IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC17-782

vs.

DENNIS L. HORTON,

Respondent.

_____|

RESPONDENT'S ANSWER BRIEF

and

INITIAL BRIEF ON CROSS APPEAL

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SYMBOLS AND REFERENCES

In this brief the petitioner, The Florida Bar, is referred to as "the Bar, or "Florida Bar" or simply "the Bar." The cross-petitioner, Dennis L. Horton, is referred to as "Mr. Horton" "respondent."

"TR-1" refers to the transcript of a final hearing held August 24, 2017.

"TR-2" refers to the transcript of a final hearing held August 25, 2017.

"TR-3" refers to the transcript of a sanctions hearing held October 23, 2017.

Transcripts are typically identified by page and line.

"Bar Exh. #" refers to an exhibit submitted by The Florida Bar.

"R. Exh. #" refers to an exhibit submitted by Respondent.

"Rule" or "Rules," unless otherwise further identified, refers to the Rules Regulating the Florida Bar, and "Standard" or "Standards" refers to the Florida Standards for Imposing Lawyer Sanctions.

"Dkt #" refers to the docket items listed in the certified record index.

STATEMENT OF THE CASE

This case began as a grievance signed by Mr. Edward Lowman, a longtime friend and client of Dennis Horton. Mr. Lowman voluntarily loaned money to Mr. Horton in a series of transactions in late 2016, totaling $90,000. A misconception arose regarding the total amount Mr. Lowman had agreed to lend. That disconnect came to the attention of The Florida Bar.

David Pennell, an investigator in the Bar's Orlando office, traveled to see Mr. Lowman in Volusia County. Mr. Pennell hand-wrote a bar complaint, which Mr. Lowman signed. The only handwriting by Mr. Lowman on the complaint form is his signature—Mr. Pennell wrote the rest. Mr. Pennell mailed the complaint to his office using a Florida Bar envelope. *See* Dkt. 56, Motion to Strike the Testimony of Edward Lowman, (attachments) (August 23, 2017). The Florida Bar opened a bar counsel investigation. Mr. Horton hired attorney Barry Rigby to defend.

When he received the grievance, Mr. Horton became aware of the need to put Mr. Lowman's loans in writing, which he had not done, though he had offered to do so. [TR-1, p. 69, lines 19-22.] He gave a note with reasonable terms, 6% interest per annum. [Bar Exh. 6, p. 125.] Over the next six months, Mr. Horton produced copious banking records, trust accounting records, and client files for inspection. He sat for two depositions per rule 3-7.11(d)(3); the first on January

10, 2017, and the second on April 6, 2017. The transcripts of these were attached to the Petition for Emergency Suspension and were made exhibits at trial.

At deposition, Mr. Horton admitted he was having liquidity problems, but also that he expected inflow from his citrus groves and the sale of a commercial property, which had been delayed. As it happened, the sale closed on January 30, 2017, upon which he repaid Mr. Lowman, with interest, on February 4, 2017. [R. Exhs. 11 and 16]. *See also* TR-2, p. 251, line 10 to p. 253, line 11.

Bar counsel arranged to take Mr. Lowman's deposition on February 6, 2017; however, the Bar failed to inform Mr. Rigby that it was taking a secret deposition of Mr. Lowman. Mr. Lowman confirmed to the Bar that Mr. Horton had repaid the loans with interest. No one asked Mr. Lowman why he had not actually authored, or even mailed, the bar complaint. No one was present to cross-examine. The referee admitted the one-sided testimony. [Bar Exh. 5.] (Motion to strike the testimony was previously denied.)

Mr. Horton produced requested documents, and he was deposed a second time on April 6, 2017. After six months of bar counsel investigation, the Bar filed a petition for emergency suspension under rule 3-5.2(a). The petition included the predicate, boilerplate allegation that Mr. Horton was presently "causing great public harm," however, not one allegation in the Bar's petition actually met that burden. [Dkt. 1].

Since a petition under rule 3-5.2(a) requires a supporting affidavit, the Bar attached an affidavit by its staff auditor, Matthew Herdeker. His personal knowledge consisted of what he had heard while sitting in on Mr. Horton's depositions. As for his own work, Mr. Herdeker opined that Mr. Horton's trust accounts were not in substantial compliance with the trust account record-keeping rules. While the petition included transcripts of Mr. Horton's two depositions, the copious exhibits thereto (424 pages) were not included, rendering the transcripts barely useful.

Mr. Horton hired the undersigned just days before the rule 3-5.2(a) petition was filed. Forty-three hours after the petition's filing, this Court issued an Order approving the petition and suspending Mr. Horton immediately from the practice of law. Mr. Horton disagreed with the Bar's decision to resort to rule 3-5.2(a), since each allegation was pleaded in the past tense; the loans had been repaid, his liquidity problem had resolved, no trust money was missing, and no crime had been charged or committed.

Mr. Horton resolved to challenge the Bar's use of the rule in a motion to the referee. The motion was heard May 19, 2017. The referee concluded that under the rule there was no way Mr. Horton could challenge the substance of the petition's predicate allegation that he was "causing great public harm." *See* Notice of Filing Transcript of May 19, 2017 Hearing, filed contemporaneously.) Given

what amounts to the *ex parte* nature of a rule 3-5.2(a) petition, the Bar violated this Court's rules in failing to disclose known adverse facts, which, had those been pleaded, may have prompted denial of the petition. At the motion hearing the Bar conceded that it was making no claim for restitution—meaning that no money was missing or owed. *Id.*, p. 40, line 21 ("Our belief is no one is owed money as far as restitution.") The referee ruled that the rule gave him no authority to rule on the issue Mr. Horton raised. *Id.*, pp. 29-31. In effect, Mr. Horton was estopped to deny that he was "causing great public harm." Indeed, the rule as written offers no such procedure or remedy. *Id*. More on this, *post*.

The case went to trial before the referee. At trial the referee admitted the transcript of Mr. Lowman's *ex parte* deposition. On considering all facts and factors, including the lack of any money missing, plus significant and persuasive reputation evidence, the referee recommended that Mr. Horton be suspended for two years *nunc pro tunc* to May 3, 2017, the date of the Clerk's suspension order.

The Bar believes that its use of the emergency suspension "nuclear option" should in all instances result in disbarment, lest its decision to resort to this process be questioned. Thus, the Bar seeks review of the recommended sanction in order to disbar Mr. Horton and to justify its own conduct. This appeal followed, and Mr. Horton cross-appealed on the constitutional and motion issues.

STATEMENT OF THE FACTS

Because this case began with a Petition for Emergency Suspension, it is instructive to review the investigation that went before, and culminated in the petition filed May 1, 2017. Mr. Horton began practicing law 43 years ago in Clermont, Florida. [Dkt. 1, Exh. B, Deposition p. 9, lines 10-12.] He has no prior discipline. The Bar's petition for suspension and the trial of this case dealt with Mr. Horton's involvement with three clients, Edward Lowman, Christa Barry, and Richard O'Connell. The Bar subpoenaed Mr. Horton to produce his files on all three, plus seven others. (No charges resulted from the other seven.) He produced all records relating to his firm's three IOTA trust accounts, plus bank records owned by persons for whom Mr. Horton was attorney-in-fact, his personal bank account, and his law firm's operating account.

The Bar's suspicion regarding Mr. Horton's conduct and motives stems from the fact that he (admittedly) had an ongoing liquidity problem, which resulted in many overdraft fees the bank charged to his law firm operating account regularly. *See* TR-2, pp. 190-95. As Mr. Horton explained, he borrowed from friends and family and worked with his banks to avoid losing everything. *Id.*

This financial anomaly involving the operating account is what prompted the Bar to audit his firm's three trust accounts. Mr. Horton employed two people to manage the trust accounts, Annette Kirk and Kay Lasky, and both of them

performed their work diligently and seriously. See TR-2, p. 231; see also R. Exh. 20, Affidavit of Ms. Kirk; and TR-2, pp. 284-293 (Testimony of Kay Lasky). The Bar's audits revealed technical record-keeping defects. The staff auditor, Matthew Herdeker, concluded that the firm's disbursements journal "did not consistently identify the client or reasons for transactions and those two things are required by attorneys in the rules regulating trust accounts. There were ledgers [that] did not consistently identify the reason for transactions." TR-1, p.101, lines 15-19.

