)

Mrs. Michelson's testimony was consistent. She was aware that the $15,000 was a retainer and not the full fee. (T. 242). She knew that there was to be an hourly charge against the retainer, but did not receive information from respondent as to the hourly rate. (T. 77, 233). She knew that the billing could have placed her in a deficit position. (T. 102). That is why she asked Vining's secretary for detailed billing many times. (T. 99-100). She was concerned about how much of the retainer had been spent. (T. 99).

The fact that $15,000 was the total amount due at particular points in time, according to what Vining told Mrs. Michelson at various times, does not mean that she claimed that the ultimate fee was to be a flat fee. Despite respondent's attempt to confuse the issue in this brief and on cross examination (wherein he refers to himself as "Vining"), Mrs. Michelson's actual testimony is clear:

Q. All right. Now, was that also based upon the fact that you thought you had an understanding that the retainer was the total fee that you were obligated to Vining for and you had already paid it?

A. Right.

Q. And you didn't owe him any more money, so whatever you got was yours to do with what you felt was appropriate. Is that correct? You didn't have to share it with Vining because had you already paid him. Right?

A. Correct.

Q. In fact, you say that Vining told you that in contravention of the provisions of the employment agreement, that you didn't owe him any more money. That was enough money. Correct?

A. Right.

Q. When did that happen, that conversation that we have just talked about where Vining said, you don't owe me any more money? Fifteen is enough. When did that happen?

A. Oh, gosh. It happened since --

Q. Do you remember the date?

A. No. I don't remember the date, but I remember since actually at the beginning of when you started representing me, that we wanted to know as the money was used up, how it was used up, and how much so that we'd know how much was left of the 15 if we needed more money and up to this date, I haven't gotten that.

. . . .

THE WITNESS: Right, and that if you owe anything else, I'll let you know and I'll let you know, and you never did.
So we always thought well, we are still working on the 15. However,

how much of the 15 have we used. (T. 213 - 216).

The following questions and answers also demonstrate that respondent's presentation of the evidence is incorrect.

> A. Yes. It's true that you said we did not owe anything --
>
> Q. Anything?
>
> A. -- and that if anything else would be owed, you would let us know.
>
> Q. And when was that?
>
> A. As I said, it was all along. And when I asked you also for the 15,000, how they were being spent, you said you did not keep your records in the computer. You kept them all in your head. (T. 217).

Marianela Villa, Iliana's sister, corroborated her testimony. (T. 275). She attended virtually all of the meetings with the respondent. They both told Vining that they needed to know the billing amounts because their father was writing the checks. (T. 273-4). During at least one meeting, he said that the billing was done in his head and that the $15,000 retainer had not been exceeded. (T. 275).

No basis exists for respondent's challenges to the findings of violations of Rules 4-1.3 and 4-1.4 of the Rules of Professional Conduct.

III

THE RESPONDENT HAS NOT MET HIS BURDEN OF PROVING INSUFFICIENCY OF THE EVIDENCE REGARDING RULE 4-1.5(e)

The respondent challenges the following finding of the referee:

> The referee recommends that the respondent 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. (ROR p.6).

The basis for respondent's argument on this point was set forth in relation to Argument II wherein he sets forth similar arguments. Same has been addressed by the Bar therein. Additionally, the Bar has quoted extensively from the record to demonstrate that respondent's argument is constructed upon a false premise.

Respondent argues that the referee failed to consider Mrs. Michelson's testimony to the effect that all she was supposed to pay was $15,000. Respondent claims that Mrs. Michelson asserted the agreement was for a "flat fee." (R's brief, p. 26). If true, respondent continues, there would be no need for hourly billing and submission of bills to the client.

It is amply clear that respondent's reconstruction of his former client's testimony is incorrect. The various passages quoted from the record in the context of

Argument II demonstrate the falsity of respondent's position. The record reveals that Mrs. Michelson never claimed that the parties had a "flat fee" agreement. Rather, she stated that $15,000 was the sum required for the retainer and that she was to be charged hourly against the retainer. She knew it was possible that additional funds could be required. According to her testimony, the only statements that the $15,000 was the total fee came at various times from respondent, at various times, but that only pertained to the status of the account on the date(s) of the inquiry.

The respondent's failure became critical in relation to settlement discussions between Iliana and her husband in June of 1995. Since she had not been apprised of the fact that the total bill was $35,000, Iliana settled for $12,000. That would have been a reasonable settlement in relation to a $15,000 bill. Respondent was consulted during the negotiations, agreed with the numbers, and did not apprise Iliana of the true amount of billing. (T. 231).

Marianela Villa, Iliana's sister, corroborated her testimony. She met with respondent many times. She testified that they both made it clear to respondent that they needed to know the billing amounts. (T. 273-274). There was no discussion of the hourly rate according to Marianela. (T. 279).

IV

DISBARMENT IS THE APPROPRIATE DISCIPLINE.

The referee made the following findings:

As to Count I

The referee recommends that the respondent be found guilty and specifically that he be found guilty of violating Rule 4-1.3, Diligence 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.

