IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	**Supreme Court Case No. SC05-774**
Complainant,	
v.	
COSTELL WALTON, JR.,	**The Florida Bar File No. 2004-51,708(17A)**
Respondent.	
_____/	

THE FLORIDA BAR'S AMENDED ANSWER BRIEF

ON APPEAL FROM A REPORT OF REFEREE

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PREFACE

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, held on October 12, 2005, will be designated as TT ____ (indicating the referenced page number). All trial exhibits will be referenced, simply, by party and exhibit number, e.g., Bar Exhibit 1. Finally, The Florida Bar will be referred to as "the bar" and the respondent, Costell Walton, Jr., will be referred to as "respondent."

STATEMENT OF THE CASE AND OF THE FACTS

In the interest of accuracy, and to ensure that the record is complete, The Florida Bar offers the following supplement to respondent's statement of the case and of the facts.

Respondent represented Tisa Burney and Catherine Badgett, who entered into a contract with Louis Asbate and his wife, to purchase the Asbate home. Ms. Burney and Ms. Badgett gave the Asbates a $3,000 deposit. When the sale failed to close, both parties claimed entitlement to the deposit. [RR 2.] On behalf of his clients, respondent filed a civil action against Mr. and Mrs. Asbate, who were represented, at trial, by Kevin Hagen, Esq. The $3,000 in dispute was deposited into the court registry. [RR 2-3.] Respondent's clients prevailed at trial and the court entered a final judgment in the amount of $3,000, plus $250 in costs, at 7% per annum. [RR 3.] The judgment was entered by the trial court, filed by the clerk of the court and recorded in the public record all on the same date: February 12, 2004. [Bar Composite Exhibit 2.]

Immediately after the judgment was entered, Mr. Asbate sought to satisfy it. [TT 34, 99, 111, 139 and 140.] Mr. Asbate is a licensed Florida realtor and real estate agent [TT 109], and testified that the outstanding judgment against him had a negative impact on his business standing. [TT 111-112.] However, on the advice of his attorney, Mr. Asbate waited until the time in which respondent could have

filed for additional costs and attorneys' fees had expired. [TT 35, 111.] As soon as this occurred, Mr. Asbate calculated the interest owed on the $250 cost award, and sent his check in the amount of $254.08 to his attorney, Kevin Hagen, with instructions that he satisfy the judgment immediately. [TT 111.] Mr. Hagen deposited Mr. Asbate's check into his trust account and reviewed Mr. Asbate's interest calculations. Satisfied as to the accuracy of Mr. Asbate's interest calculations [TT 51, 58, 80, 100], Mr. Hagen sent his trust account check to respondent, in the amount of $254.08, and requested a recorded satisfaction of judgment for his client. [TT 16.][1] Mr. Hagen's trust account check was dated May 11, 2004. [TT 15.]

Respondent did not send Mr. Hagen a recorded satisfaction of judgment. He did not call him, and he did not write to him. [TT 167-168, RR 3-4.] Months went by, and Mr. Asbate grew exasperated with the delay — which negatively impacted his business pursuits as well as his creditworthiness in the marketplace. [TT 113-115.] Mr. Asbate called Mr. Hagen, and believed that Mr. Hagen was calling respondent, to urge him to draft and record a satisfaction of the judgment that

[1] As Mr. Asbate had deposited the disputed $3,000 deposit into the court registry, these funds were available to respondent, and his clients, at any time after the judgment was entered on February 12, 2004. [TT 102.] Respondent did not file a motion for the release of these client monies until October 24, 2004 and did not seek Mr. Hagen's cursory consent to release these funds until sometime in December, 2004. [TT 88.]

