

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR,**

**Supreme Court No. SC01-2827**

**Complainant-Appellee,**

**v.**

**TFB Case No. 2002-50,116(17G)**

**WARNER BARKER MILLER, III,**

**Respondent-Appellant.**

\_\_\_\_\_ /

**THE FLORIDA BAR'S ANSWER BRIEF**

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## **PRELIMINARY STATEMENT**

Throughout this answer brief, The Florida Bar will refer to specific parts of the record as follows: the Report of Referee will be designated as RR \_\_\_\_ (indicating the referenced page number); the transcript of the final hearing will be designated as T.\_\_\_\_, l. \_\_\_\_ (indicating the referenced page and line numbers, where applicable).

## **STATEMENT OF THE CASE AND THE FACTS**

### **A. STATEMENT OF THE CASE**

The Florida Bar's formal complaint in this cause was filed on December 21, 2001. Respondent was served via certified U. S. mail at his record bar address in Florida, and his last known address in North Carolina. T. 12-13. Respondent filed no answer. T. 24, l. 9-10. On January 30, 2002, the bar served a Motion for Order Declaring Respondent to be in Default and Setting a Time and Date for a Final Hearing. The Florida Bar served a copy of this motion upon respondent, via certified U.S. mail, at both his record bar address in Florida and his last known address in North Carolina. T. 13, l. 12-20. Respondent still did not file an answer to The Florida Bar's complaint. T. 13, l. 20-21. On January 31, 2002, the Court entered a default and set the matter for final hearing on February 26, 2002. The referee's judicial assistant mailed a copy of the resulting order to respondent, at both his record bar address in Florida and his last known address in North Carolina. T. 13-14. On February 20, 2002, which was four (4) business days before the final hearing, the referee received, by Federal Express delivery, respondent's motions to vacate the default and to continue the final hearing. Respondent's motions asserted that prior to the entry of the default order, he had served an answer upon a bar secretary.

Respondent's motion also presented his request to appear at the final hearing via telephone. T. 14.

By order dated February 20, 2002, the referee denied respondent's motion to continue the final hearing and to appear telephonically. T. 15. Because he also determined that respondent was entitled to a hearing on his motion to vacate the default, the referee set this hearing for February 26, 2002, immediately prior to the final hearing. T. 11. Respondent and bar counsel were to be present, before the referee, at 3:00 p.m. on February 26, 2002. T. 11.

At the pre-trial motion hearing on February 26, 2002, The Florida Bar was represented by Ronna Friedman Young. Respondent did not appear. After the hearing began, Kevin Dennis, an attorney and respondent's friend, appeared and requested that the default be vacated and the final hearing continued. Mr. Dennis had not filed a notice of appearance and expressly stated that he was not representing respondent. RR 2. Further, Mr. Dennis plainly advised the referee that he planned to file neither an appearance nor any pleadings on respondent's behalf. He was attending the hearing only as a friend. T. 8. Mr. Dennis later testified, however, as a mitigation witness on respondent's behalf. T. 17-18, 45-47.

During the course of the final hearing on February 26, 2002, The Florida Bar offered argument as well as evidence in support of its position that it had received no

answer to its complaint. T. 22 -23. Mr. Dennis offered documentary evidence (an envelope) to support respondent's claim to have filed a misdirected answer. T. 19. However, after examining the envelope and hearing the argument of bar counsel as to its true contents (a copy of respondent's motion to set aside the default), respondent's motion to vacate the default was denied. T. 21-25. The referee specifically found that no answer was served or filed and that the entry of a default against respondent was proper and just. T. 24. The referee also determined that respondent had engaged in gross neglect for which he had no meritorious defense. T. 24, l. 23 - 24.

## **B. STATEMENT OF THE FACTS**

Respondent came to represent the plaintiff, Consuelo Rizzi, in a personal injury action. At the time that respondent agreed to represent Ms. Rizzi, a notice of Workers' Compensation Lien had already been filed in her case by the attorney for the Broward County School Board and Gallagher-Bassett Insurance Services. RR 3.

In or about September 1996, respondent received the settlement proceeds from the personal injury action. Given the Notice of Workers' Compensation Lien, respondent had an obligation to hold in trust sufficient funds to settle that lien. RR 3. He did not do so. Instead, he disbursed all settlement funds received from the settlement of the personal injury action. RR 4.