Also, in Mr. Herdeker's words, "I noted several instances in which Mr. Horton placed client cost deposits into his operating account and then transferred down into his trust account. And that is a violation known as commingling, because those cost deposits should have been placed directly in the trust account." TR-1, p.102, lines 1-6. Lastly, it was noted that the firm had a practice of putting various minor costs appearing in client ledgers into a "cost ledger" to pay with a single check costs incurred by several clients. (This was a way of "ganging up" many small costs for payment to a single vendor; each individual cost item still appeared within each client ledger.) Both Ms. Kirk and Ms. Lasky explained how and why the firm kept track of many small cost items for several clients that were payable to a single vendor; *see* TR-2, p. 291, line 18, to p. 293, line 5; *see also* R. Exh. 20, paras. 11-14. (Ms. Kirk did not appear due to disability; para. 2.)

Not only did Mr. Horton employ two people to balanced and handle his trust

accounts, binders full of records were produced, all client ledgers, all deposit receipts, all monthly reconciliations, and disbursements journals. After analyzing all this, the Bar's auditor formed his opinions as quoted above, and concluded that in his opinion Mr. Horton's firm was not in substantial compliance with the trust accounting rules. The referee adopted that opinion in his report.

Mr. Herdeker was asked how many compliance audits he had performed for the Bar of attorney trust accounts. He said, "Probably 350 to 400." Then he was asked: "Have you ever found one to be in complete compliance with every single element of every trust accounting rule?" He said, "Probably not." He was pressed further: "You could haul any attorney off the street and haul his client trust account records before a forensic auditor and something would be amiss with that. True?" Mr. Herdeker answered, "Likely." TR-1, p. 152, lines 3-14.

As the Bar admitted at the May 19, 2017 motion hearing, Mr. Herdeker's audit revealed that no one's money was missing; no one was owed restitution. This strongly implies that no breach of fiduciary duty, and no conversion or fraud took place. Typically, resort to the nuclear option of rule 3-5.2(a) involves a respondent who either: a) has converted or absconded with client funds; or b) is charged criminally. Because none of that is true here, Mr. Horton believed the Bar used Mr. Herdeker's work deceitfully, in addition to failing to disclose facts favorable to him, to prod the Court to grant its Petition in an *ex parte* situation.

Soon after, The Florida Bar trumpeted the fact of Mr. Horton's suspension to the press. Dkt. 34, Notice of Filing Florida Bar Press Release.

Mr. Edward Lowman

The nature of Mr. Horton's relationship with Edward Lowman is revealed in a series of voice messages left by Mr. Lowman. [R. Exh. 21.] The recordings were authenticated by Mr. Horton. [TR-2, p. 210, lines 5-15.] The voice mails provide insight into the friendship relation the two men shared. During 2016, Mr. Horton was the only person to visit him at his nursing home. [TR-2, p. 200, lines 1-9.]

Years earlier, Mr. Lowman had asked Mr. Horton to amend his trust to name Mr. Horton a beneficiary, which he did. [Dkt. 1, Exh. B, Deposition, p. 45, lines 1-11.] Only later did Mr. Horton become aware of the prohibition against a lawyer making a testamentary instrument that named himself as beneficiary. [TR-2, p. 226, lines 1-8.] He wrote Mr. Lowman about the matter and suggested he have a local attorney advise him about the matter. (Mr. Lowman had moved to Georgia by that time.) [R. Exh. 23]; *see also* TR-2, p. 226, lines 9-16.

Mr. Horton came of age in an era that is disappearing, where small town lawyers developed lasting friendships with long-time clients. When he started out, he was not required to pass an ethics exam, and rule 4-1.8(c) did not exist—that is, the conduct at issue now was not prohibited. During his many years as a lawyer, Mr. Horton focused on his own niche of trusts and estates; while he kept up with

that area of law, he admits he did not keep up with changes in the ethics rules. Rule 4-1.8(c), which he admitted to violating by drafting the Fifth Amendment to the Lowman trust [Bar Exh. 5], was codified in 1987. *See Fla. Bar v. Anderson*, 638 So.2d 29, 30 (Fla. 1994).

Mr. Horton never denied that he drafted the amendment his client requested; he only noted that at the time, he was unaware that such work was prohibited. See TR-1, p.61, lines 1-7. Mr. Horton makes no excuse for failing to keep abreast of changes in the ethics rules over the years. He knows that Rule 3-4.1 requires his attention as the rules evolve.

The trust amendment issue came to light when Mr. Horton produced his file on Mr. Lowman. While it is no excuse, Mr. Horton's unawareness of rule 4-1.8(c) does explain his lack of intent to violate the rule, when written. What is more interesting that, while Mr. Horton indeed drafted the amendment, he sent it to Mr. Lowman in Georgia, where Mr. Lowman signed it before a Georgia notary. *See* Bar Exh. 5. This occurred in 2011, after Mr. Horton had advised him of the need to seek other counsel with regard to it back in 2008. [R. Exh. 23.] This sequence of should mitigate a violation of the rule. For all Mr. Horton knows—having been shut out of Mr. Lowman's deposition—he very well may have gained the advice of a Georgia attorney. We do not know. In any event, the 2008 advisement to Mr. Lowman to seek counsel about the trust does tend to prove a lack of bad intent.

It was undisputed that Mr. Horton performed various tasks for Mr. Lowman while he was in a rehab facility, per a 2005 power of attorney (which Mr. Horton had never used before 2016). TR-2, p. 198, line 20 to p. 200, line 15. Mr. Horton testified that Mr. Lowman brought up the idea of lending him money. TR-2, p. 200-02. He said he wouldn't ask Mr. Lowman that, since "I knew him and he wasn't the type usually would lend money." TR-1, p. 200, lines 23-24.

Mr. Horton recounted how the real estate crash had reduced his personal net worth from $10 million down to around $1 million. He related how his real estate heavy portfolio that resulted in the liquidity crisis he was experiencing for several years, and how he tried to deal with that. See generally TR-1, pp. 190-93. He also recounted how he and Mr. Lowman became friends. TR -2, pp. 196-200. As for the $90,000 in loans Mr. Lowman made to him, Rule 4-1.8(a) does require such a transaction between a lawyer and client to be in writing and on reasonable terms, and for the client to be advised of his right to seek independent legal advice. However, Mr. Horton acceded at first to Mr. Lowman's assertion that no note was needed. It seems Mr. Horton and Mr. Lowman come from a time and place where a handshake between gentlemen had meaning. In fact, Mr. Horton testified that Mr. Lowman seemed offended when he offered to give him a note. TR-1, p. 69, lines 19-22; *see also* TR-2, p. 201, lines 7-16.

Mr. Lowman volunteered to loan $90,000 short term. TR-1, p. 69, lines 8-

13; see also TR-2, p. 216, lines 5-8. The matter came to the Bar's attention because Mr. Horton believed Mr. Lowman had agreed to lend him more. *See* TR-2, p. 214-17. Mr. Horton admits and realizes that such a disconnect would not have occurred if he had simply put the transaction in writing as the rule requires. However, this case could have been developed and tried more fairly if Mr. Lowman had been exposed to questions not just from the Bar's perspective, but also from Mr. Horton's. Mr. Horton can never know if on cross-examination Mr. Lowman may have been shown to be recalling events incorrectly, or if his medical condition or prescription medications might have affected his recall.

The Bar made much of the running negative balances in Mr. Horton's law firm operating account, which occurred throughout 2016. Due to Mr. Horton's longtime association with his banks, every check the firm wrote was honored; however, the NSF fees charged resulted in continuing, negative monthly balances. To resolve this problem, Mr. Horton decided to sell one of his income properties to the sole tenant. The sale was delayed.