Mr. Asbate had paid in May, 2004.[2] [RR 3-4.] In June 2004, Mr. Asbate called The Florida Bar's consumer affairs department, to seek assistance. [TT 114-115.] Still, respondent failed to prepare and record a satisfaction of the judgment. On June 29, 2004, Mr. Asbate filed a sworn bar complaint against respondent. [Bar Exhibit 2, TT 55.] In his mandatory response to the complaint, respondent advised The Florida Bar that he "owed no obligation to Mr. Asbate." [RR 4.] Respondent filed a second response on or about August 5, 2004. In that letter, respondent opined that Mr. Asbate suffers from "some mental disorder," and advised the bar that Mr. Asbate had been proven "a liar in a Court of Law." Respondent again denied any obligation to provide Mr. Asbate with a recorded satisfaction of judgment and threatened to seek damages against Mr. Asbate if he continued to press his bar complaint. [RR 4, TT 182.] At or about this time, in late July or early August of 2004, Mr. Asbate telephoned respondent's office and spoke with his assistant, Annette Sinclair. Ms. Sinclair told Mr. Asbate that respondent had received the check in satisfaction of the judgment, but was "awaiting clearance from the bank in order to issue a satisfaction." [TT 113, 135.] On August 4, 2004, however, respondent caused or allowed Ms. Sinclair to write and send a follow-up letter to Mr. Asbate directly (despite the fact that he was represented by Mr. Hagen),

[2] Mr. Hagen testified that he had no independent recollection of intervening conversations that he had with respondent, although he was aware that Mr. Asbate had tried to reach him, repeatedly, and had notes regarding his own conversation with Florida Bar representatives regarding the matter. [TT 38.]

disputing the foregoing statement, demanding "a retraction," and threatening legal consequence for his "libelous action." [TT 184-185.]

In late September 2004, when he unexpectedly encountered Mr. Hagen in the Broward County Courthouse, respondent spoke with him. As a result of that conversation, respondent decided that Mr. Hagen had not conspired against him. Accordingly, respondent informed Mr. Hagen, for the first time since the judgment was satisfied in May 2004, that he believed that the amount Mr. Hagen had tendered, in satisfaction of the Asbate judgment, was 23 cents short. [TT 168, 173-175, 198.] Respondent testified that, after he decided that Mr. Hagen's "effort wasn't to be difficult" [TT 175, l. 20], he "started the process of getting the satisfaction." [TT 175, l. 23-24.] Prior to that time, respondent testified that he believed that Mr. Asbate and Mr. Hagen intentionally sent him a few cents less than was due in order to be contentious and in efforts to direct sarcasm at him [TT 198]. Respondent believed that they were "playing games" with him. [TT 196, l 24-25.] He also testified that he told no one (including The Florida Bar) about the 23 cent shortage in the amount tendered, from May until September 2004, because he believed that Mr. Asbate caused the shortage intentionally, to "further irritate" him and his clients [TT 203], and because he felt personally offended. [TT 183, l. 6-7.] Respondent also admitted that his personal feelings about this case motivated his decision to hold Mr. Hagen's trust account check (in satisfaction of his clients'

judgment) in his office, unnegotiated, for months. [TT 173.] And, while respondent testified that he told his clients that the judgment had not be satisfied in full, he admitted that he did not tell them of his decision to withhold a satisfaction of the judgment over a 23 cent dispute. [TT 203, 204.]

After respondent's chance courthouse meeting with Mr. Hagen in late September 2004, respondent persisted in his demand for the missing 23 cents to satisfy the judgment. Toward this end, he returned Mr. Hagen's unnegotiated May settlement check to him, in or about October 2004, with written notice of and demand for the 23 cent shortage. On October 25, 2004, Mr. Hagen put 23 cents from his own pocket into an envelope, together with the original May 2004 settlement check, and mailed the check and the change to respondent — with his renewed request for a recorded satisfaction of judgment. [TT 40, 85.]

Despite receiving full satisfaction (to the penny)[3] of the judgment, as of October 2004, respondent still failed and refused to prepare and record a satisfaction of judgment — in contravention of applicable Florida law. [RR 4.] Finally, on or about January 21, 2005, respondent sent Mr. Asbate an unrecorded satisfaction of judgment. Respondent continued in his willful refusal to record the satisfaction of judgment, in contravention of applicable Florida law. Mr. Asbate

[3] Respondent testified that he would have been justified in withholding a satisfaction of judgment in this case, without notice to Mr. Asbate or Mr. Hagen, even if the amount tendered had been one penny short. [TT 177.]

recorded the judgment himself, at his own expense. [RR 4-5.] Later, respondent reimbursed Mr. Asbate for the recording costs, and testified at trial that his failure to record the satisfaction himself was "an oversight." [TT 178.]

