

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: SC01-736

The Florida Bar File

Nos. 2000-51, 031(11D)

2000-70, 361(11D)

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THE FLORIDA BAR,  
Complainant/ Appellee,

v.

BARTLEY CHARLES MILLER,  
Respondent/ Appellant,

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REPLY BRIEF OF RESPONDENT/APPELLANT  
BARTLEY CHARLES MILLER

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Without responding in kind to The Florida Bar's Answer Brief with hyperbole or an emotional appeal, MILLER will illustrate some of the issues raised by the Bar which are either factually inaccurate, not supported by the record, or which merit closer examination by this Court. The Florida Bar's Answer Brief is nothing more than Magistrate Barry Seltzer's order imposing sanctions against Miller. A court order that caused the underlying hearing before the Referee. Many of the magistrates facts were incorrect or partially correct as the record demonstrates.

The Florida questions Miller's "good faith" belief that the first undated right to sue letter governed when he should have filed a lawsuit on behalf of his client. However, the Bar failed to produce any testimony or witness to refute same. Miller, however produced two (2) witnesses from the EEOC and Broward County to testify that they believed the first undated right to sue letter was not controlling. In order to violate the Rules the Bar is claiming, the Bar must prove Miller had knowledge that what he was doing was improper or wrong. Thus "good faith" is an essential part of the defense to the charges leveled against Miller. If the first undated right to sue letter was not material to the case why would Miller be under any duty to disclose same? In fact it is undisputed the

Cleveland Clinic never filed any discovery request in the underlying case. The fact that the Bar argues Jim Colon and Fred Behule testified after the fact does not discredit their testimony but shows that others such as Miller thought the firsts undated right to sue letter was not material or controlling. The Bar did not produce any witness to testify that the first undated right to sue letter controlled. The bar cites to the Eleventh Circuit's opinion in the case that found the first right to sue letter controlled. However, in the area of employment law there is much controversy and confusion over the right to sue letters issued by the EEOC and what effect they have on a employees right to file suit. Obviously the EEOC representative Jim Colon held the same beliefs as did Miller. Also Fred Behule an attorney for Broward Counties Human Rights Division held the same opinion as Miller that the first undated right to sue letter was not material. The magistrate never conducted a hearing on whether Miller acted improperly. If the magistrate had afforded Miller the opportunity to submit evidence he would have learned that both the EEOC and Broward County Human Rights Division did not believe the first undated right to sue letter was material or that Plaintiff could have even filed suit based on the incomplete right to sue letter.

The Florida Bar forwarded the Referee the order/report which

is the subject of this appeal. The Referee adopted the order as his own. The Bar tries to get around this wrongdoing by stating it sent the order to Miller's counsel at or about the same time it was submitted to the Referee. In fact the appendix attached to the Bars Brief merely shows the order was faxed to Miller's counsel along with the handwritten note "Enclosed for your review is a proposed report of referee. Please call me upon review of same. Thank You." There is no indication in the note from the Bar that the proposed order would be submitted to the Referee or that the Referee even requested same be prepared. The record is completely silent as to why the Bar took it upon itself to submit the order to the Referee. The Bar forwarded the order to the Miller's counsel on May 14, 2002 and the Referee executed same on May 24, 2002. Miller's counsel was never notified by the Referee that it had an opportunity to challenge the submission by the Bar nor any opportunity to respond to the proposed order before the referee signed same as his own. Interestingly the Bar did not submit an affidavit stating the judge requested the proposed order or argued the Referee requested the Bar to submit same. In fact Miller is still at a loss as to why the Bar did what they did. If in fact the Referee requested the Bar to prepare the order then Miller should have been given an opportunity to respond to same, but

Miller was denied this basic fairness.

Miller's Initial brief is replete with case law that requires a Judge not to delegate the drafting of sensitive and dispositive orders to counsel. In this case what we have is the Bar writing a very one sided order not supported by the evidence or the Referee's own findings of fact, but rather findings of fact from the Bar. This is not fair and should not be allowed. In short we still do not know what the Referee's findings of fact are because the Referee never wrote an order expressing same. At the conclusion of the hearing the Referee stated "Once it is fully briefed, I'll take it under consideration and I will proceed with all due speed, but there's a lot to read and I have to reach moral certainty before I'm comfortable. So it will take some time" (Transcript at page 255 lines 19-24). This matter should be remanded to the referee for him to state what the findings of fact are as well as the conclusions of law and what if any should the penalty be if there was a violation of the Rules. Miller's ability to earn a living as well as his personal and professional reputation are hanging in the balance. Miller deserves the fairness of a report from the referee that are his own opinions not those of the Bar.

The Referee's recommendation of a two (2) year suspension is not supported by existing case law. Interestingly the Bar

sought a two year suspension during the hearing. The report submitted by the Bar to the referee again adopts the Bar's case and theories in total without Miller being provided an opportunity to respond. Regardless, the cases cited by the Bar all involve factual scenario that involve attorney fraud. In Miller's case he did not disclose a document never requested by the Defendant but more importantly a document known to the Defendant as same was sent to the Defendant by the EEOC. At worst Miller was negligent in his belief that the first undated right to sue letter was not material to the underlying case. An opinion also held by the EEOC and Broward County officials.

Miller also had mitigating factors that should have been taken into account in determining his sanction. The Bar does not address the mitigating factors raised in Miller's Initial Brief. Miller was sanctioned \$20,000.00 by the magistrate and required to attend CLE ethics classes. Miller's record with the Bar is clean and no prior discipline action had ever been taken against him.

Miller request this court to reverse the report of the Referee for the reasons stated above as well as in his Initial Brief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the

foregoing was delivered by mail this \_\_\_\_\_ day of December, 2002 to: VIVIAN M. REYES, ESQ., Bar Counsel, The Florida Bar, 444 Brickel Avenue, Suite M-100, Miami, Florida 33131-2404; and John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

Respectfully Submitted,

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By: \_\_\_\_\_

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**CERTIFICATE OF TYPE SIZE AND STYLE**

The typed matter in this Initial Brief is proportionally spaced and is in 12 point Courier New type.

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EDMUND M. ARISTONE, JR., ESQ.