

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case Nos. SC19-488 and
SC19-1570 (Consolidated)

v.

PHILLIP TIMOTHY HOWARD,

The Florida Bar File Nos.
2016-00, 682 (2A) and
2019-00, 088 (2A)

Respondent.

_____ /

**THE FLORIDA BAR'S RESPONSE TO RESPONDENT'S
MOTION FOR RELIEF FROM REPORT OF REFEREE**

Complainant The Florida Bar (“TFB”) opposes Respondent Phillip Timothy Howard’s (“Respondent”) motion for relief from the Report of Referee (the “Motion”), and states as follows:

1. Respondent seeks relief from the Report of Referee on the bases of purported “newly discovered evidence, fraud, misrepresentation, or other misconduct” under Florida Rule of Civil Procedure 1.540(b). Motion at 1. Even if this rule were properly invoked here, Respondent has not demonstrated any basis justifying “relief” from the Report of Referee via his Motion. Instead, his arguments are ones properly raised if at all through merits briefing.

2. To begin with, Florida Rule of Civil Procedure 1.540(b) does not apply. Rule 1.540(b) authorizes relief from a “final judgment,

RECEIVED, 01/05/2022 04:23:20 PM, Clerk, Supreme Court

decree, order, or proceeding” on several grounds. Fla. R. Civ. P. 1.540(b). The rule does not, however, authorize relief from a **non-final** order or proceeding. *See Stubbs v. Fed. Nat’l Mortg. Ass’n*, 250 So. 3d 151, 152 (Fla. 2d DCA 2018); *Campos v. Campos*, 230 So. 3d 553, 556 (Fla. 1st DCA 2017); *Garcia v. Navy Fed. Credit Union*, 224 So. 3d 339, 340-41 (Fla. 5th DCA 2017); *Kozich v. DeBrino*, 837 So. 2d 1041, 1044 (Fla. 4th DCA 2002).

3. The Report of Referee is not final. Pursuant to the Rules Regulating The Florida Bar (“RRTFB”), the Report of Referee contains only recommendations as to guilt and as to the disciplinary measures to be applied. RRTFB 3-7.6(m)(1). It is only this Court that may enter a “final” judgment with respect to attorney discipline. *See* RRTFB 3-7.7(c)(6). For this reason alone, the Court should deny the Motion.

4. Even if Rule 1.540(b) were properly invoked, Respondent has offered nothing justifying “relief” from the Report of Referee.

5. First, Respondent claims TFB counsel Shanee’ Hinson “repeatedly lied to the Referee as to the criminal conduct of JB Harris and his numerous Bar violations.” Motion at 2. Respondent admits that he learned this claimed basis upon receiving “the transcript of her testimony . . . on December 3, 2021.” *Id.* Presumably, this was

the excerpt of the March 22, 2021 sanctions hearing—a hearing at which Respondent was present—the transcript of which Respondent received “at 4:03 p.m. on December 3, 2021.” Respondent’s Dec. 16, 2021 Notice of Filing.

6. “Relief from judgment based on newly discovered evidence . . . should be seldom granted and only when the party seeking relief has exercised due diligence.” *Hooks v. Quaintance*, 71 So. 3d 908, 911 (Fla. 1st DCA 2011). “Importantly, the movant bears the burden of establishing that he exercised due diligence.” *Neapolitan Enters., LLC v. Fishman*, 303 So. 3d 1258, 1260 (Fla. 2d DCA 2020).

7. Respondent’s own allegations establish that he exercised no such diligence here. To be sure, TFB counsel did not offer testimony at the sanctions hearing, only argument, none of which was false, but regardless, Respondent was present for the March 22, 2021 hearing and heard the complained-of “testimony.” See Mar. 18, 2021 Transcript. If Respondent had an issue regarding Ms. Hinson’s statements at the March 22nd hearing, he could have and should have raised that issue much earlier than December 22, 2021. Notably too, he could have ordered the transcript earlier but did not, choosing instead to order only an excerpt apparently after the Court’s

November 4, 2021, deadline to file all transcripts had passed. See Oct. 19, 2021 Order Granting Extension to November 4, 2021; see also Oct. 29, 2021 TFB's Response to Respondent's Third Motion for Extension of Time, Ex. 1 (Affidavit of Court Reporter dated Oct. 28, 2021).

8. In short, Respondent's receipt of a transcript on December 3, 2021, does not amount to "newly discovered evidence" warranting relief from judgment under Rule 1.540(b), nor does it show this Motion was brought "within a reasonable time." Fla. R. Civ. P. 1.540(b). Respondent also does not establish that Ms. Hinson's statements amount to fraud, misrepresentation, or misconduct.

9. Respondent also contends that recently discovered "violation[s] of accountancy statutes and rules" by TFB's certified public accountant and branch auditor, Roy Jeter, justifies relief from the Report of Referee. Motion at 2. Respondent claims he did not learn of these violations until December 8, 2021, after he apparently reviewed certain accounting statutes and rules. *Id.* But simply later discovering something "hardly constitutes diligence or vigilance as required by the law." *Neapolitan Enters.*, 303 So. 3d at 1260.