More than a year after the judgment had been satisfied, and well after Mr. Asbate had recorded it himself, respondent filed a motion in the closed, underlying county court case. This motion, which was filed shortly before the final hearing in the instant bar disciplinary case, was styled as a Motion for Clarification and/or Determination of When Judgment was Satisfied. The motion was heard on October 6, 2005 – approximately a week before the final hearing in the instant bar case. [RR 5.] Respondent introduced the transcript of that hearing into evidence in his bar case. [Respondent's Exhibit 1.] Respondent alleged, in the body of his motion, that the jurisdiction of the trial court was retained "to address issues related to enforcement of the final judgment." [Respondent's Exhibit 1.]

During the course of the October 6, 2005 hearing (which was attended by Mr. Hagen as well), respondent asked the trial judge to calculate and make a ruling to establish the correct amount of interest that had been generated by his February 2004 judgment. The trial judge obliged, made the calculations and determined that both respondent's and Mr. Asbate's calculations were incorrect. He determined that Mr. Asbate's May 2004 payment to respondent's clients had been 14 cents – and not 23 cents, short. The judge also expressly noted that his determination was

not dispositive of The Florida Bar's review of respondent's conduct in the matter. [Respondent's Exhibit 1.]

Based on her evaluation of the evidence and her careful observation of the witnesses' demeanor at the final hearing, the referee found that respondent had violated specific Rules Regulating The Florida Bar, and that his conduct was willful, intentional, and motivated by his personal, negative feelings for Mr. Asbate. [RR 5-6.] The referee also found that respondent's Motion for Clarification and/or Determination of When Judgment was Satisfied, as filed in September, 2005 – long after the case was settled and the judgment was satisfied — was "a belated attempt to create some sort of defense for respondent to use in this bar disciplinary proceeding." Accordingly, the referee determined that respondent's motion was frivolous and prejudicial to the administration of justice. [RR 5.]

In light of respondent's prior disciplinary history, and after reviewing the case law as well as the Florida Standards for Imposing Lawyer Sanctions, the referee recommended that respondent be suspended for 91 days, that he be required to pay restitution to Mr. Asbate and his attorney, that he undergo a Law Office Management Assistance Service (LOMAS) evaluation, and that he pay The Florida Bar's costs in this matter. [RR 5-6.]

Respondent appealed the referee's recommendation, and sought review of:

the referee's denial of his motion to dismiss the bar's case, the referee's findings of fact and guilt, and the referee's sanction recommendation. [*See* Respondent's Petition for Review, January 11, 2006.] As respondent advanced no specific argument, in his initial brief, regarding his motion to dismiss the bar's case, it is assumed that respondent has abandoned this as a separate issue for purposes of appeal. Apparently combining this claim of error with his two remaining appellate issues, respondent argues that the referee erred in finding that his conduct violates *any* of The Rules Regulating the Florida Bar. He also asserts that if any sanction is to be imposed, it should not exceed a 10 day suspension.

The Florida Bar seeks this Court's approval and ratification of the referee's factual findings and disciplinary recommendations.

SUMMARY OF THE ARGUMENT

It is well settled that a referee's findings of fact enjoy the presumption of correctness and may not be disturbed until and unless the appellant demonstrates clear error or a lack of evidentiary support. In his initial brief, respondent has demonstrated neither clear error nor a lack of evidentiary support in the bar disciplinary case. Instead, respondent argued that the referee failed to correctly measure his conduct by the applicable civil law (regarding the satisfaction of judgments). He also complained that had she done so, the referee would have recommended that no bar discipline be imposed against him.

The referee in this case did not commit error. In the underlying civil case, respondent developed significant animosity against Mr. Asbate and his lawyer, Kevin Hagen. [For reasons that he did not explain, respondent came to believe that Messrs. Asbate and Hagen disrespected him and his clients.] So, when Mr. Asbate swiftly paid the judgment against him, respondent seized the opportunity to punish him and his lawyer with a game of "gotcha" — by refusing to prepare and record a satisfaction of judgment (based on his belief that the amount Mr. Asbate paid was 23 cents less than what he owed), and by failing to tell Mr. Hagen or his client about the shortage. Because he perceived Mr. Asbate's simple calculation error to be a purposeful insult (for reasons he does not explain), respondent sat on this information, construed it as intentional and used it to deny Mr. Asbate the

