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

REPLY BRIEF OF PETITIONER

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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., 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 Petitioner's initial brief will be designated as "Appx."

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.

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.

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.

In Point I of the initial brief, Vining argued that the referee should have granted his motion in limine to exclude testimony regarding the attorney's fee dispute between Vining and Michelson because the Bar does not have the authority to resolve such an issue.

Point II of the initial brief concerns the referee's finding that Vining failed to schedule a hearing on his client's claim for attorney's fees within a reasonable period of time and that Vining failed to keep contemporaneous time records of the time he spent on Michelson's case.

Under Point III, it was argued that the referee's recommendation of guilt based on the finding that Vining failed to render an accounting of time and charges accumulated and failed to explain the rate or basis for his fees was in error.

In Point IV, it was argued that the recommendation of disbarment was excessive and not supported by the evidence or called for under the circumstances of this case.

Generally speaking, this case has three areas which were extensively addressed in the initial brief. The first is the improper inclusion in the Bar proceedings of the fee dispute between Vining and Michelson. The second is that the failure to set a hearing on Michelson's application for entitlement to fees, if any, within a reasonable period was improper even

though Michelson herself settled the fee issue with her ex-husband for $12,000.00, thus eliminating the possibility that Michelson could have been awarded *no* fees by the court. The third is the recommendation of disbarment which, under the facts of this case, is excessive and unwarranted.

There is absolutely no question but that the underlying Bar complaint is nothing more than a fee dispute between Vining and Michelson. No evidence or testimony that bore upon the issue of fees should have been adduced by the Bar at trial with respect to the initial $15,000 retainer fee paid by Michelson. This inclusion was prejudicial error when Michelson's own testimony was that Vining had told her that there would be no additional fees due over and above the original retainer and that this announcement was made just after the finalization of the trial and entry of the final judgment dissolving Michelson's marriage.

Apparently Michelson was satisfied with the results of the final judgment in which she was named custodial parent of the child (this was a hotly contested issue), possession of the marital home, and certain other awards.[1]

If Vining's representation of Michelson was proper and there were no specific complaints of any failure to carry out discovery, or to present proper testimony and evidence, then Michelson must have been satisfied with the results, and then that leaves only the matters which arise after final judgment in June of 1993.

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:

[1] At first, Michelson directed Vining to appeal the final judgment but later voluntarily dismissed it.

> ". . . . 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 testimony set forth in the initial brief was to the effect that no hearing was scheduled on Michelson's entitlement to and/or award of fees because Michelson advised Vining that she was negotiating the fee issue directly with her ex-husband and did not want to "upset the apple cart". Michelson did settle the matter with her ex-husband for the sum of $12,000.00 and was able to therefore avoid the possibility of having the court find that she was *not* entitled to a fee award. It is difficult to understand what loss or damage Michelson suffered as a result of the time span between the final

judgment, the appeal, its subsequent dismissal until Michelson and her ex-husband reached an accord with respect to fees. The law is amply clear that if Michelson suffered no damages and, in fact, recovered $12,000.00, Michelson should not be heard to complain at this time.

If one is to believe Michelson's position that the $15,000.00 retainer magically turned into a flat, fixed fee as a result of certain conversations that she allegedly had with Vining, then the fee issue would become a nullity because, there would be *no* further fees owed. In any event, however, the Bar has no standing to determine fee issues between a client and lawyer.

If Michelson owed Vining no money because the retainer was a flat fee, and then settled her fee claim with her ex-husband for the sum of $12,000.00 and released him from further liability, then the amount of fees, the purported failure to maintain time records and to inform the client the hourly billing rate are of no relevance.

The Bar does into great detail calling to this court's attention the fact that the referee has made findings of fact and therefore unless the findings are outrageous, they must be accepted by this court. An examination of that premise belies the Bar's statement that findings of fact by the referee cannot be disturbed. The referee improperly considered Vining's time records, found that the time records were fabricated, however, Michelson said that she never saw them until the Bar complaint. How can time records, fabricated or not, be of any consequence to anyone when they were never displayed to Michelson until after the Bar complaint was filed? That is the very reason why the fee issue is improperly included in the Bar complaint and prejudicial to these proceedings.

Additionally, the referee made a finding that the hourly rate was never discussed with Michelson. Again, why would there be a necessity to discuss an hourly rate when Michelson claims the retainer fee she paid was a fixed, flat rate (contrary to the contract she signed). The Bar argued that the phrase "flat fee" was never mentioned, however, some term must have been used to describe what Michelson calls the "full fee." If the $15,000.00 retainer

was $15,000.00 was the entire fee, then it must have been a "flat fee" quote because Michelson never received any bill from Vining but only a letter requesting payment.

The Bar takes the position that Michelson needed to know the amount of the fee in order to settle her case. That is a ludicrous statement in light of Michelson's position that Vining told her she owed no more fees.