Notwithstanding this complete disbursement of all settlement funds, and without revealing the truth about such disbursement, respondent and Ms. Rizzi signed a Stipulation of Pro-rata Reimbursement with Lorna E. Brown-Burton, counsel for the Broward County School Board and Gallagher Basset (its workers' compensation servicing agent) on or about March 26, 1998. An order approving this stipulation was entered by the circuit court judge on or about April 1, 1998. *See* Composite Exhibit B to The Florida Bar's Complaint. Thereafter, respondent failed to disburse the funds, as he had agreed to in the Stipulation, because he had no funds to distribute. T. 28-29, RR 4.

Respondent's failure to hold the lien proceeds in trust was not known to Lorna Burton-Brown, Esq. nor was it known to the Court that ratified the Stipulation between the parties. Pursuant to the stipulation respondent and his client signed, both Ms. Burton-Brown and the Court believed that respondent had acted in good faith and was holding a portion of the proceeds of the personal injury lawsuit in his trust account in order to satisfy the Workers' Compensation lien. RR 7. After receiving notification from her clients, in October 1998, that they had not received reimbursement from him, Ms. Brown-Burton sent a reminder letter to respondent on or about October 21, 1998. She sent him another such letter in January 1999. When the lien still had not been satisfied, Ms. Brown-Burton filed a motion to compel payment and/or reduce order

to judgment and a motion for sanctions in August 1999, serving respondent at his last known address. Additionally, Ms. Brown-Burton attempted to contact respondent by telephone but found that his telephone number had been disconnected. Finally, in February 2002, respondent's client voluntarily paid the lien in order to regain her consumer credit. [The payment of the outstanding lien was required before she could qualify for a loan for which she had applied.] RR. 7, T. 28-34. Accordingly, while the workers' compensation lien was ultimately satisfied, such satisfaction was not the result of any redeeming effort or action on respondent's part. T. 34, l. 20-22. To the contrary, respondent's misconduct caused actual harm in the forms of delay, inconvenience and collection expenses, all of which were visited upon the lienholder. T. 35, l. 1-5, RR 7-8.

## SUMMARY OF THE ARGUMENT

The referee demonstrated neither bias nor partiality in his pre-trial orders. His order denying respondent's motions for a continuance and to allow his telephone appearance was correctly entered as the matter had been duly and timely noticed for final hearing, and respondent had been properly and timely served with such notice. Further, respondent filed neither an answer nor any other paper in the matter, did not even bother to file his motions for continuance and to allow telephone testimony until four (4) business days before the final hearing, and failed to file anything to support or substantiate such motions. Instead, his hastily drafted and untimely served pleading contained only bare assertions of fact. He offered no affidavits, sworn statements, and/or supporting evidence of any kind. Based on this complete lack of evidence, the referee had no basis upon which to continue the final hearing in this cause.

The referee's denial of respondent's motion to vacate the default is also correct and supported by the weight of the evidence. Despite actual service upon him at his North Carolina address, respondent willfully failed to file an answer to The Florida Bar's complaint - -even after bar counsel communicated the urgency of the matter to him via email *before* the motion for default was filed. Based on this complete dearth

of evidence to support respondent's motion and his own refusal to appear before the referee at final hearing, the referee had absolutely no basis upon which to vacate the default entered against respondent.

## ARGUMENT

### **Issue I**

**THE REFEREE WAS AN UNBIASED AND IMPARTIAL TRIER OF FACT. HE COMMITTED NO ERROR IN DENYING RESPONDENT'S MOTIONS FOR A CONTINUANCE AND TO APPEAR AT FINAL HEARING TELEPHONICALLY, WHEN RESPONDENT WAS IN COMPLETE DEFAULT AND HAD FILED NEITHER PAPER NOR AFFIRMATIVE DEFENSE OF ANY KIND. FURTHER, THE REFEREE CORRECTLY CONSIDERED RESPONDENT'S PRIOR DISCIPLINARY HISTORY.**

Respondent argued that the referee was biased against him because he served as referee in a 1999 bar disciplinary case which was decided against him. Further, respondent argued, the referee's reliance on that prior case (where respondent also defaulted) is flawed because the referee reached an incorrect conclusion. Finally, respondent charged that the referee's bias against him (as developed in the 1999 case) is the reason for the referee's denial of his motions for continuance and to allow a telephonic appearance at final hearing in the instant case.