satisfaction to which he was entitled. Respondent did this on his own initiative, without his clients' full knowledge or informed consent. After Mr. Asbate filed a sworn bar complaint against him, respondent denied any obligation to Mr. Asbate and advised The Florida Bar, in writing, that Mr. Asbate had mental problems and had been "proven to be a liar in a Court of Law." Neither claim was true, but respondent's game of "gotcha" continued and expanded, dangerously. From May to September, 2004, respondent utilized this "gotcha" stratagem, and refused to provide Mr. Asbate with a recorded satisfaction of his judgment. He also refused to explain his conduct or reveal the de minimus shortage — to Mr. Hagen, Mr. Asbate, or The Florida Bar. In late September 2004, respondent met Mr. Hagen in the courthouse, unexpectedly. This chance encounter assuaged respondent's feelings and prompted him to reveal the 23 cent shortage to Mr. Hagen, for the first time. Mr. Hagen paid the 23 cents immediately, out of his pocket change. Even then, after the judgment was fully paid, respondent continued in his refusal to prepare and record a satisfaction of the judgment. In late January 2005, respondent finally sent Mr. Asbate a satisfaction of judgment — but he still refused to record it. Gotcha, once again.

Over the course of 8 months, respondent executed a campaign of personal vengeance for unknown and undisclosed personal offenses, in the context of representing clients. He did this without his clients' knowledge and consent:

holding their settlement check in his file, unnegotiated, and telling them that he had not received the full judgment from Mr. Asbate — without revealing that the missing funds amounted to mere pennies. Respondent continued the game in his responses to The Florida Bar's investigative inquiries, and in his testimony before the referee. Holding fast and indeed clinging to the technical requirements and strict interpretation of the law on satisfaction of judgments, respondent abused the law as a means by which to punish Mr. Asbate and his lawyer. By doing this, respondent violated the spirit of that law — knowingly, intentionally, and absolutely. Respondent's motivation, throughout this case, was not misplaced but zealous representation of his clients. Instead, respondent was motivated by his own personal dislike for Mr. Asbate and Mr. Hagen, *regardless* of his duty to his clients. This personal animus also caused respondent to forget his duties as an officer of the court. In October 2005 (about a week before the bar disciplinary trial), respondent convinced the civil trial judge to revisit the civil judgment entered in February 2004, and to enter an order regarding the amount of interest that *should* have been paid — despite the fact that the judgment was long satisfied and had even been recorded (by Mr. Asbate) by then. The referee recognized respondent's intentions and motivations, and found that his frivolous civil motion, where no case or controversy existed, had been prejudicial to the administration of justice.

The referee's conclusions in this case proclaim, with unwavering certainty, that respondent's game of "gotcha" should not go unpunished. The referee's findings of fact are consistent with that proclamation, as is her recommended discipline. Because respondent testified that he does not regret his conduct, and would repeat it, even if a judgment payment were "one penny" short [TT 177], the referee correctly determined that respondent should receive a rehabilitative suspension of 91 days, together with the other terms and conditions set forth in her report.

ARGUMENT

I. THE REFEREE CORRECTLY FOUND THAT RESPONDENT'S CONDUCT, IN REFUSING TO PROVIDE A RECORDED SATISFACTION OF JUDGMENT (BECAUSE THE JUDGMENT DEBTOR UNKNOWINGLY MADE A 14 CENT OR 23 CENT ERROR IN CALCULATING AND PAYING INTEREST), PRESENTED CLEAR AND CONVINCING EVIDENCE OF RESPONDENT'S VIOLATION OF CERTAIN RULES REGULATING THE FLORIDA BAR.