Mr. Lowman loaned the money in September and October 2016. The next month Mr. Horton gave him a promissory note anyway, the Bar grievance having a hand in focusing his grasp of the issues. In January 2017, Mr. Horton closed on the sale of his commercial property, and repaid Mr. Lowman with interest. [R. Exh. 16]; TR-2, p. 272. The running negative balances in the firm's operating

account ended at the same time, also due to infusion of the sale proceeds. *See* Dkt. 1, Exh. C, Deposition, p. 78, lines 8-13 (explaining that his operating account has not had a negative balance since the Bar had audited him in January 2017) . The Florida Bar knew this, and it should have pleaded such facts in the *ex parte* scenario that is a rule 3-5.2(a) proceeding. The long-running liquidity issue Mr. Horton had been struggling with for many months had resolved, which he told the Bar in his second deposition. The Bar felt no need to include such pertinent information to this Court in its ex parte petition.

The Estate of Christa Barry

In the matter involving the Estate of Christa Barry, the Bar established that Mr. Horton paid himself a fee two days before the probate court issued letters of administration naming him as the personal representative. Mr. Horton admitted that he took the fee without thinking it through, since he knew he was named in the will as personal representative, and had also been Mr. Barry's lawyer. TR-1, p. 88, lines 15-18; TR-2, p. 247, lines 1-10.

Ms. Barry had disinherited her children. [R. Exh. 5] Mr. Horton explained that the situation was fluid and exigent because others were entering Ms. Barry's home and taking property, and there was much that needed to be done. He expected and got a will contest from the children. *See* TR-2, p. 242, line 19 to p. 246, line 10. Mr. Horton had transferred some of Ms. Barry's assets to his trust

account when he heard she was dying; the fee he paid himself was from trust, which he certainly was authorized to use. Dkt. 1, Exh. C, Deposition, p. 35, lines 1-5; see also TR-1, p. 115. He went to court to open the case as an emergency the day after Mr. Barry died, believing that the court would issue the letters based on the exigency. Dkt. 1, Exh. C, Deposition, p. 26, lines 12-22. Had the court done so, his taking of the fee on the same day he went to court would not have created this issue.

The Bar argued, and the referee found, that taking a fee two days before the letters were issued amounted to conduct involving fraud, dishonesty, deceit or misrepresentation under rule 4-8.4(c). The conception of how this amounts to intentional fraud is predicated on the belief that Mr. Horton's power of attorney to write the check ended upon her death; thus he was not authorized to write a check until the letters were issued. He wrote a check from his own trust account; he was owed fees for work he had done as attorney, if not the personal representative.

This issue illustrates the Bar's penchant for inconsistency and over-charging when it pursues an "emergency" that is "causing great public harm." A timing mistake such as this might typically warrant an admonishment, or a letter of advice. A clear and present danger to the public is hard to discern from this episode. Mr. Horton took a fee the same day he expected the court to issue letter naming him as PR, but the court did not do so until two days later.

Mr. Richard O'Connell

The matter involving client Richard O'Connell is similarly inoffensive. The Bar subpoenaed Mr. O'Connell's client file. That was produced. The Bar's auditor acknowledged that Mr. Horton was cooperative and forthcoming in the Bar's investigation. TR-1, p. 170, lines 12-24. Mr. O'Connell was no longer a law client; Mr. Horton was his attorney-in-fact, and managed his affairs. The Bar noted that in some instances, Mr. Horton would pay himself a fee for his work from Mr. O'Connell's checking account, but then later he would replace some or all of the fee back into Mr. O'Connell's account. Mr. Horton explained that Mr. O'Connell's expenses would sometimes spike due to unbudgeted expenses, and accordingly, his account balance would not be enough to pay his bills. When this occurred, Mr. Horton would replace some or all of a fee he had taken, to raise the balance to meet the needs. The checking account balance and the regular expenses were kept within a rather narrow margin. [R. Exh. 14.] Mr. O'Connell understood all of this. *See* R. Exh. 20 Affidavit of Richard O'Connell.

In the last six months of 2014, Mr. Horton invoiced Mr. O'Connell, and received 13 checks, totaling $13,700. TR-1, p. 123, lines 4-8. In 2015, Mr. Horton wrote 33 checks for his fees, which totaled $43,000. He redeposited money four times. The returns totaled $4,800, yielding net fees of $38,200 for 2015. TR-1, p. 123, lines 9-20. One check came from Mr. Horton's personal account, on

December 4, 2015. TR-1, p. 124, lines 1-2. In 2016, Mr. Horton wrote 33 checks for his fees, which totaled $82,840. Mr. Herdeker agreed that Mr. Horton redeposited some 25 checks into the account. TR-1, p. 124, line 24 to p. 125, line 9; *also* TR-1, p. 167, lines 23-25. The returns made in 2016 totaled $40,050. Thus, his net fee for 2016 was $42,790.

The Florida Bar alleged that bad motives were involved and that Mr. Horton was repeatedly taking (and repaying) unauthorized loans. But the evidence was just as convincing that Mr. Horton was owed fees that Mr. O'Connell's checking account balance could not accommodate at various times, due to extra expenses on top of his regular needs, and on those occasions Mr. Horton replaced his fees to allow the account balance to recover. The Bar's auditor admitted that two possibilities existed, one nefarious, one innocuous: 1) that Mr. Horton took fees that he had no right to take out of Mr. O'Connell's account and then put some back; or 2) Mr. Horton took earned fees out, then realized Mr. O'Connell had some expense that had to be paid, and simply put some of his fee back. TR-1, p. 169, line 15 to p. 170, line 5.

It is no exaggeration to say that Dennis Horton is a pillar of his community. He put on a good deal of reputation and character evidence. His volunteerism, his civic service, and the unqualified praise and admiration given to Mr. Horton by his esteemed peers and character witnesses are noteworthy, to say the least. There is

no dispute but that Mr. Horton is a good citizen and a fine man. *See* TR-3 (sanction hearing) and R. Exhs. 24 through 32. The matters Mr. Horton freely admitted to, and the confusing nature of the circumstances surrounding those matters he did not admit, do not warrant the ultimate sanction the Bar requests.

* * *

SUMMARY OF THE ARGUMENT

1. The recommended sanction is not fair to the respondent, not fair to society, and not commensurate with the harm done, or the facts, or the law.

2. Respondent's evidence of mitigation and longtime service to his community should operate to reduce the sanction to time served.

3. The Court should consider the Bar's conduct in the way it pursued this case in mitigation of the sanction to be imposed.

ARGUMENT

I. DISBARMENT IS UNWARRANTED UNDER THE FACTS AND LAW.

A. The Law Supports Public Reprimand or Less for the Trust Accounting Issues.

Because attorney disciplinary cases are all *sui generis*, resorting to previous case opinions can only serve as guideposts in determining the proper sanction in any particular case at bar. Here, there are four discrete findings of misconduct. The first involves the manner in which Mr. Horton's law firm kept trust accounting records. Mr. Horton does not dispute the Bar auditor's analysis and presentation of the technical defects in the record-keeping practices. Indeed, he agrees with Mr. Herdeker's admission that, given the density and complexity of the trust accounting rules, a professional Bar auditor would likely find record keeping violations in the trust records of virtually any law practice. In view of this reality, the question is really whether the law firm did its best efforts in accounting for all trust monies in a way that was transparent and verifiable. In this case, the answer to that question is, yes, the law firm did that. The further question then becomes: What sanction should this Court impose for the technical violations reported by Mr. Herdeker. The case law supports imposition of a public reprimand or less for the trust accounting issues.

In *Fla. Bar v. Borja*, 554 So.2d 514 (Fla. 1990), the attorney issued a check

from trust when the account contained no funds for that purpose. The Bar audited the lawyer's accounts "and found that he was not in substantial compliance with trust accounting procedures." A year later, a follow-up audit found he was "not in substantial compliance." The referee found only "technical violations" of the trust accounting rules and recommended a not guilty verdict. This Court disagreed, noting that the follow-up audit revealed the accounts were "still not in substantial compliance with the rules because they were lacking monthly comparisons, there were negative balances in the account, and respondent was still commingling accounts[.]" As a result the Court imposed a public reprimand.