Respondent's argument is misapplied. Referees routinely are assigned to hear subsequent disciplinary cases against the same respondents. No bias is created because a lawyer's previous disciplinary history is a critical element in the Court's

consideration and determination of appropriate subsequent discipline. In *The Florida Bar v. Bern*, 425 So.2d 526, 527 (Fla. 1982), this Court noted that in rendering discipline, it “considers respondent’s previous disciplinary history and increases the discipline where appropriate.” The Court also addressed the issue of cumulative misconduct of the same kind: “[t]he Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct.” *Bern*, at 527.

In respondent’s 1999 bar disciplinary case, the same referee entered a default judgment against respondent. In his initial brief in the instant case, respondent argued that the referee made the 1999 finding against the weight of the evidence. In the instant case, respondent defaulted again. In his eleventh hour pre-trial motions, as well as in his initial brief, respondent advanced the same unsubstantiated argument that he had in 1999: that the referee entered a default judgment against the weight of the evidence.

Respondent’s misconduct, in the 1999 case and in the instant case, is similar and it is cumulative. In both cases, a default had already been entered at the time of the final hearing. Accordingly, the *only* issue before the referee at final hearing was the issue of discipline. Therefore, under *Bern* and its progeny, the referee was

*required* to consider respondent's prior disciplinary history in crafting his disciplinary recommendation. Such mandatory consideration cannot be construed as bias. Similarly, the referee's prior adverse rulings against respondent are not enough to establish bias. As was the case in *Heier v. Fleet*, 642 So.2d 669 (Fla. 4<sup>th</sup> DCA 1994), respondent's allegations of prejudice and/or bias are too broadly painted and too devoid of specificity to identify bias of any kind. Further, respondent's charge of bias is directly relevant to and precipitated by the prior adverse rulings of *this* referee against *this* respondent. When these are the only indices of bias offered, the offer must fail. Relying upon a Supreme Court case, the Fourth District Court of Appeal discussed the appropriate standard of proof in *Heier v. Fleet*:

The facts asserted by a petitioner in a motion to disqualify a judge must contain an actual factual foundation for petitioner's alleged fear of prejudice. The facts asserted by a petitioner in a motion to disqualify a judge must be reasonably sufficient to create a well-founded fear in the mind of the party that he or she will not receive a fair trial. *Fischer v. Knuck*, 497 So.2d 240, 242 (Fla. 1986). The standard to be applied by the judge is whether a reasonably prudent person would, *on the basis of the stated facts*, fear that he or she cannot get a fair trial with this judge presiding. [Citations omitted, emphasis added.] Adverse judicial rulings are not a proper basis for disqualification of the judge. [Citations omitted.]

*Heier*, at 669.

As respondent has stated no specific facts (other than prior adverse judicial rulings) to demonstrate his charge of bias, that charge must fail for lack of evidence. Accordingly, respondent's argument that such (unproven) bias motivated the referee to deny his motions for continuance and to allow his telephonic appearance at final hearing must also fail. This Court reviewed appellant's burden of proof in *The Florida Bar v. Cox*, 718 So.2d 788, 791 (Fla. 1998), stating as follows:

If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgement for that of the referee. *The Florida Bar v. Bustamante*, 662 So. 2d 687, 689 (Fla. 1995). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. [Citation omitted.]

In light of the foregoing, respondent did not bear his burden of proof. Despite his broad allegations of bias, respondent failed to prove it. Despite his repeated charges of partiality, respondent cannot prove that the record evidence upon which the referee relied clearly contradicts the conclusions he reached. To the contrary, respondent's strenuous argument against them only seems to reinforce the referee's conclusions.

Based upon the record, there is no doubt as to why the referee denied respondent's motions. He was not motivated by bias. Rather, the referee was

informed and persuaded by respondent's own conduct - - and clearly said so, over and over again. Respondent's motion for continuance was denied because it was untimely, because respondent defaulted through the proceedings (despite having timely notice and actual service of all pleadings and notices), because his motion was wholly unsupported, and because he consistently failed to respond to both The Florida Bar and the referee. *See final hearing transcript*, p. 20. Respondent's motion to appear telephonically was denied because the referee determined that he needed to physically observe the respondent, to take a measure of his veracity. *See final hearing transcript*, p. 16. In so deciding, the referee was well within his rights, as this Court has often noted that "[i]t is for the referee to weigh the credibility of the witnesses before him." *The Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986). Given this ample record support for the referee's actions, The Florida Bar also notes that it was within the referee's sound discretion to deny both of respondent's "eleventh hour" motions. As in *The Florida Bar v. Kandekore*, 766 So.2d 1004 (Fla. 2000), respondent gave the referee no reasonable explanation for his "eleventh hour" requests. *See also The Florida Bar v. Vernell*, 520 So.2d 564 (Fla. 1988), wherein this Court held that it is within the referee's sound discretion to grant or deny any motion for continuance.