Respondent's first appellate issue states: "[a]t issue in this appeal is whether a lawyer should be suspended from the practice of law when that lawyer does not provide a recorded satisfaction of judgment to an individual who has made less than full and total payment of a judgment." Stated differently, respondent's question asks whether this Court should suspend a lawyer who represents his client within the parameters of the applicable Florida Statutes controlling the satisfaction of judgments — and of course, the answer is no. Respondent's simplistic question is inapposite to the facts of the instant case because it omits a multitude of crucial elements: that the judgment debtor had paid all but 14 (or 23) cents of the judgment;[4] that the judgment debtor's failure to pay the missing pennies was the result of plain error (such as respondent also committed in reaching his own

[4] At the hearing before the civil trial judge, in October, 2005, it was determined that Mr. Asbate's shortage, in satisfying the judgment against him, was short 14 cents — and not 23 cents, as respondent had claimed.

incorrect conclusion that the shortage amounted to 23 cents); that respondent acted in bad faith and never revealed the de minimis shortage to the judgment debtor *or* The Florida Bar for months; that respondent repeatedly denied all obligation to the judgment debtor for months; that respondent engaged in a campaign to threaten, harass and defame the judgment debtor to The Florida Bar; that respondent failed to disclose the true amount of the "shortage" to his clients; and that respondent never, ever, provided the judgment debtor with the mandatory, recorded satisfaction of judgment required by the very (Florida) statutes he advances in his defense. Further, respondent's appellate issue, as stated, ignores the plain meaning and purpose of the law — indeed the spirit of the law: that judgment debtors who pay their debts are entitled to legal release, recorded in the public record. Respondent did not challenge this plain truth at any stage of the instant disciplinary proceedings. He admitted that Mr. Asbate paid all but pennies of the judgment, within a short time after it was entered. But by stating his issue in the manner that he did, respondent asks this Court to cover its eyes and look the other way, so that he may use the language of the law to violate its spirit. The Court must not look away and must not allow respondent to play "gotcha," again. On very different facts and in a vastly different context, this Court examined the balance between the letter of a statute and the spirit of the law in Garner v. Ward, 251 So.2d 252 (Fla. 1971). In that case (involving the correct interpretation of a wrongful death statute

dealing with the intervention of a party), this Court offered general guidance regarding the interpretation of all Florida statutes, holding that:

> A statute should be construed to give effect to the evident legislative intent, even if the result seems contradictory to the rules of the construction and the strict letter of the statute; the spirit of the law prevails over the letter. Beebe v. Richardson [23 So.2d 718 (Fla. 1945)]. The intent prevails where strict application of the letter of the law would defeat its purpose, or be absurd. Knight & Wall Co. v. Tampa Sand Lime Brick Co., 55 Fla. 728, 46 So. 285 (Fla. 1908).

Garner, at 256.

In the instant case, the evident legislative intent of Florida Statutes §701.04(1) and §701.05 is to encourage the payment of judgments and to ensure that judgment creditors provide judgment debtors with timely legal release of the debts they pay. While the language compelling payment in full is clearly intended to speak to the judgment debtor's obligation to the pay his entire debt, there is nothing in the statute or in the common law to suggest that a 14 cent error should be a complete and absolute bar to a debtor's right to a recorded satisfaction of a paid judgment. Nor is there anything in the statute to indicate that the precepts of good faith and fair play do not apply. Accordingly, even if respondent's clients had *instructed him* not to issue a satisfaction of judgment until every penny was paid (and they did *not* do this), simple professionalism and rudimentary ethics would have compelled respondent to make a good faith effort to bring the de minimis shortage to the judgment debtor's attention. What respondent did instead, in the instant case,

strains the strictest application of the law, defeating its purpose and rendering an absurd (if not ridiculous) result. As this Court noted in Garner, the spirit of the law must prevail in circumstances such as these. If it does not, the "gotcha" school of litigation — which has been so roundly condemned by this Court and the district courts, will be revived and recharged. *See* Ryan v. Lobo De Gonzalez, et al, 921 So.2d 572 (Fla. 2005); Jenkins v. UBN Global Trading Corporation, 886 So.2d 1057 (Fla. 4th DCA 2004), and Salcedo v. Ass'n Cubana, Inc., 368 So.2d 1337 (Fla. 3rd DCA 1979).