Further the referee recommends that the respondent be found guilty and specifically that he be found guilty of violating 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 retainer, and failing to respond to her repeated requests for information about the fees and a hearing on the fees.

As to Count II

The referee recommends that the respondent be found guilty and specifically that he 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. (ROR 5-6).

In addition, the referee made the following findings as to mitigation and

aggravation under the heading "Personal History and Past Disciplinary Record":

> After findings of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the Respondent, to wit:
>
> Age: Unknown
> Date admitted to the Bar: 1959
>
> Prior disciplinary convictions and disciplinary measures imposes (sic) herein: The Respondent is currently serving a three year suspension imposed by the Supreme Court of Florida. The Respondent has a second disciplinary heard by this Referee and before the Supreme Court of Florida for a finding.
>
> Other personal history: A number of respected members of the legal community, the business community and the judiciary came before the referee in the first two disciplinary proceedings and testified as to the good character, the abilities and reputation of the Respondent. The Respondent refused to recognize any wrongdoing in his conduct with his client or his refusal to respond to requests by The Florida Bar for information throughout these proceedings.
>
> The Respondent has substantial experience in the practice of law and thus these violations are not viewed in the "light" of an inexperienced attorney. Additionally, having heard three sets of testimony in three disciplinary proceedings, this Referee has noticed a pattern of disregard for and contempt displayed by the Respondent for his clients as well as opposing counsel in all these proceedings, although the Referee should note that the Respondent has always displayed respect towards the Referee in hearings. It seems to this Referee, that the Respondent although possessing good legal skills, has lost sight of the requirement for an attorney to serve as a counselor for his client and to put the cause of the client above that of the attorney. While a business, the practice of law should serve as more than an exercise in extracting money from those who come before an attorney asking for legal assistance. (ROR 7).

Respondent stresses the single mitigating factor of testimony as to his reputation. That is insignificant in view of the many aggravating factors included in the findings.

For example, respondent was not truthful when he was asked on the witness stand whether he had ever committed fraud. (Tm. 222). His answer was "I don't think so." When confronted with the finding (in regard to his three-year disciplinary suspension) of conversion and civil theft, respondent's contemptuous response was: "What difference does it make what the jury found?" (Tm. 223).

Respondent's lack of cooperation with the Bar was reflected by walking out of a deposition (Tm. 206) and apparently advising his secretary to repeat whatever instruction he raised at her deposition. (Tm. 208, line 14 through 209, line 12). Similarly, when asked why he hadn't produced records at the Bar's request, he responded "I didn't want to." (Tm. 192).

Respondent has not disputed any of the aggravating factors. Furthermore, he has presented no cases which indicate that the discipline was inappropriate. At the conclusion of the final hearing, the Bar did present authority to support its request for disbarment.

In The Florida Bar v. Wilder, 543 So.2d 222 (Fla. 1989), the respondent was found guilty of neglect and of false representations to clients regarding the status of

the case. He received a 180 day suspension. However, numerous aggravating factors which exist in this case were not present in Wilder. Also, there are more violations of the rules in the present case than in Wilder.

Two disbarment cases are similar to this case. They are The Florida Bar v. Taylor, 202 So.2d 562 (Fla. 1967) and The Florida Bar v. Merwin, 636 So.2d 717 (Fla. 1994).

Florida Standards for Imposing Lawyer Sanctions also mandate disbarment. Standard 4.41(b) states that disbarment is appropriate when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client. In this case, Iliana negotiated a settlement with her husband without knowing that she would face additional fees of $20,000. Vining advised her that her resolution of the matter for $10,000 would be a good result. (T. 191). He failed to give her any notice of the accruing billing on an interim basis or at the time of the negotiations.

Standard 8.1 provides:

> Disbarment is appropriate when a lawyer:
>
> (b) has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of conduct.

The prior case in which respondent was disciplined is similar insofar as it involved misconduct relating to fees. The Florida Bar v. Vining, 707 So.2d 670 (Fla. 1998). Specifically, it involved, among other factors, "extensive fraud" committed

upon the court by filing an inaccurate stipulation pertaining to fees. (Tm. 224).

Similarly, fraud through false billing documents is involved in this case. Furthermore, the respondent hid from his client the true amount he was billing.

In sum, the applicable authority supports disbarment. This is particularly true in view of the current thirty six month suspension for fraud upon the court.

CONCLUSION

Based upon the foregoing, the referee's report should be approved and the respondent should be disbarred.

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFIED that the original and seven (7) copies of the foregoing Answer Brief of The Florida Bar was sent via overnight to **Sid J. White**, Clerk, Supreme Court of Florida, 500 So. Duval Street, Tallahassee, Florida 32399 and that a true and correct copy was sent certified mail (Z 447 108 581) return receipt requested, to **Edward C. Vining, Jr.**, respondent, 25 SE Second Avenue, Suite 527, Miami, Florida 33131 and via regular mail to **John Anthony Boggs**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399 this 18 day of December, 1998.

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ARLENE KALISH SANKEL
Bar Counsel
TFB # 272981