In *Fla. Bar v. Heston*, 501 So.2d 597 (Fla. 1987), the Bar's audit of the trust account found that the lawyer had "commingled personal and trust funds" and had maintained poor books and records based on "poor policies and procedures regarding the trust account." Further, no client trust account reconciliation had been made and, lastly, for one month the trust balance was short $7,305.18. The Court agreed with the referee's recommendation of a public reprimand followed by two years' probation.

In *Fla. Bar v. Athanason*, 157 So.3d 1048 (Fla. 2014), respondent's bank notified the Bar of insufficient funds in her trust account. The Bar auditor performed a compliance audit covering seven years. The audit revealed "shortages in the trust account and further revealed that the trust account records were not in

substantial compliance with the rules." Respondent replaced the missing funds using her own money. The audit concluded that the shortages were "due to poor bookkeeping practices and that there was no intent to misappropriate funds from her clients." This Court imposed a public reprimand by publication and a three-year probation.

In *Fla. Bar v. Altman*, 157 So.3d 1048 (Fla. 2014), the respondent failed to supervise his non-lawyer employee whom he had allowed to manage the law firm's trust accounts. The attorney reported to the Bar that funds were missing, and also contacted law enforcement. The Bar's auditor performed a compliance audit on the trust accounts for a period spanning some 18 months and "determined that during the audit period, a total of $45,009.58 was misappropriated" by the employee. The audit "revealed that Respondent failed to take the necessary steps to properly supervise [the employee's] handling of his trust account which allowed her to misappropriate his client's funds." Mr. Altman then had his accounts audited for a five year period, which included the Bar's audit period, and found that the employee had embezzled $84,000. This Court sanctioned Mr. Altman with a public reprimand by publication. Case No. SC14-2102.

In *Fla. Bar v. Jimenez*, 173 So.3d 967 (Fla. 2015), the respondent did not keep trust accounting records. Mr. Herdeker admitted in the instant case that he had performed the compliance audit on Mr. Jimenez's trust account. His audit

"revealed that respondent failed to maintain the appropriate records and perform the required procedures for the trust account[.]" The audit also revealed "a shortage in the trust account due to one check erroneously being negotiated twice by respondent's bank. [ ] This error was never reversed and contributed to the depletion of the funds owed to the IRS." Further, the Bar's audit found that the "failure to maintain the required records and perform the required trust accounting procedures prevented him from discovering that his firm's check to the IRS had never been negotiated and prevented him from identifying the bank's double negotiation of a check in a timely manner." Lastly, the audit also revealed that respondent "did not maintain sufficient documentation to support earned fees, where transfers were made from trust to operating. The audit revealed payments for personal, business, and travel expenses from the trust account to which respondent did not keep sufficient records to show those fees were in fact earned at the time the transfers were made." This Court suspended Mr. Jimenez for 90 days followed by a two-year probation.

It is clear in this record that any anomalies evident in Mr. Horton's trust accounting practices pale in comparison to each and every one of these reported cases involving trust account rules violations. Consequently, under this Court's precedents, the instant, technical non-compliance issues (opined by Mr. Herdeker as "substantial") do not even qualify for a public reprimand. By affixing its

auditor's technicality-laden opinion to its Petition for Emergency Suspension, The Florida Bar engaged in overreaching and invited waste of judicial labor. The Bar has sought to paint this case as a matter with momentous trust violations. To repeat, no money is missing, the records were kept diligently if not error-free, and they were promptly produced.

Since the Bar relied on him in this rule 3-5.2(a) proceeding, Mr. Herdeker perhaps felt obliged to overstate his opinion that "substantial," violations of the trust accounting rules had occurred. In any event, and by any measure, these violations are technical; they are not substantial. Mr. Horton's two employees were diligent in keeping the trust accounts. By themselves, these trust accounting issues might warrant a recommendation of diversion to the Bar's trust accounting workshop.

B. The Law Supports a 60-day Suspension or Less for Loan Issues.

As for the loans given by Mr. Lowman, the Bar knew going into the case filing that Mr. Horton had repaid the loans with substantial interest on January 2017, months before the instant petition was filed. Since this was a business transaction between client and lawyer in which the precepts of rule 4-1.8(a) were not followed, the question becomes what should a proper sanction be for this violation? Whatever that may be, the undersigned is convinced that a proper sanction is not emergency suspension coupled with public ruination of Mr.

Horton's life and career. And yet that's what he got.

In *Fla. Bar v. Black*, 602 So.2d 1298 (Fla. 1992), the attorney borrowed funds from his law client. In addition, the referee found that the client was left "completely unsecured in the transaction," and that the lawyer "failed to advise the client of his right to separate representation," both of which elements are present here. (Recall, however, that once Mr. Horton learned of his duties under the rule, he gave Mr. Lowman a promissory note.) Mr. Black, however, also "promised to pay the client a usurious rate of interest, never informed the client of the illegality of the transaction, and used the client in an effort to obtain a personal loan"—none of which are present here. Mr. Black repaid the loan. This Court noted:

> "This case is one where a lawyer in difficult personal circumstances seized upon a chance for an emergency loan when he was unable to obtain funds elsewhere. He took advantage of an unsophisticated client, and a clear violation exists. On the other hand, the extensive mitigation as found by the referee militates against a severe punishment."

Id. at 1298-99.

The referee in *Black* recommended a 91-day suspension. This Court, in its wisdom and commitment to justice, rejected that and imposed a 60-day suspension for Mr. Black's violation of the rules, followed by a two-year probation.

There is no case more closely analogous to the instant circumstances than *Black*. Here, Mr. Horton, struggling with business debts due to an economic

downturn, accepted his friend's offer of goodwill and support. Mr. Horton promised that the money would be repaid in short order, and he made good on that promise. It is hard to believe that the mitigation evidence in *Black*, though not described in the opinion, could be more compelling than the mitigation evidence presented by Mr. Horton in the instant trial.

There is, however, another, similar case that could be instructive here. In *Fla. Bar v. Nesmith*, 642 So.2d 1357 (Fla. 1994), the attorney's law client was a corporation owned by a Mr. Passas. Mr. Nesmith sought and received a personal loan from Mr. Passas in order to stave off a foreclosure or property. The niceties of rule 4-1.8(a) were not observed. The referee found that the rule did not apply, because Mr. Passas in his individual capacity was not the respondent's law client, his corporation was; therefore, the strictures of the rule did not apply to the personal loan transaction. The Florida Bar appealed, arguing that the rule should apply. This Court upheld the not guilty verdict based on the distinction the referee had made between the owner and the corporation.

Here, in the strictest sense, Mr. Lowman was Mr. Horton's client only with respect to a power of attorney Mr. Horton had never used before the loans were offered by Mr. Lowman. It is axiomatic that an attorney-in-fact need not be a licensed attorney. The only legal services it was proven at trial that Mr. Horton ever previously performed involving Mr. Lowman was in Mr. Lowman's capacity

as trustee—not in his individual capacity. The law does draw this distinction in the realm of trusts and estates. *See Beseau v. Bhalani*, 904 So.2d 641, 642 (Fla. 5th DCA 2005) ("Although Appellant, 'individually' was named in the complaint's caption, the body of the complaint makes clear that her claims were made solely as personal representative of the estate. Thus, Appellant was never a party to the action in her individual capacity."). There is a colorable question, under the distinction made in *Nesmith*, whether Mr. Horton and Mr. Lowman conducted their personal loan transaction as lawyer and client, or as friends.

C. Drafting the Trust Amendment Warrants 90-day Suspension.

The next issue highlights the relationship between Mr. Lowman and Mr. Horton. In investigating Mr. Horton's law practice and client files, the Bar found an issue about which Mr. Lowman had no complaint. In 2011, he had asked Mr. Horton to draft a trust amendment naming Mr. Horton as a trust beneficiary. Mr. Horton admitted he did so, but did not finalize or execute the instrument; instead, he mailed it to Mr. Lowman in Georgia. He previously cautioned Mr. Lowman that he should use another lawyer in those circumstances. It is clear that it was Mr. Lowman's desire to make Mr. Horton his beneficiary.