Finally, in considering and weighing this issue, this Court must determine whether respondent has demonstrated that the referee's findings are clearly erroneous or contrary to the weight of the evidence. In addressing this, at the bottom of page 8 of his initial brief, respondent stated that "[i]t is the respondent's position that the Referee's findings of guilt are clearly erroneous and that as to the ultimate issue (an obligation to provide a satisfaction prior to full payment) is [sic] lacking in evidentiary support." Because respondent's claim of error is confused, and his "ultimate issue" is misapplied, he has not met his appellate burden of proof. It is axiomatic that the referee is responsible for making findings of fact and for resolving conflicts in the evidence. The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994). Accordingly, her findings of fact are entitled to a presumption of correctness. The Florida Bar v. Hayden, 583 So.2d 1016 (Fla. 1991). These

findings must be upheld unless the respondent proves that they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990), The Florida Bar v. Vining, 707 So.2d 670, 673 (Fla. 1998).

Respondent has advanced neither evidence nor argument to demonstrate clear error or a lack of evidentiary support. Accordingly, the referee's finding that respondent's conduct constitutes violation of the referenced Rules Regulating The Florida Bar, must be upheld.

II. THE REFEREE CORRECTLY RECOMMENDED A 91 DAY SUSPENSION, TOGETHER WITH CERTAIN OTHER TERMS AND CONDITIONS, AS APPROPRIATE DISCIPLINE IN THE INSTANT CASE.

After hearing all of the testimony, receiving all of the evidence, and considering mitigation, aggravation, respondent's prior discipline, the case law and the Florida Standards for Imposing Lawyer Sanctions, the referee recommended that respondent be suspended from the practice of law for 91 days. She also recommended that, as conditions precedent to his eligibility to apply for reinstatement, respondent be required to pay the bar's costs in these proceedings, that he undergo a Florida Bar Law Office Management Assistance Service (LOMAS) evaluation of his law office, and that he be required to pay restitution to Mr. Asbate and his attorney, for legal fees and costs (if any) caused by respondent's failure to timely prepare and record a satisfaction of judgment.

This Court has a wider scope of review over disciplinary recommendations than it does over findings of fact. This is because it falls to this Court to order appropriate punishment, when necessary. The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989). Notwithstanding this broader overview authority, a referee's recommendation of discipline is also afforded a presumption of correctness unless the recommendation is clearly erroneous or without record support. The Florida Bar v. Barcus, 697 So.2d 71 (Fla. 1997), *quoting* The Florida Bar v. Niles, *supra*.

In the instant case, the referee's disciplinary recommendation was synthesized from her review of the case law, the aggravating and mitigating factors present in the case, and The Florida Standards for Imposing Lawyer Sanctions. In his initial brief, respondent took issue with each of these elements, and argued that the referee's analysis was wholly incorrect, or flawed. Beginning with the case law, respondent relied on The Florida Bar v. Price, 569 So.2d 1261 (Fla. 1990) and The Florida Bar v. Whitaker, 596 So.2d 672 (Fla. 1992) to support his claim that a public reprimand is the appropriate discipline to be imposed in the instant case. Both of these cases are inapposite because they bear no relevance to the instant case. In Price, the lawyer took a dismissal in a bankruptcy case without his clients' approval. Finding that Price's misconduct was an isolated incident, and because he had no disciplinary history, the Court imposed a public reprimand. Price is wholly unlike the case at bar. In the instant case, respondent engaged in an 8 month

odyssey of neglect, incompetence and deceit. His conduct negatively impacted the administration of justice and caused harm to his victim, Mr. Asbate. Over a 14 cent error in an interest calculation, and motivated by his own intense feelings of personal dislike, respondent precipitated a bar investigation, a referee hearing and now an appeal — all of which have wasted Court time and public resources. The respondent cannot, within the bounds of reason, argue that the instant case is like Price. Similarly, he cannot reasonably argue that the Price discipline of a public reprimand is appropriate in the instant case. Whitaker, a neglect case involving the expiration of a statute of limitations, is equally dissimilar to the instant case and its discipline (also public reprimand) is equally inappropriate.

While The Florida Bar found no reported case directly on point, given the unique facts of this case, it takes guidance from this Court's decision in The Florida Bar v. Nowacki, 697 So.2d 828 (Fla. 1997). In that case, the referee found the respondent (who had significant prior discipline, as does respondent) guilty of undue delay and communication violations, and imposed a 91 day suspension. In so doing, the Court noted that Nowacki's conduct evidenced a "persistent pattern of client neglect and mismanagement." Nowacki, at 833. In The Florida Bar v. Jones, 403 So.2d 1340 (Fla. 1981), the Court upheld the referee's determination to suspend Jones for 6 months, for conduct which was prejudicial to the administration of justice. As respondent has failed to demonstrate case law which

establishes that the referee's recommendation of discipline is clearly erroneous, the presumption of correctness has not been compromised, and the referee's recommendation should stand.