10. Respondent also continues his attacks on the individual that instigated the TFB's investigation in Case No. SC2019-1570, Peggy Harris, and Ms. Harris's counsel, J.B. Harris. Motion at 2. In short, Respondent complains that Peggy Harris did not review the original TFB complaint she filed, that it was instead drafted by her counsel, J.B. Harris, and that it was all part of a larger scheme by J.B. Harris to extort money from Respondent.

11. In support of his allegations, Respondent cites evidence he previously provided to the Referee on these points dating from June 2018 to March 2021. *See id.* at 3-4. In fact, the Referee considered and addressed Respondent's allegations in the Report of Referee, including by expressly finding that although it was concerning that Ms. Harris' initial complaint "contain[ed] inaccuracies or falsehoods (prepared by J.B. Harris)," "even if [TFB]'s independent investigation and allegations (now proven) started with a faulty/partially false complaint—the proof at hearing of many violations by [R]espondent is clear." *See* Report of Referee at 7-8; Report of Referee Additional Findings at 41-42, 46-47.

12. Regardless, a Rule 1.540(b) motion is "not the appropriate vehicle for handling attorney misconduct that does not prejudice the

final judgment.” *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 20 So. 3d 952, 958 (Fla. 4th DCA 2009). The same goes for Respondent’s claims here. Respondent makes no effort to explain how such purported misconduct prejudiced the Report of Referee, other than summarily stating that is so. TFB’s complaints in these consolidated cases arose not just from Ms. Harris’s complaint but based on its own independent investigation of Respondent’s conduct with respect to both Ms. Harris’s case as well as the separate case of Jason Hall. See TFB Compl. in Case No. SC19-488. Respondent’s complaints about Peggy Harris and J.B. Harris—complaints he has also thoroughly described in his attempt at an initial brief—do not justify relief from judgment under Rule 1.540(b).

13. Respondent next contends violations of “Judicial Cannon [sic] Rule 3(D)” by the Referee, as well as the Referee’s “bias[], prejudice[] and incapab[ility] of rendering an intelligent, knowledgeable and discerning Report of Referee,” justify relief from the Report of Referee. Motion at 2. Respondent claims he did not discover this basis for relief until the Referee granted Respondent’s disqualification motion in another pending TFB proceeding against

Respondent, in Consolidated Case Nos. SC19-1563 and SC20-1596, on December 13, 2021. *Id.*

14. Claims of bias and prejudice are not bases for relief from judgment. *See Fla. R. Civ. P. 1.540(b)*. Nor is the Referee an “adverse party” within the meaning of Rule 1.540(b)(3). But, to the extent the Court charitably views the Motion as asserting that the Referee’s disqualification in other cases amounts to evidence of fraud or misconduct, the Referee’s grant of the disqualification motion in other disciplinary cases does not *ipso facto* mean any allegations of purported fraud and misconduct on the part of the Referee are true. *See Fla. R. Gen. Prac. & Jud. Admin. 2.330(h)* (“The judge against whom an initial motion to disqualify under subdivision (e) is directed may determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged.”). Thus, aside from Respondent’s conclusory statements, nothing establishes the Referee engaged in any misconduct. Further, to establish fraud, Respondent must demonstrate a “a prime facie case of fraud, not just nibble at the edges of the concept.” *Freemon v. Deutsche Bank Trust Co. Ams.*, 46 So. 3d 1202, 1205 (Fla. 4th DCA 2010) (internal quotation marks omitted). Respondent does not meet this burden.

15. In sum, Rule 1.540(b) is not an appropriate vehicle for attacking the Report of Referee and the Court should deny the Motion for that reason alone. To the extent the Court even reaches the merits of the Motion, the Motion should be denied for the reasons described above. Respondent largely rehashes arguments that are or should have been made in his merits briefing, and this Motion—like so many of Respondent’s recent filings—appears to be nothing more than another attempt to delay these proceedings. For all these reasons, TFB respectfully asks the Court to deny the present Motion. TFB also renews its request for the Court to grant TFB’s own pending motion to dismiss.

Respectfully submitted on January 5, 2021.

HOLLAND & KNIGHT LLP

/s/ Tiffany A. Roddenberry
Kevin W. Cox, Esq.
Florida Bar No. 34020
kevin.cox@hklaw.com
Tiffany A. Roddenberry, Esq.
Florida Bar No. 92524
tiffany.roddenberry@hklaw.com
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832

Co-Counsel for The Florida Bar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 5, 2021, a true and correct copy of the forgoing was filed through the Florida Courts E-Filing Portal and served by email to the following:

Shaneé L. Hinson
Bar Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
shinson@floridabar.org

Timothy Howard, J.D., Ph.D.
1415 East Piedmont Dr., Suite 5
Tallahassee, FL 32308
tim@howardjustice.com
Respondent

and

Patricia Ann Toro Savitz
Staff Counsel
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300
psavitz@floridabar.org

*Counsel for Complainant, The
Florida Bar*

/s/Tiffany A. Roddenberry
Attorney