The recommendation of disbarment is excessive and not only is it not supported by the record, but is to extensive a punishment to be meted out under these circumstances and this Court should not uphold the referee's recommendations.

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.

In the report of June 22, 1998, the referee recommends a finding of guilt as to Count I in that Vining failed to schedule a hearing on Michelson's claim for attorney's fees, failed to keep detailed, contemporaneous written records of work performed, and failed to keep Michelson informed of the status of her claim for attorney's fees.

Vining has already responded to these findings by calling to the court's attention that there was conflict whether Vining was authorized to proceed and, if so, Michelson could have been placed in the position of having the dissoltuion court find that she had *no* entitlement to fees/costs to be paid by her ex-husband or, as testified to by Vining, whether Michelson was attempting to settle that very issue directly with her ex-husband.

Michelson has suffered no damage by not having a hearing on entitlement to fees; quite to the contrary, she was able to procure the sum of $12,000.00 from her ex-husband.

Michelson testified that she knew there was a reservation in the final judgment regarding her entitlement, if any, to fees, she authorized the dismissal of her appeal from the final judgment and the record supports the fact that Michelson was negotiating with her ex-husband and settled the fee issue for $12,000.00.

In Rios v. McDermott, Will & Emery, 613 So.2d 544 (Fla. 3rd DCA 1993) the court held:

> The allegation that appellees did not render status reports is insufficient to support the legal malpractice claim because the alleged damages do not flow from the failure to give status reports. This Court has previously ruled that an alleged violation of the Code of Professional Responsibility does not state a cause of action for legal malpractice.

In Rios, a case with similarities to the case at bar, the Third District Court of Appeal made a ruling that reporting to a client or failure to report to a client does not constitute malpractice and certainly supports the proposition that the complainant has not tied the alleged failure to report to any prejudice or damage.

The referee recommended finding of guilt because Vining failed to keep his client informed of the status of her claim for attorney's fees and her responsibility for his attorney's fees in excess of the initial retainer fee of $15,000.00.

First off, Michelson was well aware of the status, knew the hearing had not taken place, was in contact with her ex-husband, was deeply involved in settling the matter of fees and eventually did so for $12,000.00.

As to failing to inform Michelson of any fees owed over the retainer fee, it must again be pointed out that Michelson admitted she signed the July, 1992 retainer contract but insists it was verbally modified when Vining told her the $15,000.00 was the entire fee. If that be true, Michelson has paid the entire fee, made the notation on her last check to Vining[2] that it was for payment of all attorney's fees and therefore, the referee's reference to repeated requests by Michelson for information about a hearing on fees either from Vining or her former husband is misguided.

If Vining had set the matter for fees (as Michelson complains he did not) and the dissolution court found Michelson *was not* entitled to fees, there is no doubt that Michelson would instead be complaining that she was in the midst of settlement negotiations with her ex-husband and that Vining was not authorized to take the matter to court. Michelson apparently is entitled to have it either way. No matter what Vining does or doesn't do, it is wrong. As to the finding under Count II, the referee has recommended guilt in failing to provide Michelson with an accounting especially in light of the fact that she was negotiating settlement with her ex-husband. Again,

[2] Which was a check for $182.00 representing reimbursement to Vining for out of pocket costs.

it must be pointed out that Michelson insists that Vining told her the $15,000.00 retainer was the full fee. If Michelson (who is a *schoolteacher*) had comprehended the contents of the very simple retainer contract (Appx. 44-45) had requested from her ex-husband a larger sum (than what she ultimately got), it is well within the realm of possibility that the ex-husband would have refused to pay any other amounts over and above the $12,000.00 and therefore Michelson again may not have received any monies.

In the case of The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986), Justice Adkins commented in his dissent that:

> .... disbarment is not warranted in this instance.
>
> Disbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable. *The Florida Bar v. Davis,* 361 So.2d 159 (Fla. 1978); *The Florida Bar v. Carlson,* 183 So.2d 541 (Fla. 1966).

This is rank speculation for the referee to find liability under these circumstances and is incorrect and not borne out by the matters of record. Disbarment is not warranted and this Court should so find.

CONCLUSION

Vining reiterates his position that this matter is merely a fee dispute between Vining and Michelson which is not cognizable as a Bar complaint. Michelson's convenient "verbal alteration" of a written contract is not worthy of belief.

Further, under the facts and circumstances of this case, the referee's recommendation of disbarment is harsh, extreme and unwarranted.

It is respectfully urged that this Court reverse the findings and recommendations of the referee.

Respectfully submitted,

_____
Edward C. Vining, Jr.

CERTIFICATE OF SERVICE

I CERTIFY that on February 5, 1999 a copy has been furnished by mail to the following:

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_____
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