At the time he originally became a trust beneficiary, Mr. Horton, admittedly, was ignorant of the pertinent rule at issue. He failed to keep himself updated on the rules. As noted, rule 4-1.8(c) became effective in 1987. This Court considered

that rule for the first time in the context of attorney discipline, in *Fla. Bar v. Anderson*, 638 So.2d 29 (Fla. 1994). In *Anderson,* the lawyer made nine testamentary instruments for a client, six of which named himself or his wife as beneficiaries. The referee found that Anderson did not expect or intend to benefit; it was a tactic to protect the property. The breach of this rule resulted in a 90-day suspension.

There does seem to be a strict liability attached to rule 4-1.8(c). If so, it is noted that Mr. Horton did mitigate his violation of the rule by informing Mr. Lowman once he understood the violation. [R. Exh. 23.] As for his state of mind, the evidence shows that Mr. Horton was negligent in not knowing the rule, as opposed to an intentional violation. We do not know if Mr. Lowman followed his earlier caution and sought the advice of other counsel. We do not know he didn't.

D. Recommendation of Guilt as to Rule 4-8.4(c) Should be Rejected.

In the findings the referee announced in chambers on September 20, 2017, he identified two instances for which he recommended Mr. Horton be found guilty of violating the intentional misconduct rule, 4-8.4(c), that is, for engaging in conduct involving fraud, dishonesty, deceit, or misrepresentation. The two instances the referee referenced were: a) Mr. Horton drafting the trust amendment at his client's request; and b) Taking a fee to handle Ms. Christa Barry's estate as attorney and personal representative two days before the probate court issued the

letters of administration. With respect, Mr. Horton contends that the referee was incorrect in his assessment of the relevant evidence, and thus was incorrect in his recommendation on a finding of guilt.

The matter involving the trust amendment is more fully discussed above. Mr. Horton discovered his strict liability in amending the Lowman trust and advised his client accordingly. He sent the unexecuted document to Georgia, where Mr. Lowman had moved. While it would have been better not to have drafted the document, Mr. Horton he had advised his client to seek other counsel regarding such matters. A proper sanction for his conduct in drafting the trust amendment has already been discussed. The evidence adduced at trial of Mr. Horton's bad intent in that instance was not clear and convincing, indeed, it seems it is a matter of strict liability, not requiring any bad intent.

The same is true as to Mr. Horton taking a fee two days before being legally entitled to, based on his assumption that letters of administration would be issued that same day. While taking that fee was presumptuous, and technically illegal (i.e., without the authority of letters of administration), it was not done with bad intent. The particular conduct may have violated rule 4-1.5(a), but there was no competent, substantial evidence adduced at trial clearly proving intentional misconduct in a way that was knowingly fraudulent or dishonest. To the issue of injury or potential injury, Mr. Horton asserts respectfully that, if he had replaced

the funds and then withdrawn them again two days later, it is hard to appreciate what difference that would make, or what injury would have reasonably resulted.

Mr. Horton explained that Ms. Barry was at home, being cared for by hospice during her last days. TR-2, pp. 238-40. He was being contacted regularly by people who knew Ms. Barry; these folks related her worsening condition, and also efforts by her offspring to enter her home and take property. *Id.* Mr. Horton knew that Ms. Barry had disinherited her children in two wills he had drafted for her. He knew that her children had claimed Ms. Barry owed them money, and he knew that Ms. Barry's daughter was an attorney. All of this informed Mr. Horton that Ms. Barry's property needed to be secured and protected, and also that a will contest was likely in the offing. (As of today, Case No. 35-2016-CP-001415, In Re Estate of Christa M. Barry, Lake County, Florida, shows 78 docket entries.)

Mr. Horton testified before and after his suspension as to the services he performed for Ms. Barry before and after her death. Ms. Barry died on Labor Day, Monday, September 5, 2016. On September 6th, he personally filed the probate case seeking immediate issuance of the letters of administration. This was due to the conflict that was erupting involving her children. As noted, he took a fee to start the contested probate case as the estate's attorney and its personal representative. He believed the letters would be issued September 6th; however, they were not issued until September 8, 2016.

The totality of these circumstances does not amount to clear and convincing evidence that Mr. Horton intended to deceive or defraud any person. He admits his law firm was incurring bank fees for overdrafts in its operating account for many months before Ms. Barry happened to pass away, disinheriting her children. Throughout its investigation and this case, The Florida Bar sought to connect the law firm's deficit spending with services that Mr. Horton provided to his clients and charged for; however, on close inspection those efforts amount to little more than suspicion and coincidence. Since the Bar knew of the operating account statements showing negative balances, it subpoenaed 10 of Mr. Horton's client's files, trying to connect the collecting of fees with stanching the flow of red ink.

The problem with the Bar's theory and methodology is twofold. First, it presumed that Mr. Horton had such a compelling need to balance his overdrawn operating account that he would commit ethical violations in order to accomplish it. That presumption is not a legal one, and it was not proven because, as Mr. Horton said, the bank paid every check the firm wrote, regardless. Second, as Mr. Horton admitted, he had borrowed large sums from a non-client friend, Deborah Wade, and also from his relatives, as well as from Edward Lowman. See

Even though the Bar knew about the personal loans, and even though the overdrafts were a concern, but not an overriding one to Mr. Horton, the Bar continued trying to tie the services Mr. Horton rendered to the overdrafts. In his

characterization of Mr. Horton's work for Richard O'Connell, the Bar auditor admitted, "I could tell that some of the funds were used for Mr. O'Connell's care when he didn't have enough money in his account to pay for his nursing home or for his caregiver. Some of the funds were used for that purpose, but some of the funds Mr. Horton did use for his own benefit." TR-1, p. 133, lines 5-16. The Bar argues that his taking of a fee of $15,500 later in the Christa Barry estate case occurred the same day that the last loan from Mr. Lowman of $15,000 was declined. When asked why he took that fee at that particular time, Mr. Horton explained, quite honestly that it was not a coincidence. "I needed that money, so I thought I would take a portion of my personal representative's fee." Dkt. 1, Exh. B, Deposition, p. 61, line 24 to p. 62, line 15. That doe not mean the fee was not earned, or was otherwise unethical, however.

The Bar noted, and Mr. Horton did not dispute, that this fee practically equaled the amount of the additional loan that Mr. Lowman had declined. The referee took this coincidence as evidence of bad intent or wrongdoing on Mr. Horton's part, however, without any proof that the fee he took then was unearned, illegal, prohibited, or clearly excessive fee, under Rule 4-1.5(a). The coincidence, by itself, is evidence of nothing, but it validates a presumption of bad intent. A presumption supported by a coincidence is not clear and convincing proof sufficient to sustain a conviction for fraudulent or deceitful conduct. This Court

requires proof of a clearer and more convincing nature in the face of such an allegation. "Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *Fla. Bar v. Wohl*, 842 So.2d 811, 814 (Fla. 2003) (quoting *Fla. Bar v. Sweeney*, 730 So.2d 1269, 1271 (Fla.1998)). In this instance, the referee's finding was clearly erroneous and lacked evidentiary support.

Proof of bad intent can be inferred from the circumstances, as noted in the Preamble to the Rules of Professional Conduct. No proof was offered showing that Mr. Horton had no right to a fee in the Barry case equal to or greater than the further loan which he believed Edward Lowman had offered him, but which Mr. Lowman denied. Mr. Horton testified as to his discussions with Mr. Lowman about the additional loan of $15,000, and how he felt certain he understood that would be the last amount Mr. Lowman would lend. (This disconnect is one of several areas of inquiry in which Mr. Horton was very prejudiced by having been excluded from Mr. Lowman's deposition; that issue is discussed more fully, *post*.)

Absent the proof that is lacking here, an inference drawn from a coincidence cannot sustain such a damning allegation. If the Bar believed—and could prove—that Mr. Horton replaced the loan that was denied by taking an illegal or unethical fee, or worse, by converting funds, then it should not have relied on

mere presumption and coincidence to support the allegation.