Next, respondent took issue with the referee's application of The Florida Standards for Imposing Lawyer Sanctions. In reaching her disciplinary recommendation, the referee found Standards 4.42 and 6.22 applicable. Standard 4.42(a) states that suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to that client. Standard 6.22 provides that suspension is appropriate when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client, or causes interference or potential interference in a legal proceeding. Respondent challenged these findings, and urged the Court to find Standard 4.43 (recommending the imposition of a public reprimand) applicable instead. As respondent advanced no argument in support of his challenge, and has not otherwise demonstrated that the referee's application of the Florida Standard for Imposing Lawyer Sanctions was clearly erroneous, those findings should not be disturbed by this Court.

Additionally, respondent challenged the referee's findings regarding the aggravating factors to be applied to the facts of this case. Specifically, respondent challenged the referee's finding that respondent had a "dishonest or selfish

motive." In support of his challenge, respondent urges the Court to agree that he received no personal benefit from his misconduct in this case. The bar strongly disagrees: the referee found that respondent was motivated, at *all times* in the instant case, by his own intense dislike for Mr. Asbate and his lawyer, Mr. Hagen. Accordingly, respondent derived personal satisfaction, at his clients' potential expense, from his punishment of Mr. Asbate – by refusing to give him a recorded satisfaction of the judgment he paid. In support of this finding, the referee noted respondent's own testimony, during his disciplinary trial, that he felt "justified" in his action, because he had believed that Mr. Asbate and Mr. Hagen were "playing games" with him. The referee also noted respondent's admission that he was not honest with his own clients, regarding his conduct toward Mr. Asbate. As respondent has failed to present evidence to support his charge that the referee incorrectly applied the aforementioned aggravating factor in the case at bar, respondent's challenge must fail, and the referee's recommendation as to discipline should be upheld.

Finally, the respondent challenged the referee's decision to consider prior misconduct and cumulative misconduct as relevant factors in recommending a sanction. This Court has held, repeatedly, that it must weigh respondent's prior misconduct and impose new discipline in light of respondent's prior disciplinary record. Respondent has significant prior discipline. The referee did not err by

taking this disciplinary history into consideration at the time of her deliberations as to sanctions.

CONCLUSION

In the instant case, respondent engaged in an 8 month odyssey of intentional misconduct (motivated by personal animus) that was incompetent, dilatory and profoundly prejudicial to the administration of justice. Even assuming that respondent's interest calculations were correct (they were not), respondent's conduct cannot be construed as reasonable, given that the controversy was over 14 cents. For 14 cents, respondent failed to prepare and record a satisfaction of judgment. For 14 cents, he threatened and maligned the judgment debtor. And for 14 cents, he abused the time and resources of the bar, the referee and this Court. At trial, respondent admitted that his conduct was predicated by his intense dislike for Mr. Asbate and his lawyer, and that he acted without the knowledge and consent of his clients — to their detriment. This is "gotcha" litigation of the very worse kind. Respondent took the letter of the law and contorted it to fit his own purpose: a personal vendetta against a fellow lawyer and his client. Respondent did not act in good faith and he did not honor the spirit of the law. Instead, he used the letter of the law to impede justice. Because his conduct was willful, because respondent believes himself to be justified in his misconduct, and because of respondent's significant prior discipline, he should receive a 91 day suspension, under the terms and conditions recommended by the referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original of The Florida Bar's Amended Answer Brief has been furnished by regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; true and correct copies have been furnished by regular U.S. mail to Kevin P. Tynan, Counsel for Respondent, at 8142 N. University Drive, Tamarac, Florida 33321, and to Staff Counsel, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this _____ day of May, 2006.

LORRAINE CHRISTINE HOFFMANN

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel hereby certifies The Florida Bar's Amended Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

LORRAINE CHRISTINE HOFFMANN

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