## Issue II

### **THE REFEREE CORRECTLY DENIED RESPONDENT'S LATE FILED AND WHOLLY UNSUPPORTED MOTION TO VACATE DEFAULT FINAL JUDGMENT.**

Respondent's argument on this point is two-fold. First, he argued that because he timely served an answer to The Florida Bar's complaint (allegedly to a Bar secretary at a mysteriously unexplained and wrong address), the entry of a default judgment against him was erroneous. Second, respondent argued that the referee erred again when he failed to grant his motion to vacate the default. Both arguments were considered and rejected by the referee. On the first point, the referee accepted into evidence an affidavit from The Florida Bar which demonstrated that no secretary or staff member at The Florida Bar had ever received respondent's answer. Based on this affidavit, the argument of bar counsel, and the referee's own non-receipt of any answer or other paper from respondent, the referee conclusively determined that respondent did not file or serve an answer to The Florida Bar's complaint. *See final hearing transcript*, p. 23. As this Court repeated in *The Florida Bar v. Winderman*, 614 So.2d 484, 485 (Fla. 1993), a referee's findings "are presumed correct and will be upheld unless clearly erroneous or lacking in evidentiary support." As there is competent substantial evidence to support the referee's finding that

respondent filed no answer to The Florida Bar's complaint, the referee's entry of a default judgment, arising from that finding of fact, must be upheld.

Addressing respondent's second point (that the referee erred in failing to vacate the default order), the referee clearly stated that he denied respondent's motion to vacate the default because it was untimely, because it failed to demonstrate excusable neglect, and because it contained no recitation of a meritorious defense. Again, there is ample record support for the referee's determination. It is undisputed that respondent failed to file his motion until days before the final hearing. It is also undisputed that respondent's motion contained nothing but bare allegations and promises of proof. It was completely devoid of either claim or evidence of excusable neglect, and provided not a hint of a meritorious defense. Further, as the motion was filed just days before the final hearing (but some time after the default was entered), the referee also found that respondent failed to demonstrate due diligence in seeking to set aside the default. Based on this substantial record of respondent's failure to demonstrate any basis upon which the default might be set aside, coupled with the respondent's own too little/too late efforts to advance a defense or even respond to the referee or The Florida Bar, the referee correctly utilized his discretion and denied respondent's motion to vacate the default. *See The Florida Bar v. Roth*, 696 So.2d 969 (Fla. 1997).

## CONCLUSION

Despite due process and actual service of all pleadings upon him, respondent failed to file an answer or otherwise respond to The Florida Bar's complaint. Accordingly, a default was entered against him and the matter was set for final hearing on sanctions. Despite due process and actual service of the hearing notice upon him, respondent failed and refused to appear before the referee for final hearing. Instead, four (4) business days before the hearing, respondent filed motions for continuance, to appear telephonically, and to vacate the default. Each of these motions were deficient and incomplete; all were denied. On the day of hearing, the referee heard the testimony of respondent's mitigation witness, received exhibits into evidence, reviewed the record before him as well as respondent's prior disciplinary history, and recommended respondent's disbarment. Respondent has not challenged the disciplinary recommendation. As the referee's findings are supported by competent, substantial evidence, and respondent has presented no contrary evidence on the record (his recitations on appeal are outside of the record on appeal), the referee's findings should be presumed correct and upheld on appeal. Given his prior disciplinary history and his repeated similar misconduct, Respondent should be disbarred.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of The Florida Bar's Answer Brief have been furnished by regular U.S. mail to Walter Barker Miller III, respondent, 720 Riceville Rd., Asheville, NC 28805, and to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this \_\_\_\_\_ day of July, 2002.

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LORRAINE CHRISTINE HOFFMANN

**CERTIFICATION OF TYPE, SIZE, STYLE AND ANTI-VIRUS SCAN**

Undersigned counsel hereby certifies that the brief of The Florida Bar is submitted in 14 point, proportionately spaced, Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

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LORRAINE CHRISTINE HOFFMANN