Every trial lawyer knows that it is not necessarily what something is that counts—it's how it can be made to look. In some cases the facts and explanations are so clear as to be irrefutable. This is not one of those cases. Because there is not competent, substantial evidence of a fraud having been committed by Mr. Horton, the recommendation of guilt as to Rule 4-8.4(c) should be rejected.

E. Recommendation of Guilt as to Rule 4-8.4(c) is Erroneous.

The last matter involves the services Mr. Horton provided to Richard O'Connell under a power of attorney and the fees he received. With respect, Mr. Horton contends that the referee erred in his assessment of the relevant evidence, and this rendered his recommendation on a finding of guilt erroneous.

Mr. O'Connell lives in an assisted living complex and pays a private caregiver, Ms. Luna, to assist him three or more days each week. There is no indication that he is incapacitated. Mr. O'Connell is one of those who, at a certain age, no longer wish to deal with bills and taxes and finances, and so he hired Mr. Horton to do that.

This issue at trial centered on the fact that Mr. Horton took fees out of Mr. O'Connell's checking account, and also deposited fees back into it, numerous times. Thus, a chart of his fee withdrawals and fee refunds would look like a zig-zag going down the page. At trial, this issue turned on the explanation for why

this pattern had occurred.

On paper, to an auditor's eye, this looks like Mr. Horton was using the account as a storehouse from which to take and pay back short term loans on an as-needed basis. While this is a provocatively simple and alluring conclusion, it is too easily drawn. The reality regarding Mr. O'Connell's account that Mr. Horton described is a bit more chaotic and complex, as reality often is.

Mr. Horton may not be the most astute handler of money. As a rule, however, professional negligence is distinct from ethical or disciplinary matters, though they can overlap. Mr. Horton's service to Mr. O'Connell as attorney-in-fact began in the latter part of 2014, and extended to the date of the emergency suspension. Mr. Horton had provided Mr. O'Connell with invoices in 2014, but then Mr. O'Connell said he didn't want to receive invoices.

In 2015 and 2016, Mr. Horton testified that he would periodically take his fee from Mr. O'Connell's checking account, and then a short while later, he would realize that Mr. O'Connell owed some medical bill, or that he owed Ms. Luna more, or some such expense, and so Mr. Horton would return all or part of his previous fee. He would just collect it later. The reason this kept happening was because Mr. O'Connell had a small margin between his income and expenses. See R. Exh. 14 (his monthly income and expenses).

Mr. O'Connell was kept aware of what was going through his account in his

meetings with Mr. Horton. As Mr. O'Connell attested in his Affidavit, "I know, that on some occasions after Mr. Horton paid his own fees from my account, I had to, or I wanted to, pay for goods or services that could have overdrawn my account and, on such occasions, Mr. Horton would replace some of his fees back into my account so that my checking account would not be overdrawn." [R. Exh. 8.]

Mr. O'Connell elaborated: "These situations, where my checking account balance fell short of my ability to pay Mr. Horton's fees and take care of my other needs usually resulted from my wanting or needing to pay bills from medical providers, or hospital bills, and sometimes to pay Ms. Luna for her caregiving services. On some occasions, I wanted to pay Ms. Luna extra, as it suited me." *Id.*

Further, Mr. O'Connell confirmed: "I understand that if Mr. Horton wrote his fees from my account and then realized that my other obligations exceeded the balance that remained in any particular month, he was doing me a favor by making sure my account did not get overdrawn." *Id.*

Mr. O'Connell concluded: "I received and reviewed a full accounting of his fees and I have no problem with those, and I have no problem with the way he has managed my bank account when my obligations to him and to others exceeded the cash I had on hand at the time." *Id.*

Thus, as the Bar's auditor admitted, the trial court had one set of hard paper facts and two divergent explanations, one nefarious and one innocuous. As H. L.

Mencken supposedly said, "For every complex problem, there is an answer that is clear, simple, and wrong." The referee framed the issue this way: Did total dollar amount of the checks Mr. Horton wrote to himself from Mr. O'Connell's checking account, as fees in a given year equate to Mr. Horton's total fee for that year? While the referee believed the gross amount withdrawn equaled Mr. Horton's total fee, this conclusion is erroneous. The net that Mr. Horton received was his total fee, not the gross.

It appears that the referee rejected Mr. Horton's explanation as to why Mr. O'Connell's account kept taking two steps forward and two steps or one step back. A referee's assessment of a witness's credibility is reviewed for abuse of discretion. *Fla. Bar v. Charnock*, 661 So.2d 1207, 1209 (Fla.1995). Here, the difference of opinion lies in the preconception of an underlying motive. It is easy to believe going in that Mr. Horton was using this account merely as a piggy bank if you assign his every motivation to the fact that he had liquidity problems. But, that logic is suspect. To reach such a conclusion, more is needed than the simple premise that Mr. Horton had money problems; it requires the additional premise that Mr. Horton is morally corrupt, and there is no clear and convincing evidence of that premise; it was merely implied—which is not enough.

Logic dictates that Mr. Horton's fee was the net amount he ultimately got, not the sum of all checks (disregarding the re-deposits). This is important to

realize, because the average monthly fee that Mr. Horton charged Mr. O'Connell was roughly the same in 2014 (when there were no re-deposits) as they were in 2015 and 2016—if you accept the net figure as the total fee, year-to-year.

The Florida Bar has the burden of production and burden of proof for each and every element of each and every pleaded rule violation. The Bar put on no evidence to refute or rebut Mr. Horton's explanation regarding the repeated taking and refunding of his fee as the account balance required, nor Mr. O'Connell's explicit affidavit. The Bar subpoenaed Mr. O'Connell's bank records and his client file. If documentary evidence exists to refute Mr. Horton's explanation, or to even cast doubt on it, the Bar certainly has it. Yet, no evidence was offered by the Bar to show that Mr. Horton's explanation is wrong. Indeed, the Bar's auditor admitted that he found instances tending to support Mr. Horton's explanation.

As noted, Mr. Horton offered more than just his own word regarding his explanation. Although he would not hail Mr. O'Connell into court, he did admit into evidence writings that Mr. O'Connell had signed and later attached to his Affidavit. These were written and by Mr. O'Connell of his own volition. See R. Exh. 8 (attachments). Upon reviewing those letters, undersigned counsel made sure to ask Mr. O'Connell for an affidavit.

Mr. O'Connell never grieved Mr. Horton. He was one of the many people who were abruptly affected by the fact of Mr. Horton's emergency suspension. He

has nothing bad to say about Mr. Horton. That could explain why the Bar did not call him as a witness here. In contrast with Mr. Horton's explanation, the Bar offered paper evidence and argument. When two different explanations are plausible, and one is supported by factual statements and the other is supported only by opinion testimony or argument, it is difficult and dangerous to elevate the latter to a point where it is deemed to clearly and convincingly refute or disprove the factual testimony. Based on this conflict in the evidence, there is no competent, substantial evidence in this record to uphold the referee's findings relating to Mr. Horton's service to Mr. O'Connell. The Bar did not carry its evidentiary burden with respect to any allegations relating to Richard O'Connell. Accordingly, the Court should reject the referee's recommendation of guilt.

II. WITH MITIGATION, A SHORT SUSPENSION IS WARRANTED.

A. The Case Law Cited Herein Militates for Time Served.

The trust account violations reported by the auditor—regardless of whether one calls them substantial or merely technical—warrant no more than a public reprimand under the case law. No client was harmed or even potentially so. Under *Borja, Heston, Athanason*, and *Altman*, each of which included more serious trust accounting breaches than were proven here, nothing more than a public reprimand is warranted, at times coupled with probation. Even considering much more serious violations, such as are recited in *Jimenez*, a non-rehabilitation

suspension is the remedy. Because the violations found here do not even rise to the level of any one of these prior trust accounting cases, the Court should either side with Mr. Horton and adjudge them to be technical in nature, or admonish Mr. Horton to do better in the future.

As for Mr. Horton's strict liability in drafting a testamentary instrument borrowing money from Mr. Lowman, this case is sufficiently analogous to the facts set forth in *Fla. Bar v. Anderson*, 638 So. 2d 29 (Fla. 1994). Accordingly, Mr. Horton deserves no worse sanction than Mr. Anderson received, that is, a 90-day suspension.

Regarding the circumstances of borrowing funds from Mr. Lowman without adhering to the requirements of Rule 4-1.8(c), this case is nearly on all fours with the facts set forth in *Fla. Bar v. Black*, 602 So.2d 1298 (Fla. 1992), that is, a 60-day suspension plus two years' probation. Mr. Horton argues that the other rule violations for which the referee recommended guilty verdicts are erroneous, and lack sufficient evidentiary support such that he should not be sanctioned for those.

Thus, without even considering aggravating or mitigating factors, the proper sanction would appear to be a non-rehabilitative suspension, plus probation, following the case authority. When the aggravating factors of a pattern of misconduct and experience in the practice of law are considered, an argument can be made for a rehabilitative suspension. The problem with this case is that Mr.

Horton has already been suspended now for over a year. He can never be unsuspended. With no real proof, and not even an allegation that Mr. Horton misappropriated client funds, the Florida Bar still argues that its precipitous resort to rule 3-5.2(a) should be put aright by this Court ordering disbarment.

Even assuming *arguendo* that the referee got this case right in all its particulars, this is not a disbarment case, as the referee realized. When one considers the mountain of reputation and character evidence adduced at trial, and the fact of no prior discipline, the issue of a proper sanction must be weighed very carefully. And then there is the matter of The Florida Bar's conduct in depriving Mr. Horton of fundamental fairness not only in failing to fully disclose known adverse facts to this Court in seeking an emergency suspension, but also in refusing to allow Mr. Horton or his counsel to know of, or participate in, a deposition of the complaining witness, Mr. Lowman. The lack of equity present here affects not only the quality of justice, but speaks volumes about the Bar's motives and its lack of faith in its own case. Prosecutorial misconduct is manifest.

The Florida Bar investigated potential rule violations in this matter, but it did not investigate who Mr. Horton is, and how he contributes to his community. Mr. Horton's character and reputation witnesses are a testament to his life and his calling; one could hardly ask to improve on such outstanding testimony regarding a man's life and character. This must be taken into account.

Based on all the equities, the case law, the facts, and the aggravating and mitigating factors present—and most importantly, the fact that no clients were injured and no restitution is owed, the two-year suspension recommended by the referee is not reasonably supported by the case law. A more rational and just sanction would be to impose a one-year sanction, *nunc pro tunc*, with probation, and to terminate the suspension under which Mr. Horton has been laboring ever since the Bar decided to resort improvidently to the use of rule 3-5.2(a).

B. If the Referee's Findings are Upheld, the Sanction is Appropriate.

A referee's findings of mitigation and aggravation, like other factual findings, carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *Fla. Bar v. Arcia*, 848 So.2d 296 (Fla. 2003). The scope of review in reviewing a referee's recommendation of discipline is broader than that afforded to the referee's findings of fact, as it is the Court's responsibility to order the appropriate sanction. *Fla. Bar v. Miller*, 863 So.2d 231, 235 (Fla. 2003); *Fla. Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989). Generally, this Court will not second-guess the referee's recommended discipline, as long as it has a reasonable basis in the case law and the Florida Standards for Imposing Lawyer Sanctions. *Fla. Bar v. Brown*, 905 So.2d 76, 83-84 (Fla. 2005).

The referee cited multiple factors in aggravation and mitigation of sanction. It is clear from the Report that he considered the case carefully. Given the

difficulty of this case, the referee's ultimate recommendation should be given the respect and consideration it deserves. The standards that should apply under any analysis of this case and these convoluted facts are: Fla. Stds. Imposing Law. Sancs. 4.12 (suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury), and Standard 4.62 (suspension is appropriate when a lawyer knowingly deceives a client and causes injury or potential injury).

Because the standards do not suggest the appropriate length of a suspension, the case law is instructive in deciding whether the referee's recommendation of a two-year suspension has a reasonable basis. The cases cited by the Bar in its initial brief are not instructive, as they involve much more serious conduct and consequences than are evident here, and more egregious misconduct of a repetitive nature, under any calculus.

Based on all the equities, the cases, the facts, and the recommendations of the referee and the aggravating and mitigating factors recited in the report, and recognizing that no clients were injured and no restitution is owed, the two-year suspension recommended by the referee is reasonably supported by the standards and the case law.

CONCLUSION

For the reasons stated herein above, this Honorable Court should order that

the Respondent, Dennis L. Horton, be appropriately disciplined such that the sanction is fair to him and to society.

INITIAL CROSS-BRIEF OF RESPONDENT

For this Cross-Brief, the Respondent, Dennis Horton, incorporates the Statement of the Case and Statement of the Facts that are set forth herein above, as if they are set forth here.

ARGUMENT

I. RESPONDENT'S RIGHTS OF DUE PROCESS WERE VIOLATED.

A. Rule 3-5.2(a) Implies a Right But Denies Any Remedy.

When Mr. Horton was suspended on an emergency basis under rule 3-5.2(a) in May 2017, he moved to challenge the Florida Bar's allegation that under its pleaded allegations, he was then "causing great public harm." Mr. Horton believed that The Florida Bar had no legitimate factual basis to assert to this Court in what in essence was an *ex parte* Petition for Emergency Suspension under Rule 3-5.2(a) that Mr. Horton *appears* – present tense – to be causing great public harm. The Petition did not set forth clear and convincing evidence that to support that pleaded assertion, as the rule requires.

The referee correctly determined that, even though the Bar in a rule 3-5.2(a) petition must show clear and convincing evidence that the respondent is causing great public harm, rule 3-5.2 provides no mechanism to challenge or gain relief

from a petition that does not. See Transcript of May 19, 2017 Hearing, filed with this brief.

Rule 3-5.2 creates what is essentially an *ex parte* proceeding. When a petition filed under subsection (a) is filed by the Bar, nothing in the rule provides for any opportunity for the responding attorney to be heard, especially with respect to the damning allegation that he is causing great public harm—and therefore needs to be suspended immediately without recourse. There is no procedure or mechanism that allows the Court to issue a rule to show cause, or to entertain in any way a response. The state has created a completely one-sided proceeding that relies too heavily on the competency and motives of counsel for The Florida Bar.

Rule 3-5.2 states as follows:

(a) Petition for Emergency Suspension.

(1) *Great Public Harm*. On petition of The Florida Bar, authorized by its president, president-elect, or executive director, supported by 1 or more affidavits demonstrating facts personally known to the affiants that, if unrebutted, would establish clearly and convincingly that a lawyer appears to be causing great public harm, the Supreme Court of Florida may issue an order suspending the lawyer on an emergency basis.

A close reading of the rule seems to grant to an opposing party the right to rebut the "personally known facts" that are required to be set down in a supporting affidavit. The rule's language also appears to grant a right to challenge whether the supporting evidence is clear and convincing, because, if it is not, then a

petition filed under the rule should fail. The reality is, however, that no such rights are granted in the rule.

The rule offers an illusion of a remedy, by creating a right to make a motion to dissolve the suspension order once it is entered. *See* rule 3-5.2(g). That section states in pertinent part: "The lawyer may move at any time for dissolution or amendment of an emergency order by motion filed with the Supreme Court of Florida ... [.] The filing of the motion will not stay the operation of an order of emergency suspension or interim probation entered under this rule."

It is noted that any right conferred by subsection (g) does not alter the essentially ex parte nature of a proceeding initiated under subsection (a). The right to move to dissolve an order of emergency suspension is strictly illusory, however, because of the language of subsection (i), which states:

> (i) **Hearing on Petition to Terminate or Modify Suspension**. The referee will hear a motion to terminate or modify a suspension or interim probation imposed under this rule within 7 days of assignment and submit a report and recommendation to the Supreme Court of Florida within 7 days of the date of the hearing. The referee will recommend dissolution or amendment, whichever is appropriate, to the extent that bar counsel cannot demonstrate a likelihood of prevailing on the merits on any element of the underlying rule violations."

This section appears to allow a lawyer to file a "petition to terminate suspension," which, one surmises, is different in kind from a "motion to dissolve the emergency order of suspension" permitted by subsection (g). It is a distinction without a difference, however. Each will be treated the same way, under the

impossibly high standard enunciated in the rule: A suspension can only be dissolved (or terminated) "to the extent that bar counsel cannot demonstrate a likelihood of prevailing on the merits on any element of the underlying rule violations." (Emphases added.)

In reality, a movant would have to show the converse; to succeed he would have to show that the Florida Bar could not demonstrate the likelihood of prevailing on the merits of any element of any of the underlying, pleaded rule violations. Now consider the case at bar. The petition for emergency suspension was supported by an affidavit by Bar staff auditor, Matthew Herdeker, who stated in his supporting affidavit, *inter alia*, that Mr. Horton had violated the rules governing trust accounts. Then recall that Mr. Herdeker, on cross examination, had this to say:

Q: Well, how many Bar -- how many audits have you done for the Bar of attorney trust accounts?

A: Probably 350 to 400.

Q: Have you ever found one to be in complete compliance with every single element of every trust accounting rule?

A: Probably not.

Q: Never. You could haul any attorney off the street and haul his client trust account records before a forensic auditor and something would be

amiss with that. True?

A: Likely.

TR-1, p. 152, lines 3-14.

Just before this exchange, Mr. Herdeker, the author of the sole supporting affidavit that was used to suspend Mr. Horton, said this:

Q: Do you understand that it was your affidavit that supported that petition?

A: Yes.

Q: Okay. How does the fact that Mr. Horton borrowed $90,000 from Mr. Lowman and paid it back in February of 2017 equate to an emergency in May of 2017?

A: There was a violation in regard to that loan. Mr. Horton did not file -- did not follow the rules regulating the Florida Bar. He did not reduce the terms of that loan to writing. He did not advise Mr. Lowman to seek outside counsel. He also attempted to take another $15,000 that Mr. Lowman disputes that he was entitled to. And that's the issue with the loan.

Q: And how does that present a clear and present danger to the public by Mr. Horton having paid that back in some three months before this petition was filed with your affidavit attached?

A: Well, as the Bar Auditor, I review trust account records and identify

violations as I see them. I don't determine what's great public harm or if an emergency suspension should happen.

TR-1, p. 151, line 7 to p. 152, line 2.

It stands to reason that there is no way any attorney who is emergency suspended and trust accounting violations are alleged would find it utterly impossible to ever succeed on a motion to terminate, when he would have to allege and show, basically, that there are no trust accounting rule violations, technical or otherwise. Given Mr. Herdeker's honest admission that not one in 400 audits resulted in finding that every element was in place, these rights must be procedural only, because any substantial due process they might seem to have is illusory.

In the context of subsection (a), however, there is not even a procedure. The target of the petition is subject to immediate injunction without any method or mechanism to respond. Not only could Mr. Horton rebut certain evidence (were he allowed), he could also show by the four corners of the Bar's petition that he was not presently causing great public harm. Nowhere can any definition be found as to what constitutes great public harm; it is in the eye of the beholder who, in this circumstance, is The Florida Bar.

Once you are suspended in an *ex parte* proceeding, that's it. This one-sided reality can only invite prosecutorial overreaching. Once the prosecuting entity starts overreaching, no due process rights exist to counter that. Abuse follows.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Independent Enterprises Inc. v. Pittsburgh Water*, 103 F.3d 1165, 1177 (3d Cir. 1997) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). The property interests at stake in this proceeding are Mr. Horton's reputation, and his license to practice law. The latter, it must be conceded, constitutes a property interest that deserves procedural due process protection. When the state actor is the state bar, through the supreme court, a person's reputational interest may be a protected interest as well.

Florida has long recognized that a person has a legal right to enjoy his reputation free of false or derogatory characterizations by others. The Supreme Court of the United States has held that injury to reputation, by itself, does not constitute the deprivation of a liberty or property interest protected under the Fourteenth Amendment." *Behrens v. Regier*, 422 F.3d 1255, 1259 (11th Cir. 2005) (citing *Paul v. Davis*, 424 U.S. 693, 701-02, 96 S.Ct. 1155, 1160-61, 47 L.Ed.2d 405 (1976)). Damages to a plaintiff's reputation are only recoverable in an action under 42 U.S.C. § 1983 if those damages were incurred as a result of government action significantly altering the person's constitutionally recognized legal rights. *See Cypress Ins. Co. v. Clark*, 144 F.3d 1435, 1438 (11th Cir. 1998). Respondent believes his constitutional rights were violated in this case.

After having its petition granted against Mr. Horton, The Florida Bar issued a press release announcing his emergency suspension. Dkt. 34, Notice of Filing Florida Bar Press Release. Given Mr. Horton's standing and reputation in his community, the effects of that publicity were devastating. This publicity effort by the Bar can serve to compound the harm when the Bar improvidently pursues an action under rule 3-5.2(a).

Mr. Horton respectfully requests this Honorable Court to consider revising the emergency suspension rule in light of the issues presented in this case.

B. The Bar Violated the Rule Governing Ex Parte Proceedings.

Before it filed the instant petition, The Florida Bar knew that Mr. Horton had paid back Mr. Lowman's loan with interest, in early February 2017. Mr. Lowman himself disclosed that fact. The Bar's audit of the law firm's trust acounts had been completed in January 2017. The pleaded allegations relating to Christa Barry and Richard O'Connell were all pleaded in the past tense—indeed all the allegations pleaded in the petition occurred in 2016, as a close reading of the petition reveals. This reality spotlights the Bar's failure to disclose the pertinent adverse fact of Mr. Horton repaying a $90,000 loan in four months, with interest. This failure to disclose is completely prejudicial in an *ex parte* setting.

Rule 4-3.3(c) states as follows:

(c) Ex Parte Proceedings. In an ex parte proceeding a lawyer shall inform

the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

When the Florida Bar files a petition under rule 3-5.2(a), it knows that the rule and this Court do not allow the lawyer an opportunity to respond. When it knows facts that are adverse to its position, the law governing lawyers requires disclosure as an officer of the court. The system is bound to break down, and to be unjust, unless this rule is followed.

The Florida Bar did not follow this rule in Mr. Horton's case, and he was prejudiced as a result. He can never know if this Court may have denied the petition if that highly pertinent, adverse fact had been disclosed. Without it, the Court is left to imply that the $90,000 is still owed to a client, and that changes the whole coloration of the *ex parte* pleading. This evinces a lack of good faith.

Then, knowing that Mr. Horton was represented by counsel, and having deposed him, the Bar arranged to depose Mr. Lowman, but failed to notify Mr. Horton's lawyer of that proceeding. The Bar intentionally excluded respondent's counsel from the deposition, which it intended to offer as Mr. Lowman's trial testimony, knowing that he would not attend the trial. Such conduct is dishonest, in bad faith, and fundamentally unfair. It raises a question for every lawyer who is required to join the mandatory state bar as to what kind of exemplar or paragon this Court should require The Florida Bar to be.

CONCLUSION

Respondent seeks mitigation of sanction considering the Bar's misconduct in investigating and bringing this case.

CERTIFICATE OF SERVICE

I CERTIFY that this brief was e-filed through the portal with the Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925 and served per Rule 2.516 to Carrie C. Lee, Esq., at clee@floridabar.org, mcasco@floridabar.org, aquintel@floridabar.org, avanstru@floridabar.org, at The Florida Bar, 561 E. Jefferson Street, Tallahassee, Florida 32399 on May 4, 2018.

s/ Brett Alan Geer

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

The undersigned counsel hereby certifies that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been e-filed with Hon. John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal. I further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, using Avast Antivirus.

s/ Brett Alan Geer
BRETT ALAN GEER